



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

3 **Neutral Citation Number: [2025] CIGC (Crim) 25**

4 **Case No: SCA0015 to 0020/2024**

5
6
7 **CLIVE FREEMAN (AKA CLIVE FITZPATRICK, AKA CLIVE GURZHII)**
8 **AND JULIA GURZHII**

9
10 **V.**

11
12 **REX**

13
14 **Appearances:** **Mr. Nicholas Dixey of Nelson Legal for the Appellant Clive**
15 **Freeman (Aka Clive Fitzpatrick, Aka Clive Gurzhii)**
16 **Appellant Clive Freeman present**
17 **Appellant Julia Gurzhii in person -Refuses to Attend**
18 **Mr. Ben Brown Crown Counsel of the Office of the Director of**
19 **Public Prosecutions for the Respondent**

20
21 **Before:** **The Hon. Justice Cheryl Richards KC**

22
23 **Submissions Heard:** **23rd May 2025**

24 **Judgment Delivered:** **16th June 2025**

25
26 *Criminal Law – Appeals against convictions and sentences pursuant to s.181 of the Criminal*
27 *Procedure Code (2021 Revision). Elements of the offence of Human Smuggling contrary to s.66 of*
28 *the Customs and Border Control Act (2024 Revision), whether complicit dishonesty with passengers*
29 *is a requirement for the offence. Illegal Landing contrary to s.105 (1) of the Customs and Border*
30 *Control Act (2024 Revision). Defence of Duress of Circumstances, Evidential burden. Failing to*
31 *Complete a Disembarkation Card contrary to s. 98 (1) of the Customs and Border Control Act (2024*
32 *Revision), whether requirement for immediacy. Sentences for Human Smuggling, whether manifestly*
33 *excessive where two migrants on board vessel.*



SUMMARY COURT APPEAL JUDGMENT

PRELIMINARY MATTERS

1. There were four preliminary matters upon the commencement of the hearing of this appeal. The Court was advised by Prison Officers from HMP Fairbanks that the second appellant Julia Gurzhii refused to attend in person or by video link. The Court noted that this had been her position on all previous dates for this appeal. Counsel for the first appellant Mr. Clive Gurzhii confirmed that he had previously spoken with Ms. Gurzhii at the request of the Court and advised her of her right to have legal representation. The Court concluded that Ms. Gurzhii had waived her right to be present for her appeal. The position today on delivery of this judgment is that she has also refused to attend.
2. Counsel for the appellant Mr. Gurzhii raised two points. Counsel indicated that an application that the appeal proceed by way of a rehearing had been considered and foreshadowed but that his specific instructions are now that no such application is to be made.
3. Counsel said that a second point is that from his research, the Human Rights Commission Report on Cuban Migrants of 2013 records consultations involving this tribunal in another capacity. Counsel said that this was noted but no application for recusal was to be made. The appellant was asked to indicate his position in open Court and he stated that he consented to the appeal hearing proceeding before this tribunal.
4. The fourth preliminary matter is that the Court noted that in March 2025 at a preparatory hearing, Mr. Gurzhii then appearing in person had asked for certain closed circuit television footage. This was of the areas of the holding cells and corridors of the Court for the dates of the trial 5th, 12th and 30th July 2024 and 9th August 2024. He said that these may have recorded how he and his wife Ms. Gurzhii were treated by officers when they were being taken from the cells to the Court room. The response from inquiries made is that these records are no longer available. Due to data storage capacity these

1 records are usually kept for no more than ninety days if they are not requested within
2 that period.



3
4 **INTRODUCTION TO THE APPEAL**

5
6 5. The appellants appeal their convictions and sentences following trial before the
7 Summary Court. On the 4th September 2024, they were each convicted of three offences
8 as follows:

9
10 i. Charges 01143/24 and 01145/24 charged the appellants separately with the
11 offence of Illegal Landing contrary to s.105 (1) of the *Customs and Border*
12 *Control Act* (2024 Revision). The particulars are that each on or before the
13 14th May 2024 landed in the Cayman Islands where such landing was in
14 contravention of the *Customs and Border Control Act* (2024 Revision).

