THE GRAND COURT OF THE CAYMAN ISLANDS
In Chambers

CAUSE NOS. 10 OF 2013 & 18 of 2013

In the matter of Canute Nairne

AND in the matter of the WRIT OF HABEAS CORPUS AD SUBJICIENDUM

Appearances:	Mr. Guy Dilliway-Parry of Priestleys for the Applicant
	Ms. Laura Manson of the Office of the Director of Public Prosecutions for the Director of Public Prosecutions
	Ms. Suzanne Bothwell of the Attorney General's Chambers
Before:	Hon. Justice Henderson
Heard:	February 14, 2013

JUDGMENT

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

Facts

2. The facts are not in dispute.

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

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

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

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

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

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

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

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

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

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

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

Issues

12. The issues are:

1) Was Mr. Nairne's detention unlawful?

2) Is section 65 of the *Police Law,* 2010 or any material part of it in conflict with section 5(5) of the *Bill of Rights*?

3) If so, can the provision in question be read and given effect in a way which is compatible with the *Bill of Rights* or must a Declaration of Incompatibility be made?

The Impugned Legislation

13. Section 65 of the *Police Law,* 2010 ("section 65") reads:

> 65. (1) When a person has been taken into custody without a warrant for an offence, a police officer of the rank of Sergeant or above to which that person is brought shall at once enquire into the case, and if, when the enquiry is completed, there is no sufficient reason to believe that the person has committed an offence that person shall be released forthwith.
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> (2) If, upon the enquiry, there is reason to believe that the person arrested has committed an offence that police officer of the rank of Sergeant or above may release the person on bail
>
> (3) Where the police officer arresting a person determines that he does not have sufficient evidence to charge but has reasonable grounds for believing that the detention of that person without being charged is necessary –
>
> (a) to secure or preserve evidence relating to an offence for which he is under arrest;
> (b) to obtain that evidence by questioning him; or
> (c) to complete the investigation,
>
> he may place that person in police detention for a period not exceeding seventy-two hours from the time of arrest.
>
> (4) Where a police officer of the rank of Chief Inspector or above has reasonable grounds for believing that –
>
> (a) the detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;
> (b) an offence for which he is under arrest is an arrestable offence; and
> (c) the investigation is being conducted diligently and expeditiously,
>
> he may authorize the keeping of that person in police detention for a further period of twenty-four hours after the period referred to in subsection (3).

(5) A person may not be kept in police detention after the period referred to in subsection (4) except upon the order of a summary court made on the application of a police officer.

(6) The application made under subsection (5) shall be heard in chambers, and the court shall consider whether there are reasonable grounds for believing that matters set out in subsection (4) and, if it is so satisfied, it may order further detention for a further period of seventy-two hours.

(7) Notwithstanding an application made under subsection (5) and an order granted under subsection (6), where there are exceptional circumstances, a police officer may make a further application to the court for an order of detention for further period of twenty-four hours.

(8) If, at the end of the periods of seventy-two hours and twenty-four hours referred to in subsections (6) and (7), the person is not charged, he shall be released without further reference to the court, but may be re-arrested for the offence for which he was previously arrested if new information justifying a further arrest has come to light since his release.

(9) Wherever in subsections (3), (4), (6), (7) or (8) reference is made to a period of seventy-two or twenty-four hours, such reference shall be read and construed as allowing detention for a lesser period at a time so long as the total period of detention under one authority does not exceed seventy-two or twenty-four hours as the case may be.

(10) Subject to subsection (11), a release on bail of a person under this section is a release on bail granted in accordance with the *Bail Law* (2007 Revision).

(11) Nothing in the *Bail Law* (2007 Revision) prevents the re-arrest without warrant of a person released on bail subject to a duty to attend at a police station if new evidence justifying a further arrest has come to light since his release.

(12) Subject to subsection (13), in this section references to "bail" are references to bail subject to a duty –

(a) to appear before the court at such time or place; or
(b) to attend at such police station at such time,

as the police officer granting bail appoints.

(13) If a police officer has granted bail to a person subject to a duty to appear at a police station, that police officer may give written notice to the person that his attendance at the police station is no longer required.

(14) If a person arrested for an offence was released on bail subject to a duty to attend at a police station and so attends, he may be detained without charge in connection with that offence only if the police officer who granted bail bas reasonable grounds for believing that the person's detention is necessary –

(a) to secure or preserve evidence relating to the offence; or
(b) to obtain such evidence by questioning him.

(15) The time from which the period of detention of a person is to be calculated shall be -

(a) in the case of a person arrested outside of the Islands, the time at which that person arrives at the first police station to which he is taken within the Islands;
(b) in the case of a person who attends voluntarily at a police station and is arrested at the police station, the time of his arrest;
(c) in the case of a person who accompanies a police officer to a police station without having been arrested and is arrested at the police station, the time of his arrest; or
(d) in any other case, the time at which the person arrested arrives at the first police station to which he is taken after his arrest.

The Constitutional Provision

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

(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
(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 in mentioned in subsection (2) (e) is not tried within a reasonable time 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. [underlining added]

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

Procedure When Seeking a Declaration of Incompatibility

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

> **23.** - (1) 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 or sections of the *Bill of Rights* and the nature of that incompatibility.

"Primary legislation" means a Law enacted by the Legislature of the Cayman Islands (*Bill of Rights*, s. 28(b)).

16. The application is made to the Grand Court:

26. - (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.

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

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

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

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

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

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

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

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

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

Consequences of a Declaration of Incompatibility

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

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

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

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

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.

Constitutional Interpretation

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

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

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

> **25.** In any case where the compatibility 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.

This section 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.

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

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

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

Issue 1: Was Mr. Nairne's Detention Unlawful?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The assessment of 'promptness' has to be made in the light of the object and purpose of Article 5. The Court has regard to the importance of this Article in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimize the risk of arbitrariness. Judicial control is implied by the rule of law, '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 its inspiration'.
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> 59. The obligation expressed in English by the word 'promptly' and in French by the word '*aussitôt*' is clearly distinguishable from the less strict requirement in the second part of paragraph 3 ('reasonable time'/'*délai raisonnable*') and even from that in paragraph 4 of Article 5 ('speedily'/'*a bref délai*'). The term 'promptly' also occurs in the English text of paragraph 2, where

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

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

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

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

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

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

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

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

> undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3).
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> There has thus been a breach of article 5(3) in respect of all four applicants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

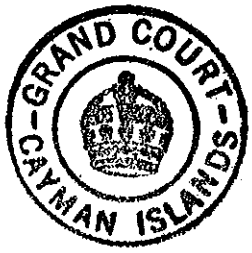
Order

48. I grant to Mr. Nairne an Order:

1) declaring that his detention from 9:15 a.m. on January 14, 2013 onwards was unlawful because the order authorizing it was obtained *ex parte*;

2) declaring that section 65(4) of the *Police Law* 2010 is incompatible with section 5(5) of the *Bill of Rights* and, as a consequence, it was a violation of his rights to detain him under section 65(4);

3) permitting him to set down a further hearing to address his claims for compensation and costs.



Pronounced the 14th day of February, 2013

Written Reasons Delivered the 17th of April, 2013

Henderson, J.

Henderson, J.
Judge of the Grand Court