

1 **THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **In Chambers**

3
4 **CAUSE NOS. 10 OF 2013 & 18 of 2013**
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7
8 **In the matter of Canute Nairne**
9

10 **AND in the matter of the WRIT OF HABEAS CORPUS AD SUBJICIENDUM**
11
12
13

14
15 Appearances: Mr. Guy Dilliway-Parry of Priestleys for the Applicant
16
17 Ms. Laura Manson of the Office of the Director of Public
18 Prosecutions for the Director of Public Prosecutions
19
20 Ms. Suzanne Bothwell of the Attorney General's Chambers
21
22 Before: Hon. Justice Henderson
23
24 Heard: February 14, 2013
25
26
27



28 **JUDGMENT**
29
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31

- 32 1. For how long may an arrested person be held in custody before being brought
33 before a court? This question requires, for the first time in the Cayman Islands, a
34 consideration of the compatibility of a statutory provision (section 65 of the
35 *Police Law, 2010*) with Part I of Schedule 2 to the *Cayman Islands Constitution*
36 *Order 2009 S.I. 2009 No. 1379* ("the *Bill of Rights*").
37

1 **Facts**

2
3 2. The facts are not in dispute.
4

5 3. The Applicant, Canute Nairne (“Mr. Nairne”), was arrested at the Owen Roberts
6 International Airport on Grand Cayman at 10:10 a.m. on January 10, 2013 on
7 suspicion of Being Concerned in the Supply of Cocaine. That offence is created
8 by section 3(1)(f) of the *Misuse of Drugs Law*, 2010 Revision and is one for
9 which a person may be arrested without warrant: *ibid.*, s. 5(1). In fact, the police
10 were conducting a murder investigation as well as a drug investigation.
11

12 4. Mr. Nairne was taken to the George Town Police Station, searched,
13 photographed, and fingerprinted. A DNA sample was taken from him. At 11:50
14 a.m. he consulted an attorney by telephone. Around this time, Detective Inspector
15 Adeniyi Oremule (“D/I Oremule”), the lead investigator, received information
16 that Mr. Nairne had been asking other prisoners to contact a woman in Jamaica
17 and ask that she destroy certain items which D/I Oremule considered of
18 evidentiary value.
19

20 5. On January 11, 2013 around 10:30 a.m. Mr. Nairne was allowed to consult his
21 attorney. Police officers then interviewed Mr. Nairne for about 70 minutes before

1 returning him to his cell. On the afternoon of January 12 Mr. Nairne was
2 interviewed again by police officers for about 80 minutes.

3
4 6. Chief Inspector Patrick Beersingh signed an Authorization on January 13, 2013
5 authorizing the further detention of Mr. Nairne for a period not to exceed 24
6 hours. A third interview of Mr. Nairne was conducted on that day for about 50
7 minutes. On this occasion a urine sample was taken from him.

8
9 7. On the following day, January 14, D/I Oremule appeared before the Chief
10 Magistrate at 9:15 a.m. and applied *ex parte* for an order authorizing Mr. Nairne's
11 further detention for a period of 72 hours. That period was to expire at 10:10 a.m.
12 on January 17, 2013.

13
14 8. Mr. Nairne sought and obtained a Writ of *Habeas Corpus ad Subjiciendum* from
15 myself on January 15, 2013. The Commissioner of Police was directed to produce
16 Mr. Nairne in the Grand Court on January 16 at 2:30 p.m.

17
18 9. After hearing from the attorneys for Mr. Nairne and the Commissioner on January
19 16, I ordered that Mr. Nairne be released on bail (with conditions) and gave
20 directions for the hearing of the *Habeas Corpus* application and the companion

1 application for a Declaration of Incompatibility. The hearing on the merits was
2 held on February 14, 2013.

3
4 10. In short, Mr. Nairne was held in police custody without being charged with an
5 offence or produced to a court for a period of 6 days and 5 ½ hours. His detention
6 is said to have been permitted by section 65 of the *Police Law*, 2010.

7
8 11. The evidence I have received by affidavit satisfies me that throughout this period
9 of detention the police conducted a wide-ranging and thorough investigation not
10 only of the offence for which Mr. Nairne was arrested but also of a related murder
11 in which he was a suspect.

12
13 **Issues**

14
15 12. The issues are:

- 16
17 1) Was Mr. Nairne's detention unlawful?
18
19 2) Is section 65 of the *Police Law*, 2010 or any material part of it in conflict
20 with section 5(5) of the *Bill of Rights*?
21
22 3) If so, can the provision in question be read and given effect in a way
23 which is compatible with the *Bill of Rights* or must a Declaration of
24 Incompatibility be made?
25
26
27

1 **The Impugned Legislation**

2
3 13. Section 65 of the *Police Law*, 2010 (“section 65”) reads:

4
5 65. (1) When a person has been taken into custody without a warrant for an
6 offence, a police officer of the rank of Sergeant or above to which that
7 person is brought shall at once enquire into the case, and if, when the
8 enquiry is completed, there is no sufficient reason to believe that the
9 person has committed an offence that person shall be released forthwith.