15
16 ii. Charges 01144/24 and 01146/24 charged the appellants separately with the
17 offence of Failing to Complete a Disembarkation Card contrary to s. 98 (1)
18 of the *Customs and Border Control Act* (2024 Revision). The particulars
19 are that each on or before the 14th May 2024 having disembarked in the
20 Cayman Islands, failed to complete and hand to an officer immediately on
21 arrival a disembarkation card.

22
23 iii. Charges 01343/24 and 01344/24 charged the appellants separately with the
24 offence of Human Smuggling contrary to s.66 of the *Customs and Border*
25 *Control Act* (2024 Revision). The particulars are that each on the 14th May
26 2024, assisted or facilitated in the transportation, harbouring or movement
27 of Tilahun Asseffa Bruke and Kedir Osama Musa into the Islands.

28
29 6. The trial was heard over three days before the Learned Chief Magistrate (“the
30 Magistrate”). The prosecution called eight witnesses. The appellants declined to
31 participate in or give evidence during the trial. They declared that they did not consent
32 to the jurisdiction of the Court and left the Court room. Arrangements were made for
33 video connections in their cells so that they could hear the evidence. The Prosecution



1 confirmed to the Summary Court that all relevant papers, bundles and exhibits had been
2 served on each of them. The Magistrate rendered verdicts and sentences on the 5th
3 September 2024.

4
5 7. On the charge of Human Smuggling, the first appellant was sentenced to 4 years (48
6 months) imprisonment and the second appellant 40 months imprisonment.

7
8 8. For the offence of Illegal Landing the first appellant was sentenced to 18 months
9 imprisonment and the second appellant to 12 months imprisonment and for the third
10 offence the sentences were 6 months and 4 months respectively.

11
12 9. Money found on the vessel was ordered confiscated to be returned in part to the two
13 passengers. The appellants were ordered to pay a costs contribution of US\$946 with the
14 remainder. The vessel was ordered confiscated.

15
16 **NOTICES OF APPEAL**

17
18 10. Both appellants filed Notices of Appeal in person on the 12th September 2024. These
19 were identical as to grounds of appeal as follows: -

- 20 i. No due process of law.
21 ii. No evidence of a crime.
22 iii. Unsafe conviction.
23 iv. Miscarriage of justice.
24 v. Breach and or incompatibility of s.7 when read together with s.3 of the Cayman
25 Islands Constitution Order 2009.
26 vi. Against Human Rights.
27 vii. Missing full disclosure.
28 viii. Sentence is manifestly excessive and wrong in principle.
29 ix. Magistrate failed to follow statutory guidelines.



1 **SUMMARY OF THE EVIDENCE**

2
3 11. The evidence may be summarised as follows. The appellants are foreign nationals. At
4 about 10:30am on the morning of the 14th May 2024, Customs and Border Control
5 officers on Cayman Brac received information about a foreign vessel, a yacht which was
6 moored to the dock on the West End of the Islands. It bore the name “Moon Dancer”
7 which was not a name in the Cayman Islands Border Control system. The officers
8 attended the dock and as there was no visible activity on board, they went into the town
9 in search of the occupants of the vessel. They found the two appellants in the deli of a
10 supermarket having a meal. They had a young child with them. Mr. Gurzhii identified
11 himself as the captain of the vessel and confirmed that he had not undertaken the
12 clearance process.

13
14 12. He was advised that he should have stayed on board and contacted Border Control and
15 that they would have to be taken back to the vessel and the clearance process completed.

16
17 13. Mr. Gurzhii was handed a blank form which he filled out and signed as the master of the
18 vessel. It listed himself and Ms. Gurzhii as the only two passengers. Both appellants
19 were given disembarkation cards which they completed. They indicated that their
20 passports and travel documents had been stolen. When asked for the registration
21 documents for the vessel, Mr. Gurzhii said that there were on board. When the officers
22 indicated that they would be boarding the vessel, both appellants became agitated. Ms.
23 Gurzhii repeated the things that Mr. Gurzhii was saying. The evidence of officer Claude
24 Terry is that they started to accuse the officers of wanting to steal their child and of
25 operating outside their jurisdiction. Both said that they wanted to leave, and according
26 to the witnesses it became almost hostile. The two attempted to leave and the officers
27 prevented them from doing so.

28
29 14. On boarding the vessel, the officers found that there was a padlock to the entry way.
30 They removed the padlock and entered. Two Ethiopian men Mr. Bruke and Mr. Musa
31 were found inside. The two men gave evidence at trial that they were travelling from
32 Saint Martin to Honduras and had paid the appellants about Euro \$5000 to transport



1 them. Ms. Gurzhii had been a part of the discussion about the amount to be paid. She
2 had told Mr. Gurzhii that he should charge them more.

3
4 15. The men said that they had made a previous stop in the Virgin Islands and had been
5 locked inside the boat by Mr. Gurzhii who had told them that he did not want them to be
6 ‘shown’ or to be visible. They were told that if any officers came to the boat, they were
7 to say that they were janitors. There was detailed evidence given about the nature of the
8 treatment which they received at the hands of the two appellants while on board.

9
10 16. The men said that they did not know that they were going to the Cayman Islands. Mr.
11 Bruke testified that neither of the two (Mr. and Mrs. Gurzhii) said anything to them about
12 the reason that they were going to the Cayman Islands, but he noticed when they stopped
13 that there was no fuel and the food was finished.

14
15 17. When they arrived in the Cayman Islands, they were taken from the outside to the inside
16 of the boat. They usually stayed on the outside of the boat to sleep and travel. They were
17 locked inside the boat and the three of them, Mr. and Mrs. Gurzhii and the child left the
18 boat. Mr. and Mrs. Gurzhii took some bags with them and something to buy fuel.

19
20 18. Officer Claude Terry testified that in the course of speaking with Mr. Gurzhii, Mr.
21 Gurzhii did say that he was having issues with his vessel with the engine overheating,
22 that they were very low on water and that he essentially drifted to Cayman Brac.

23
24 19. On board the vessel the officers found the Certificate of Registration and Insurance for
25 the vessel. Both were in the name of Mr. Gurzhii.

26
27 **THE LAW**

28
29 20. Section 105 (1) of the *Customs and Border Control Act* (2024 Revision) (“the *Act*’)
30 provides for the offence of Illegal Landing. It states: -

31
32 “(1) A person who —

33 (a) lands or attempts to land in the Islands;

34 (b) does any act preparatory to landing in the Islands; or

1 (c) remains or resides in the Islands,
2 where such landing, preparing, remaining or residing is or would be in
3 contravention of this Act, commits an offence and is liable on summary
4 conviction to a fine of twenty thousand dollars and to imprisonment for five
5 years.

6 (2) A person who —

7 (a) knowingly assists or causes another to land in, or to depart from, the
8 Islands;

9 (b) connives in such landing or departure; or

10 (c) wilfully does an act preparatory to paragraph (a) or (b), whether or not
11 that other person knew that there was a contravention of this Act, in
12 circumstances where such landing or departure is, or would be, in
13 contravention of this Act, commits an offence and is liable on summary
14 conviction to a fine of fifty thousand dollars and to imprisonment for
15 seven years.

16 (3) The court before which a person is convicted of an offence under

17 subsection (2) may order the forfeiture of a vehicle or vessel used or
18 intended to be used in connection with the offence if the convicted person
19 — (a) owned the vehicle or vessel at the time the offence was committed;
20 ...”