10
11 (2) If, upon the enquiry, there is reason to believe that the person arrested has
12 committed an offence that police officer of the rank of Sergeant or above
13 may release the person on bail

14
15 (3) Where the police officer arresting a person determines that he does not
16 have sufficient evidence to charge but has reasonable grounds for
17 believing that the detention of that person without being charged is
18 necessary –

19
20 (a) to secure or preserve evidence relating to an offence for which he is
21 under arrest;

22 (b) to obtain that evidence by questioning him; or

23 (c) to complete the investigation,

24
25 he may place that person in police detention for a period not exceeding seventy-
26 two hours from the time of arrest.

27
28 (4) Where a police officer of the rank of Chief Inspector or above has
29 reasonable grounds for believing that –

30
31 (a) the detention of that person without charge is necessary to secure or
32 preserve evidence relating to an offence for which he is under arrest or
33 to obtain such evidence by questioning him;

34 (b) an offence for which he is under arrest is an arrestable offence;
35 and

36 (c) the investigation is being conducted diligently and expeditiously,

37
38 he may authorize the keeping of that person in police detention for a further
39 period of twenty-four hours after the period referred to in subsection (3).
40

- 1 (5) A person may not be kept in police detention after the period referred to in
2 subsection (4) except upon the order of a summary court made on the
3 application of a police officer.
4
- 5 (6) The application made under subsection (5) shall be heard in chambers, and
6 the court shall consider whether there are reasonable grounds for believing
7 that matters set out in subsection (4) and, if it is so satisfied, it may order
8 further detention for a further period of seventy-two hours.
9
- 10 (7) Notwithstanding an application made under subsection (5) and an order
11 granted under subsection (6), where there are exceptional circumstances, a
12 police officer may make a further application to the court for an order of
13 detention for further period of twenty-four hours.
14
- 15 (8) If, at the end of the periods of seventy-two hours and twenty-four hours
16 referred to in subsections (6) and (7), the person is not charged, he shall be
17 released without further reference to the court, but may be re-arrested for
18 the offence for which he was previously arrested if new information
19 justifying a further arrest has come to light since his release.
20
- 21 (9) Wherever in subsections (3), (4), (6), (7) or (8) reference is made to a
22 period of seventy-two or twenty-four hours, such reference shall be read
23 and construed as allowing detention for a lesser period at a time so long as
24 the total period of detention under one authority does not exceed seventy-
25 two or twenty-four hours as the case may be.
26
- 27 (10) Subject to subsection (11), a release on bail of a person under this section
28 is a release on bail granted in accordance with the *Bail Law* (2007
29 Revision).
30
- 31 (11) Nothing in the *Bail Law* (2007 Revision) prevents the re-arrest without
32 warrant of a person released on bail subject to a duty to attend at a police
33 station if new evidence justifying a further arrest has come to light since
34 his release.
35
- 36 (12) Subject to subsection (13), in this section references to “bail” are
37 references to bail subject to a duty –
38
39 (a) to appear before the court at such time or place; or
40 (b) to attend at such police station at such time,
41
42 as the police officer granting bail appoints.

- 1
2 (13) If a police officer has granted bail to a person subject to a duty to appear at
3 a police station, that police officer may give written notice to the person
4 that his attendance at the police station is no longer required.
5
6 (14) If a person arrested for an offence was released on bail subject to a duty to
7 attend at a police station and so attends, he may be detained without
8 charge in connection with that offence only if the police officer who
9 granted bail has reasonable grounds for believing that the person's
10 detention is necessary –
11
12 (a) to secure or preserve evidence relating to the offence; or
13 (b) to obtain such evidence by questioning him.
14
15 (15) The time from which the period of detention of a person is to be calculated
16 shall be -
17
18 (a) in the case of a person arrested outside of the Islands, the time at
19 which that person arrives at the first police station to which he is taken
20 within the Islands;
21 (b) in the case of a person who attends voluntarily at a police station and is
22 arrested at the police station, the time of his arrest;
23 (c) in the case of a person who accompanies a police officer to a police
24 station without having been arrested and is arrested at the police
25 station, the time of his arrest; or
26 (d) in any other case, the time at which the person arrested arrives at the
27 first police station to which he is taken after his arrest.
28

29 **The Constitutional Provision**
30

31 14. Section 5 of the *Bill of Rights* contains this provision:
32

- 33 (5) Any person who is arrested or detained –
34
35 (a) for the purpose of bringing him or her before a court in the execution of
36 the order of a court; or
37 (b) on reasonable suspicion of his or her having committed, or being about
38 to commit, a criminal offence,
39