21
22 21. Section 2 of the *Act* provides the definition of “land”. It states: -



23
24 ““land” means to go to, to be, to remain or to reside in any place in the Islands other
25 than —

26 (a) on board a vessel; or

27 (b) in a place under the control of an officer in the officer’s official capacity;”

28
29 22. Section 98 of the *Act* imposes a requirement to complete a disembarkation card
30 immediately on arrival:

31
32 “98. (1) Subject to subsection (4), a person who, disembarking in or leaving the
33 Islands, fails to complete and hand to an officer, immediately on arrival or



1 departure, a disembarkation card or embarkation card, as the case may be,
2 in the prescribed form commits an offence.”

3
4 23. Arrival is defined in the *Act* as meaning arrival in a port or in an airport or in an area
5 within the territorial limit of the Islands.

6
7 24. Section 66 of the *Act* provides for the offence of Human Smuggling. It states:

8
9 “(1) A person who, in contravention of this Act and whether for financial or
10 material benefit or not, assists or facilitates the transportation, harbouring or
11 movement into or out of the Islands, of an individual commits an offence
12 and is liable on summary conviction to a fine of fifty thousand dollars and
13 to imprisonment for seven years.

14
15 (2) Subsection (1) applies to anything done — (a) in the Islands; or (b) outside
16 the Islands by a body incorporated under the law of the Islands.”

17
18 25. The Court’s powers on an appeal from a decision of the Summary Court are set out in
19 s.181 of the *Criminal Procedure Code* (2021 Revision): -

20
21 “The court may adjourn the hearing of the appeal, and may, upon the hearing
22 thereof confirm, reverse, vary or modify the decision of the Summary Court,
23 including the passing of some other sentence (whether more or less severe) or
24 remit the matter to the Summary Court for retrial, or may make such other
25 order in the matter as it may think just, and may, by such order, exercise any
26 power which the Summary Court might have exercised, and such order shall
27 have the same effect and may be enforced in the same manner as if it had been
28 made by the Summary Court: Provided that the court may, notwithstanding
29 that it is of the opinion that the point raised in the appeal might be decided in
30 favour of the appellant, dismiss the appeal if the court considers that no
31 substantial miscarriage of justice has actually occurred.”



1 **THE GROUNDS OF APPEAL**

2
3 26. Notwithstanding the absence of the second appellant, I have considered the general
4 grounds of appeal as filed and the specific grounds as argued in so far as they may touch
5 and concern the safety of her convictions and the appropriateness of the sentences
6 imposed upon her.

7
8 27. The appellants' first and primary ground of appeal as argued before this Court is that the
9 Magistrate failed to correctly identify the elements of the offence of Human Smuggling
10 and thus the convictions for that offence are unsafe and should be set aside.

11
12 28. The Magistrate stated that:

13
14 "Accordingly, the Crown needed to prove that the defendants, having facilitated the
15 transportation of an individual, arrived in the Islands with such individuals and they
16 did not declare such individuals on any forms."

17
18 29. Counsel for the first appellant submits that in fact the offence requires the following
19 elements:

20
21 i. The agency of the passenger in a scheme of complicit dishonesty or put
22 another way an arrangement with the passengers concerned.

23
24 ii. The identification of a breach or intended breach of a specific immigration
25 provision by the passengers of the vessel.

26
27 iii. The intention by the passengers to enter the Islands whether illegally or
28 otherwise or to breach the Act.

29
30 30. Counsel submitted that the alternative would mean that any master who provided a false
31 passenger manifest which did not include the names of passengers would be guilty of
32 the offence whether or not it was by arrangement with those passengers.



1 31. Counsel said that it is an essential element of the offence for there to have been a breach
2 committed by Mr. Bruke and Mr. Musa and for this breach to have been identified in
3 circumstances where they had no intention to land.

4
5 32. Counsel submitted that the offence under the *Act* is really about assisting and facilitating
6 illegal immigration into the Islands and that: -

7
8 “...the correct construction requires a scheme, where the offender is a facilitator,
9 assisting passengers to illegally enter the Islands undetected. To help to move a
10 person secretly across a border is a violation of state sovereignty, and that is the
11 mischief the section aims to address.”