1 and who is not released, shall be brought promptly before a court; and if any
2 person arrested or detained in such a case as in mentioned in subsection (2) (e) is
3 not tried within a reasonable time he or she shall (without prejudice to any further
4 proceedings that may be brought against him or her) be released either
5 unconditionally or on reasonable conditions, including in particular such
6 conditions as are reasonably necessary to ensure that he or she appears at a later
7 date for trial or for proceedings preliminary to trial, and such conditions may
8 include bail. [underlining added]
9

10
11 (6) Any person who is deprived of his or her liberty by arrest or detention shall be
12 entitled to take proceedings by which the lawfulness of his or her detention shall
13 be decided speedily by a court and his or her release ordered if the detention is not
14 lawful, and he or she shall be entitled to compensation if unlawfully arrested or
15 detained; but a judicial officer or an officer of a court or a police officer acting in
16 pursuance of the order of a judicial officer shall not be personally liable to pay
17 compensation under this subsection in respect of anything done by him or her in
18 good faith in the discharge of the functions of his or her office, and any liability to
19 pay and such compensation in respect of that thing shall be a liability of the
20 Crown.
21

22 23 **Procedure When Seeking a Declaration of Incompatibility**

24
25 15. A Declaration of Incompatibility is provided for in section 23(1) of the *Bill of*

26 *Rights*:

27 23. - (1) If in any legal proceedings primary legislation is found to be
28 incompatible with this Part, the court must make a declaration
29 recording that the legislation is incompatible with the relevant section
30 or sections of the *Bill of Rights* and the nature of that incompatibility.
31

32 “Primary legislation” means a Law enacted by the Legislature of the Cayman
33 Islands (*Bill of Rights*, s. 28(b)).
34

35 16. The application is made to the Grand Court:

1 26. - (1) Any person may apply to the Grand Court to claim that government
2 has breached or threatened his or her rights and freedoms under the
3 *Bill of Rights* and the Grand Court shall determine such an
4 application fairly and within a reasonable time.
5

6 The Grand Court may, in addition to making the requested Declaration, grant
7 other relief:

8 27. - (1) In relation to any decision or act of a public official which the court
9 finds is (or would be) unlawful, it may grant such relief or remedy, or
10 make such order, within its powers as it considers just and
11 appropriate.
12

13 (2) No award of damages is to be made unless, taking account of all the
14 circumstances of the case, including -
15

- 16 (a) any other relief or remedy granted, or order made, in relation to
17 the act in question (by that or any other court); and
18 (b) the consequences of any decision (of that or any other court) in
19 respect of that act,
20

21 the court is satisfied that the award is necessary to afford just satisfaction to the
22 person in whose favour it is made.
23
24

25 17. A new Order in the *Grand Court Rules* (the “*Rules*”), Order 77A, sets out some
26 procedural provisions governing applications for relief under sections 23 and
27 26(1) of the *Bill of Rights*. Such applications must be commenced by petition or
28 by writ: *Rules, O. 77A, r. 2(1)*. The respondents (or defendants) must be the
29 Attorney General and “any relevant public official”: *ibid., r. 4(2)*. The particulars
30 to be set out in the pleading are described in *O. 77A r. 4(1)*. A petition must be
31 supported by an affidavit (*ibid., r. 2(4)*) and a writ must be accompanied by a

1 statement of claim (*ibid.*, r. 2(3)). All proceedings of this sort must (unless the
2 court orders otherwise) be held in open court: *ibid.*, r. 2(5).

3
4 18. Where a party is seeking a Declaration of Incompatibility the Attorney General
5 must be served (*ibid.*, r. 3(1)) and no further step may be taken (unless the court
6 orders otherwise) until 7 days have passed or until the Attorney General advises
7 that he will not intervene (*ibid.*, r. 3(3)). The Attorney General may intervene as
8 of right (*ibid.*, r. 3(4)) but may never seek his costs or be made the subject of an
9 award of costs (*ibid.*, r. 3(5)). If a Declaration is granted the Attorney General
10 must cause it to be served upon the Clerk of the Legislature: *ibid.*, r. 3(7).

11
12 19. The procedural provisions governing an application in the nature of habeas corpus
13 are to be found in the Rules at Order 54.

14
15 **Consequences of a Declaration of Incompatibility**

16
17 20. Our new *Bill of Rights* does not give to any judicial officer at any level the power
18 to set aside any legislative provision. Even after a Declaration of Incompatibility,
19 the impugned provision continues in force. The task of bringing primary
20 legislation into compliance with the *Bill of Rights* is left to the Legislature and not
21 the courts. Sections 23(2) and (3) and 24 of the *Bill of Rights* provide:

22 **23. (2)** A declaration of incompatibility made under subsection (1) shall

1 not constitute repugnancy to this Order and shall not affect the
2 continuation in force and operation of the legislation or section or
3 sections in question.
4

5 (3) In the event of a declaration of incompatibility made under subsection
6 (1), the Legislature shall decide how to remedy the incompatibility.
7