12
13 33. Counsel said that there would be no need for the reference to financial benefit or reward
14 in the section if complicit dishonesty was not required.

15
16 34. Counsel for the appellant helpfully provided the legislative history of the offence of
17 Human Smuggling as having been first enacted by the *Immigration (Amendment) (No.*
18 *2) Law 2006* before being subsequently placed in the *Customs and Border Control Act.*
19 Counsel submitted that it is clear from its history that the legislative purpose is to prevent
20 secret illegal immigration.

21
22 35. Counsel drew an analogy between the section in the Cayman Islands legislation and
23 section 25 of the United Kingdom *Immigration Act* 1971. Section 25 states:

24
25 “(1)A person commits an offence if he—

26 (a) does an act which facilitates the commission of a breach or attempted
27 breach of immigration law by an individual who is not a national of the
28 United Kingdom,

29
30 (b) knows or has reasonable cause for believing that the act facilitates the
31 commission of a breach or attempted breach of immigration law by the
32 individual, and



1 (c) knows or has reasonable cause for believing that the individual is not a
2 national of the United Kingdom.”

3
4 36. Counsel submitted that it is accepted that the two provisions are not identical and that
5 perhaps the need for complicit dishonesty is more clearly set out in the United Kingdom
6 statute. Reliance is placed on two cases from the English Court of Appeal, *R v Bani and*
7 *other related cases*¹ and *R v Kaile (Joginder Singh)*².

8
9 37. In the first case the Court held that proof was required that the defendant knew or had
10 reasonable cause to believe that the migrant passenger had at least a contingent unlawful
11 intention to enter the United Kingdom. In the second that the alleged breach of the
12 immigration law by the passenger has to be stated clearly and it was not.

13
14 38. Counsel noted the uncontested evidence as to the poor treatment of the two passengers
15 in the instant case but said that from the evidence it is clear that they were in the Islands
16 against their will. They wanted to go to Honduras, and they were not here as part of a
17 plot to smuggle themselves into the Islands. They had no intention of breaching the laws
18 of the Islands. Counsel said in oral submissions that there is no evidence that their
19 passage to Honduras was unlawful and no evidence as to the legality of their arrival or
20 travel to Honduras. Counsel said that a more appropriate offence which may have been
21 charged in this case may have been the offence of Wrongful Confinement.

22
23 39. Counsel for the Respondent submitted in reply that the Magistrate was correct in setting
24 out the elements of the offence. Counsel said that by s.3(2) of the *Interpretation Act*
25 (1995 Revision) every local law is to be interpreted according to its plain reading. It
26 states: -

27
28 “(2) Every local law of the Islands shall be carried out and applied according
29 to the plain reading, and not according to any private construction, and any
30 private construction influencing a decision in any case shall be deemed a
31 sufficient cause for appeal or new trial or counter prosecution.”

¹ [2021] EWCA Crim 1958

² [2009] EWCA Crim 2868

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1 40. Counsel submitted that the s.66 offence does not require that the transported person
2 intends to breach immigration law, neither is there a requirement for an element of
3 complicit dishonesty between the transporter and the passenger. Counsel said that the
4 offence does not require some evidence of a plot to smuggle passengers into the Islands
5 and that Counsel for the appellant is inviting the Court to read into the legislation
6 additional requirements which are not there.

7
8 41. I have given consideration to the evidence, submissions and the materials. Counsel for
9 the appellant has provided additional background material in the form of Bills,
10 discussion papers and a Human Rights Commission 2013 Report. While these may be
11 helpful aids to interpretation, I do not consider that these are necessary or ought to be
12 adverted to in a case where the statute is plain on its face.