8 24. It is unlawful for a public official to make a decision or to act in a way
9 that is incompatible with the Bill of Rights unless the public official is
10 required or authorized to do so by primary legislation, in which case the
11 legislation shall be declared incompatible with the *Bill of Rights* and the
12 nature of that incompatibility shall be specified.
13

14 **Constitutional Interpretation**

15

16 21. The task of interpreting a constitutional provision differs in fundamental ways
17 from the construction of a statute. Clayton and Tomlinson, in *The Law of Human*
18 *Rights* (second edition, Vol. 1, 2009, Oxford University Press) remark at page 152
19 that constitutional provisions “must be approached in a flexible manner so that
20 they can be adapted to changing conditions.” The Privy Council has said (in
21 *Attorney General for NSW v Brewery Employees Union* (1909), 6 CLR 469 at
22 611-12) that a constitution should be given a “large and liberal interpretation” and
23 not one which is truncated by a “narrow and technical construction”. Again, in
24 *Minister of Home Affairs and another v Fisher* (1991) 44 WIR 107, the Privy
25 Council called for a “generous interpretation” for the purpose of according to
26 individuals a “full measure of those fundamental rights and freedoms” enshrined
27 in the instrument. The Court preferred the view that a constitutional instrument
28 should be treated as *sui generis*, with its own principles of interpretation and

1 without any “necessary acceptance of the presumptions that are relevant to
2 legislation of private law” (at page 113). Lord Bingham (in *Reyes v The Queen*
3 [2002] AC 235, para. 26) characterized the correct approach to constitutional
4 interpretation as “generous and purposive”, echoing language used earlier by,
5 among others, Lord Diplock in *AG of the Gambia v Jobe* [1984] AC 689 at page
6 700. Lord Bingham continued with the observation (quoting with approval from *S*
7 *v Makwanyane* 1995 (3) SA 391, at page 431) that although public opinion may
8 have some relevance to the court’s task it is “no substitute” for the court’s
9 obligation to protect the rights of minorities and marginalized people through
10 enforcement of guaranteed rights.

11
12 22. The Bill of Rights includes a requirement in section 25 that legislation must be
13 “read and given effect in a way which is compatible with the rights” guaranteed
14 by it:

15
16 **25.** In any case where the compatibility of primary or subordinate legislation
17 with the Bill of Rights is unclear or ambiguous, such legislation must, so
18 far as it is possible to do so, be read and given effect in a way which is
19 compatible with the rights set out in this Part.
20

21 This section ensures that the court will strive to align an impugned legislative
22 provision with what the Legislature may reasonably be taken to have intended and
23 by this process of “reading down” will seek to avoid a formal declaration of
24 incompatibility but the obligation imposed by section 25 arises only in “unclear or

1 ambiguous” cases. Since the section appears in the Bill of Rights it has the effect
2 of elevating both the rule of construction itself and the limitation upon it to
3 constitutional status. Clear cases of incompatibility are to be left to the Legislature
4 for correction.

5
6 23. The utility of reading down is not without limit. In *de Freitas v Permanent*
7 *Secretary of Ministry of Agriculture and others* [1998] UKPC 30 the Privy
8 Council observed that “an enactment construed by severing, reading down or
9 making implications into what the legislature has actually said should take a form
10 which it could reasonably be supposed that Parliament intended to enact”. The
11 Privy Council in *de Freitas* quoted with approval from *Osborne v Canada*
12 (*Treasury Board*) (1991) 82 DLR (4th) 321 (SCC) to the effect that after a
13 “wholesale reading down” a law may “bear little resemblance to the law that
14 Parliament passed” which gives rise to a “strong inference” that it is simply
15 incompatible. In such cases the task of bringing the legislation into conformity
16 with constitutional guarantees is best left to the legislative branch of government
17 as it will have access to relevant information and expertise not available to the
18 court.

19
20 24. The obligation to attempt to read a challenged provision in a manner compatible
21 with the UK *Human Rights Act* has been described there as a “strong
22 interpretative obligation”: see Clayton and Tomlinson, *op. cit.*, page 175 ff. I

1 accept that the courts of the Cayman Islands must approach the interpretative
2 obligation with equal vigour but the occasion is unlikely to occur as often because
3 the *Human Rights Act* provision is expressed in broader language than section 25;
4 the former sets down an obligation (“as far as it is possible to do so”) which is not
5 limited to “unclear or ambiguous” cases.

6
7 **Issue 1: Was Mr. Nairne’s Detention Unlawful?**

8
9 25. This question presents little difficulty as neither respondent has attempted to
10 argue that the detention was lawful throughout.

11
12 26. The arguments proceeded on the basis that D/I Oremule did have the right
13 (without, for the moment, considering any question of incompatibility) under ss.
14 65(1) to (3) to arrest Mr. Nairne and to detain him for up to 72 hours. On the same
15 basis, the authorization given by Chief Inspector Beersingh under s. 65(4)
16 permitted an extension of the detention period to 96 hours.

17
18 27. Just prior to the expiration of that 96-hour period D/I Oremule applied to the
19 Chief Magistrate for an order permitting a further detention period of 72 hours
20 under s. 65(5) and (6). This application was made *ex parte*; no effort was made to
21 produce Mr. Nairne to the court. The subsection requires that the application be
22 heard “in chambers”. An application in chambers is not necessarily, or even

1 usually, conducted on an *ex parte* basis. There is nothing in the legislation which
2 permits a police officer to apply for such an order in the absence of the detainee.

3
4 28. The respondents now accept that this manner of proceeding was in violation of
5 Mr. Nairne's right (enshrined in section 5(5) of the *Bill of Rights*) to be "brought"
6 promptly before a court after his arrest. The right to be "brought" before a court
7 imposes an affirmative obligation upon those who have custody of an arrested or
8 detained person to convey the person into the presence of a judicial officer (see,
9 on this point, *TW v. Malta* (1999) ECHR25644/94, at para. 43; *McKay v. United*
10 *Kingdom* October 3, 2006, App. No. 543/03 (ECtHR);). The right is not merely a
11 right to make an application for release to a court; the state must take the initiative
12 to provide judicial oversight of the justification for detention. Thus the presence
13 of a process (*habeas corpus*) which provides a judicial consideration of the
14 lawfulness of the detention should the detained person invoke it does not affect
15 the right. In *Brogan and Others v. United Kingdom* (1989) 11 EHRR 117
16 (referred to in more detail below) the 4 arrested men could have brought *habeas*
17 *corpus* applications but that possibility did not diminish the state's obligation to
18 bring them promptly before a court.

19
20 29. Although it may seem that section 65(5) leaves open the question of whether the
21 application may be made *ex parte*, it must be read in a manner which complies

1 with a detainee's right to be brought before a court. I am satisfied that section
2 65(5) applications must be made in the presence of the person who has been
3 arrested and detained and that any further detention "authorized" by an order
4 obtained *ex parte* is unlawful. Section 65(6) should be read as including the
5 words "in the presence of the person in detention" after the phrase "in chambers".
6 It follows that Mr. Nairne's detention from 9:15 a.m. on January 14 onwards was
7 unlawful and he is entitled to judgment in his *habeas corpus* application.
8

9 **Issue 2: Is Section 65 of the *Police Law, 2010* or Any Material Part Of It In**
10 **Conflict With Section 5(5) of the *Bill of Rights*?**
11

12 30. Mr. Nairne was detained for a period of 72 hours by D/I Oremule under the power
13 contained in section 65(3). He was then detained for a further period of almost 24
14 hours upon the authority of Chief Inspector Beersingh under the power contained
15 in section 65(4). When Chief Inspector Beersingh's authority expired (at the end
16 of 96 hours of detention) Mr. Nairne was detained for a further 2 days and 5 ½
17 hours. If, contrary to my ruling given above, the order of the Chief Magistrate was
18 a lawful one, he was detained during this latter period under the power contained
19 in sections 65(5) and (6). Had he been detained as long as 72 hours after the Chief
20 Magistrate's order, a police officer could have asked a magistrate to extend the
21 period of detention for a further 24 hours upon showing that there were

1 “exceptional circumstances”. This final period is authorized by section 65(7). In
2 summary, Mr. Nairne was detained without charge for 6 days and 5 ½ hours.

3
4 31. The legislation permits a period of detention without charge for up to 8 days but
5 requires that an order authorizing the detention be obtained from a magistrate by
6 the end of the fourth day. Section 5(5) of the *Bill of Rights* gives to everyone who
7 is arrested or detained a right to be brought “promptly” before a court. Mr. Nairne
8 submits that sections 65(3), (4), (5) and (6) each violate this right and should be
9 the subject of a Declaration of Incompatibility.

10
11 32. What is meant by the word “promptly”? The word appears in Article 5(3) of the
12 European Convention on Human Rights (“the Convention”) in the same context
13 as it is used in our *Bill of Rights*. Article 5(3) requires that everyone who has been
14 arrested or detained upon reasonable suspicion of having committed (or being
15 about to commit) a criminal offence be “brought promptly” before a judicial
16 officer. The European Court of Human Rights (“the ECtHR”) considered the
17 meaning of “promptly” in depth in *Brogan and others v. United Kingdom, supra*.
18 The four applicants had been arrested in Northern Ireland under anti-terrorist
19 legislation. Within a day of each man’s arrest he was informed that the Secretary
20 of State for Northern Ireland had agreed to extend his detention by a further 5
21 days pursuant to a provision in the legislation. In the result, the four men were

1 held without being charged or brought before a court for periods of 4 days and 6
2 hours, 4 days and 11 hours, 5 days and 11 hours, and 6 days and 16 ½ hours
3 respectively. Since all were released without being charged or brought before a
4 court at all, the question became whether each man had been released promptly.