13
14 42. The offence in the United Kingdom is an act facilitating the commission or attempted
15 commission of a breach of immigration law by an offender who knows or has reasonable
16 cause to believe that the act which he does will have that effect. The offending therefore
17 focuses on the other person or passenger who is committing the breach of the
18 immigration law.

19
20 43. The Cayman Islands provision does not speak to assisting or facilitating a breach. The
21 focus is on the offender who acts in contravention of the *Act* by transporting, harbouring
22 or movement into or out of the Islands. To prove the offence, the section of the *Act*
23 contravened should be identified and there must have been transportation, harbouring or
24 movement of an individual into or out of the Islands.

25
26 44. This is not a section focused on smuggling a person into the country as detailed in the
27 cited cases which considered migrant boats entering the United Kingdom with persons
28 seeking asylum. The Cayman Islands provision relates to persons coming into or out of
29 the Cayman Islands in breach of the *Act*.

30
31 45. While it would have been helpful to have identified in the particulars of the offences the
32 nature of the contravention of the *Act*, it was plain on the evidence that it was a failure
33 to declare the two passengers who were transported or moved into the Islands. The



1 passengers were concealed from the Immigration Authorities by a pre-agreed plan which
2 was effected on arrival.

3
4 46. Section 86 of the *Act* places an onus on the Master of a vessel to complete onward
5 passenger and crew manifests. It states:

6
7 “86. (1) Every master, the local agent or the captain of every vessel arriving in the
8 Islands, other than a recreational sport fishing vessel returning from a sports fishing
9 expedition that took place beyond the Islands’ territorial waters, prior to the arrival
10 of such vessel or as soon as practicable thereafter, shall deliver to an officer lists
11 showing separately the names and particulars of —

- 12 (a) the passengers on board the vessel;
13 (b) the passengers whose intention it is to disembark at the Islands;
14 (c) the crew of the vessel; and
15 (d) any other person on board the vessel.

16
17 (2) A recreational sports fishing vessel arriving in the Islands shall comply with the
18 prescribed arrival procedures.

19
20 (3) Where the master or captain of the vessel transports to the Islands passengers or
21 crew — (a) who are required to have a valid entry visa or proof of citizenship, and
22 are not in possession of such documents; or (b) in respect of whom the master or
23 captain provides false information in relation to the master’s or captain’s duty under
24 subsection (1) and subsection (2), the master or captain is liable to be fined by an
25 officer or a sum of two thousand dollars.”

26
27 47. The mental element for the offence under s.66 must at the higher end be deliberate or
28 intentional assistance or facilitation of the transportation or movement of people which
29 is in contravention of the *Act*.

30
31 48. I accept the submissions of Counsel for the Respondent as to the elements of the offence
32 and the absence of a requirement for complicit dishonesty with the passengers as an
33 essential ingredient. Plainly there will be cases where this is present. There will be others



1 such as the instant case where all that can be said is that while the passengers had no
2 specific intention to land in a particular country on route to their destination they surely
3 must have implicitly intended stops for fuel and replenishment.

4
5 49. I have considered the position of the second appellant. I was initially troubled by this. If
6 the responsibility is fixed on the Master of the vessel, how does the second appellant
7 commit the offence? However, I am mindful of the usual principles set out in section
8 18 of the *Penal Code* (2024 Revision) as to aiding and abetting an offence. On the
9 evidence in this case the non-declaration was underpinned by active attempts to conceal.
10 The Master could only have made the declaration in the confidence that he had the
11 support of the second appellant. This was a joint and agreed plan for financial gain.

12
13 50. Counsel for the Respondent's submission which is accepted is that both appellants acted
14 together, in effect that the second appellant aided and abetted the first Appellant and that
15 this is evidenced by the following matters: -

- 16
17 i. The two passengers Mr. Bruke and Mr. Musa entered into a financial
18 arrangement with both appellants for passage to South America.
19 ii. The appellants instructed both passengers to lie to authorities should they be
20 discovered, by pretending that they were hired cleaners. The passage
21 ultimately resulted in the vessel entering the territorial waters of the Cayman
22 Islands.
23 iii. The passengers' existence was concealed from the authorities by both
24 appellants, thus completing the offence.
25 iv. Both appellants facilitated the movement of Mr. Bruke and Mr. Musa into
26 the Islands and did so in contravention of the *Act* by concealing their
27 existence/failing to disclose their details as legally required to do.