5
6 33. The Court concluded that none of the 4 men had been released promptly; Article
7 5(3) had been breached in each case. In doing so, the Court took “full judicial
8 notice” of the prevalence and severity of terrorist activity in Northern Ireland
9 which had led to the legislation. Ultimately, the Court felt that the “scope for
10 flexibility” in interpreting and applying the requirement for promptness is “very
11 limited”. The majority (there were several dissents) said:

12 The assessment of ‘promptness’ has to be made in the light of the
13 object and purpose of Article 5. The Court has regard to the
14 importance of this Article in the Convention system: it enshrines
15 a fundamental human right, namely the protection of the
16 individual against arbitrary interferences by the State with his
17 right to liberty. Judicial control of interferences by the executive
18 with the individual’s right to liberty is an essential feature of the
19 guarantee embodied in Article 5(3), which is intended to
20 minimize the risk of arbitrariness. Judicial control is implied by
21 the rule of law, ‘one of the fundamental principles of a
22 democratic society ...’, which is expressly referred to in the
23 Preamble to the Convention’ and ‘from which the whole
24 Convention draws its inspiration’.

25
26 59. The obligation expressed in English by the word ‘promptly’ and
27 in French by the word ‘*aussitôt*’ is clearly distinguishable from
28 the less strict requirement in the second part of paragraph 3
29 (‘reasonable time’/‘*délai raisonnable*’) and even from that in
30 paragraph 4 of Article 5 (‘speedily’/‘*a bref délai*’). The term
31 ‘promptly’ also occurs in the English text of paragraph 2, where

1 the French text uses the words '*dans le plus court délai*'. As
2 indicated in the *Ireland v. United Kingdom* judgment, 'promptly'
3 in paragraph 3 may be understood as having a broader
4 significance than '*aussitôt*' which literally means immediately.
5 Thus confronted with versions of a law-making treaty which are
6 equally authentic but not exactly the same, the Court must
7 interpret them in a way that reconciles them as far as possible
8 and is most appropriate in order to realize the aim and achieve
9 the object of the treaty.

10
11 The use in the French text of the word '*aussitôt*', with its
12 constraining connotation of immediacy, confirms that the degree
13 of flexibility attaching to the notion of 'promptness' is limited,
14 even if the attendant circumstances can never be ignored for the
15 purposes of the assessment under paragraph 3. Whereas
16 promptness is to be assessed in each case according to its special
17 features, the significance to be attached to those features can
18 never be taken to the point of impairing the very essence of the
19 right guaranteed by Article 5(3), that is the point of effectively
20 negating the State's obligation to ensure a prompt release or a
21 prompt appearance before a judicial authority. *135

- 22
23 60. The instant case is exclusively concerned with the arrest and
24 detention, by virtue of powers granted under special legislation,
25 of persons suspected of involvement in terrorism in Northern
26 Ireland. The requirements under the ordinary law in Northern
27 Ireland as to bringing an accused before a court were expressly
28 made inapplicable to such arrest and detention by section 12(6)
29 of the 1984 Act. There is no call to determine in the present
30 judgment whether in an ordinary criminal case any given period,
31 such as four days, in police or administrative custody would as a
32 general rule be capable of being compatible with the first part of
33 Article 3(3).

34
35 None of the applicants was in fact brought before a judge or
36 judicial officer during his time in custody. The issue to be
37 decided is therefore whether, having regard to the special
38 features relied on by the government, each applicant's release
39 can be considered as 'prompt' for the purposes of Article 5(3).

- 40
41 61. The investigation of terrorist offences undoubtedly presents the
42 authorities with special problems, partial reference to which has

1 already been made under Article 5(1). The Court takes full
2 judicial notice of the factors adverted to by the government in
3 this connection. It is also true that in Northern Ireland the
4 referral of police requests for extended detention to the Secretary
5 of State and the individual scrutiny of each police request by a
6 Minister do provide a form of executive control. In addition, the
7 need for the continuation of the special powers has been
8 constantly monitored by Parliament and their operation regularly
9 reviewed by independent personalities. The Court accepts that,
10 subject to the existence of adequate safeguards, the context of
11 terrorism in Northern Ireland has the effect of prolonging the
12 period during which the authorities may, without violating
13 Article 5(3), keep a person suspected of serious terrorist offences
14 in custody before bringing him before a judge or other judicial
15 officer.

16
17 The difficulties, alluded to by the government, of judicial control
18 over decisions to arrest and detain suspected terrorists may affect
19 the manner of implementation of Article 5(3), for example in
20 calling for appropriate procedural precautions in view of the
21 nature of the suspected offences. However, they cannot justify,
22 under Article 5(3), dispensing altogether with 'prompt' judicial
23 control.

- 24
25 62. As indicated above, the scope for flexibility in interpreting and
26 applying the notion of 'promptness' is very limited. In the
27 Court's view, even the shortest of the four periods of detention
28 *136 namely the four days and six hours spent in police custody
29 by Mr. McFadden, falls outside the strict constraints as to time
30 permitted by the first part of Article 5(3). To attach such
31 importance to the special features of this case as to justify so
32 lengthy a period of detention without appearance before a judge
33 or other judicial officer would be an unacceptably wide
34 interpretation of the plain meaning of the word 'promptly'. An
35 interpretation to this effect would import into Article 5(3) a
36 serious weakening of a procedural guarantee to the detriment of
37 the individual and would entail consequences impairing the very
38 essence of the individual and would entail consequences
39 impairing the very essence of the right protected by this
40 provision. The Court thus has to conclude that none of the
41 applicants was either brought 'promptly' before a judicial
42 authority or released 'promptly' following his arrest. The

1 undoubted fact that the arrest and detention of the applicants
2 were inspired by the legitimate aim of protecting the community
3 as a whole from terrorism is not on its own sufficient to ensure
4 compliance with the specific requirements of Article 5(3).

5
6 There has thus been a breach of article 5(3) in respect of all four
7 applicants.
8

9 34. There are a number of other decisions to essentially the same effect. In *Koster v.*
10 *The Netherlands* [1991] ECHR 12843/87, the same Court referred to its earlier
11 judgment in *Brogan* and found without difficulty that a period of detention of 5
12 days before a suspect was brought before a court (for a violation of military
13 discipline) constituted a violation of Article 5(3). The Human Rights Committee
14 of the United Nations has held in *Freemantle v. Jamaica*, U.N. Doc.
15 CCPR/C/68/D/625/1995, that a period of 4 days detention (before any court
16 appearance) on suspicion of murder was a breach of Article 9 paragraph 3 of the
17 International Covenant on Civil and Political Rights (“the Covenant”). The
18 Covenant requires that an arrested or detained person be “brought promptly”
19 before a judicial officer.

20
21 35. At the other end of this rather short spectrum, the European Court of Human
22 Rights said in *Aquilina v. Malta* (2000) 29 EHRR 185, a companion case to *TW v.*
23 *Malta*, that a period of 2 days can be regarded as “prompt”. In *McKay v. United*
24 *Kingdom* (Application no. 543/03) October 3, 2006, the ECHR held that a suspect
25 who was brought before a magistrate within 36 hours of his arrest was brought

1 there promptly (at para. 48). The magistrate had no general power to grant release
2 on bail; the suspect was released a day later by order of a judge so the actual
3 period of detention was about 2 ½ days. The ECHR considered that the entire
4 procedure had been followed with “due expedition” (at para. 50), implying that a
5 period of 2 ½ days can be considered prompt.

6
7 36. Some consideration of the level of promptness required by the law of other
8 Western democracies is also relevant.

9
10 37. In the United Kingdom the general rule is that a person who has been arrested or
11 detained by the police may not be held longer than 24 hours: *Police and Criminal*
12 *Evidence Act, 1984* c. 60 s. 41(7). An officer of the rank of superintendent or
13 above may authorize an extension of this time to 36 hours: *ibid.*, s. 42(1). Any
14 longer period of detention must be authorized by a court: *ibid.*, ss. 42(2) & (4), 43.

15
16 38. In Canada an arrested person who is not released on bail immediately must be
17 brought before a court “without unreasonable delay” and in any event within 24
18 hours: *Criminal Code of Canada*, RSC 1985 s. 503(1)(a). There is one exception
19 which no doubt owes its existence to the vast distances which may sometimes
20 intervene between the locale of an arrest and the nearest judicial officer: where no

1 judge or justice of the peace is “available” within 24 hours the suspect must be
2 brought before a court “as soon as possible”: *ibid.*, s. 503(1)(b).

3
4 39. The Australian *Crimes Act 1914* s. 23(4) provides for an initial period of detention
5 of just four hours which may be extended by a magistrate for a further 20 hours.
6 This period of time is calculated in such a way as to exclude the time taken in
7 transporting the suspect to a police station, interviewing the suspect, conducting
8 an identification parade, and allowing the suspect to obtain legal advice (see *ibid.*,
9 s. 23(7)).

10
11 40. My attention has also been drawn to section 45 of *Standing Order No. 22*
12 (November 1, 1985) of the Royal Cayman Islands Police Force. This provision,
13 which has now been superseded by the *Police Law*, provides that anyone in police
14 custody must be brought before a magistrate within 72 hours unless that is
15 rendered impossible by illness or accident. It therefore appears that in earlier
16 times no need for a period in excess of 72 hours was perceived.

17
18 41. In summary, the authorities suggest that a period of detention of up to about 60
19 hours before being brought before a court is regarded as “prompt”, depending
20 upon the circumstances, but any period in excess of 4 days or more is not. In the
21 United Kingdom a suspect may be held for only 36 hours before his detention is

1 authorized by a court. Canadian legislation provides for a 24-hour period provided
2 a judicial figure is available within that time. Australian legislation requires that a
3 suspect be brought before a court within four hours but the time taken to conduct
4 a number of essential procedures is excluded from the calculation.