28
29 51. In my view, to these can be added, that from the evidence both appellants sought to
30 prevent the officers from going on board the vessel. The second appellant declared that
31 she was leaving when the issue of boarding the vessel was raised by the officers. She is
32 described as repeating what the first appellant said. The clear intent of both was to
33 conceal the passengers. In my view there is a sufficiency of evidence that the second
34 appellant therefore aided and abetted the concealment.



1 52. The conclusion is that there was a sufficiency of evidence in respect of both appellants
2 such that the Magistrate applying the necessary burden and standard of proof could
3 properly conclude that the offence pursuant to s.66 of the *Act* was proven.
4

5 **GROUND 2 – ILLEGAL LANDING**
6

7 53. Counsel for the first appellant’s submission in respect of the offence of Illegal Landing
8 is that the verdict is unsafe. This is submitted to be because there was some evidence of
9 duress of circumstances or *force majeure* in that the boat was in such poor condition that
10 it could no longer be navigated safely. Counsel relies on the account given to officer
11 Claude Terry by Mr. Gurzhii. The submission is that the prosecution needed to disprove
12 or otherwise address this before the offence could be proved.
13

14 54. Counsel stated that there was no evidence that the landing was not forced by an
15 overheating engine or the unseaworthiness of the vessel. In oral submissions Counsel
16 drew the Court’s attention to sections of the notes of evidence and several photographs
17 in the hearing bundle which are said to show the possible poor condition and state of the
18 vessel.
19

20 55. Counsel for the Respondent in reply submitted that the material referred to by Counsel
21 for the appellant falls well short of establishing that the entry was due to duress of
22 circumstances. Counsel asked the Court to note that: -
23

- 24 i. The evidence is hearsay.
- 25 ii. Neither appellant gave evidence at the trial, nor did they consent to be
26 interviewed under caution and there was nothing of an evidential nature
27 which emanated from them as to any potential mechanical defect.
- 28 iii. Neither passenger gave evidence of any mechanical defect.
- 29 iv. There was no evidence of any radio transmission, calls for assistance, or any
30 such report by either appellant to the authorities upon their arrival of any
31 mechanical defect.
32



- 1 56. Counsel submitted that the appellants failed to satisfy the evidential burden and that there
2 is no evidence of any mechanical defect with the vessel. Counsel said this argument is
3 only being raised following conviction.
4
- 5 57. Counsel submitted that any suggestion that the vessel drifted into the territorial waters
6 of the Cayman Islands due to duress of circumstances is not capable of belief,
7 particularly in light of the conduct of both appellants upon initial contact with the
8 authorities. Counsel said that both were adamant from the outset that they did not
9 recognise the laws of the Cayman Islands and maintained this throughout the
10 investigation and proceedings in the Summary Court.
11
- 12 58. I have considered the point as to absence of evidence and the evidential burden in
13 relation to duress of circumstances as addressed in *R. v Petgrave (Pascoe)*³, but in my
14 view the answer is to be found in the definitions of land and arrival in s.2 of the *Act*.
15
- 16 59. Arrival is defined as meaning arriving in a port or in an airport or in an area within the
17 territorial limit of the Islands; Land means “to go to, to be, to remain or to reside in any
18 place in the Islands other than — (a) on board a vessel; or (b) in a place under the
19 control of an officer in the officer’s official capacity”.
20
- 21 60. The charge is not arriving illegally in the Cayman Islands, it is landing, this means being
22 at a place in the Islands other than on board the vessel.
23
- 24 61. Had the appellants remained on board the vessel as they were required to do, the offence
25 would not have been committed. Instead, they disembarked from the vessel and without
26 permission went off to the supermarket.
27
- 28 62. It cannot be said that the defence of *force majeure* or mechanical failure even if raised
29 on the evidence applies to the trip to the supermarket.
30
- 31 63. I conclude that there was sufficient evidence upon which the Magistrate could properly
32 find that the charge was proved to the required standard and that the convictions are safe.