5
6 43. Section 65(3) permits the detention of a suspect for up to 72 hours without
7 bringing him before a magistrate; is this provision compatible with a fundamental
8 obligation to bring a suspect before a court promptly? In the Cayman Islands, as
9 in many other smaller jurisdictions, no magistrate is sitting from about 5 PM on
10 Fridays until about 9:30 a.m. on Mondays – a period of 64 ½ hours. That is likely
11 the reason that Standing Order No. 22 imposed a limit of 72 hours. While a 72-
12 hour period is significantly longer than the specified periods in the United
13 Kingdom, Canada and Australia I consider that it is permissible. The ECtHR in
14 *McKay, supra*, was considering a period of some 60 hours and had no criticism to
15 offer. I therefore find that section 65(3) is compatible with the *Bill of Rights*. Mr.
16 Nairne's detention for the first 72 hours was in accordance with the law.

17
18 44. Section 65(4) permits the continued detention of a suspect for a further 24 hours
19 after the initial 72-hour period has passed provided a police officer of the rank of
20 Chief Inspector or above has authorized it. There is no obvious explanation for
21 why the authorization is to be given by a police officer rather than a court. The

1 section represents a change from the existing practice mandated by *Standing*
2 *Order 22*. Counsel to the Attorney General did not advance a specific justification
3 for the provision. It is true that on weekends which are preceded or followed by a
4 statutory holiday a person who is arrested or detained on the evening of the start
5 of the holiday might (under our present practice) be brought before a magistrate
6 only after 96 hours have passed but Counsel to the Attorney General did not seek
7 to rely upon that as a justification. This circumstance occurs just a few times each
8 year; arrangements could be made to ensure that a judicial officer is available on
9 statutory holidays. I find I am unable to view a first appearance in court by a
10 detained person four days after arrest as having been made promptly. Section
11 65(4) of the *Police Law 2010* is not compatible with section 5(5) of the *Bill of*
12 *Rights*.

13
14 45. I am satisfied that ss. 65(5), (6) and (7) of the *Police Law 2010* are compatible
15 with the *Bill of Rights* provided that any detention in accordance with those
16 provisions is authorized by a magistrate after a hearing at which the suspect is
17 present.

18
19 **Issue 3: If So, Can the Provision In Question Be Read and Given Effect in a**
20 **Way Which is Compatible With the *Bill of Rights* or Must a Declaration of**
21 **Incompatibility Be Made?**
22

1 46. The question of whether a 4-day delay before producing an arrested or detained
2 person to a court can be considered prompt is, to an extent, debatable. I am
3 prepared for present purposes to accept that the answer is “unclear”.
4 Consequently, I am obliged by section 25 of the *Bill of Rights* to consider whether
5 the provision can be read down or interpreted in such a way as to bring it into
6 harmony with section 5(5).

7
8 47. I have considered whether section 65(4) could be read with the substitution of the
9 words “a magistrate” for the phrase “a police officer of the rank of Chief
10 Inspector or above” so that any detention beyond 72 hours would require judicial
11 approval. The difficulty is that this change eviscerates the section; the original
12 intent of the Legislature is not modified or expanded by it but obliterated. A
13 police officer’s primary interest is (and should be) the furtherance of the
14 investigation. He has none of the attributes of a court. By assigning to a senior
15 police officer (rather than to a judge) the right to determine whether a prisoner
16 should be released, the Legislature was making a choice between two
17 fundamentally different decision makers with no common features. That was
18 deliberate. A change of this magnitude is beyond the scope of the process of
19 reading down. Removing the power to release from the police and assigning it to
20 a judge is not reading the provision in a manner “which it could reasonably be
21 supposed that Parliament intended to enact” (*deFreitas, supra*). It can reasonably

1 be supposed that the Legislature intended the exact opposite. For this reason I
2 must decline to read down section 65(4) in a manner which renders it compatible
3 with our new Constitution.
4

5 **Order**
6

7 48. I grant to Mr. Nairne an Order:
8

- 9 1) declaring that his detention from 9:15 a.m. on January 14, 2013
10 onwards was unlawful because the order authorizing it was
11 obtained *ex parte*;
12
13 2) declaring that section 65(4) of the *Police Law* 2010 is incompatible
14 with section 5(5) of the *Bill of Rights* and, as a consequence, it was
15 a violation of his rights to detain him under section 65(4);
16
17 3) permitting him to set down a further hearing to address his claims for
18 compensation and costs.
19
20
21
22

23 Pronounced the 14th day of February, 2013

24 Written Reasons Delivered the 17th of April, 2013

25 *Henderson, J.*

26 Henderson, J.

27 Judge of the Grand Court