³ 2018 WL 03232689 (2018)
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1 **GROUND 3 – FAILURE TO COMPLETE DISEMBARKATION CARD**

2
3 64. Counsel for the first appellants’ submission is that the conviction for the offence of
4 Failing to Complete a Disembarkation Card is unsafe and should be set aside. The basis
5 for this is said to be that the Magistrate construed the requirement to complete a
6 disembarkation card too strictly. Counsel’s submission is that the word ‘immediately’ in
7 the statute should have been construed as meaning as soon as practically possible.

8
9 65. Counsel submitted that there must be many cases where the appropriate forms are not
10 on board a vessel or aircraft and an officer may not be immediately present. The Customs
11 and Border Control officers themselves gave evidence of a practice of allowing twenty-
12 four hours for completion of the forms. Counsel submitted that a passenger aircraft
13 which runs out of forms for its passengers would fall afoul of the law in cases of minor
14 breaches.

15
16 66. Counsel for the Respondent in a robust response submitted that the requirement to
17 complete disembarkation cards immediately upon arrival serves a critical purpose in
18 ensuring border control, public health, and security screening.

19
20 67. Counsel said that this is a case involving two people who demonstrated a wilful disregard
21 for the laws of this jurisdiction, and who had no intention of completing a landing card
22 immediately on arrival, as soon as practicable, or otherwise.

23
24 68. Counsel submitted that approaching this matter on a case by case basis as suggested by
25 Counsel for the appellant, it is of note that the appellants arrived without any prior notice
26 or communication with the authorities. They disembarked and left the dock. They made
27 no efforts to contact the authorities, to provide notice of their arrival, or to complete
28 disembarkation cards. Counsel said that this is not a case where the appellants were
29 simply unable to complete a card and hand it to an officer as soon as they disembarked.
30 Counsel references paragraph 16 of the Magistrates’ verdict ruling which states: -

31
32 “The legislation requires those arriving into the Cayman Islands to complete and
33 hand to an officer a disembarkation card immediately on arrival. There is no



1 discretion by CBC officers. There is no time window of 24 hours afforded for such
2 cards to be completed. That would be a mockery of the intention of the legislation,
3 if persons landing in the jurisdiction may attend to shopping and having a meal and
4 then perhaps fill out a form.”

5
6 69. On this point, I accept the submissions of the Respondent. The law is clear. Applying a
7 discretion in particular circumstances is not the same as reading words into the *Act* which
8 are not there. Plainly had the appellants remained on board and made contact with the
9 authorities as they ought to have done they would have been provided with the necessary
10 forms.

11
12 70. I conclude that there was sufficient evidence upon which the Magistrate could properly
13 conclude that the charge was proved to the required standard and that the convictions
14 are safe.

15
16 **CONCLUSION**

17
18 71. The appeals against the convictions are therefore dismissed in each case.

19
20 **APPEALS AGAINST SENTENCES**

21
22 72. Counsel for the first appellant submits that all the sentences imposed were manifestly
23 excessive. Counsel notes that in sentencing for the offence of Human Smuggling, the
24 Magistrate relied on the case on *R v Van Binh Le and Rudi Heinrich Stark*⁴, which
25 considered sentences under section 25 of the United Kingdom *Immigration Act* at a time
26 when the maximum sentence in that country was seven years imprisonment.

27
28 73. In that case the appellants appealed against sentences of three and a half years'
29 imprisonment and five years' imprisonment respectively. It was held that an offence
30 contrary to s.25(1)(a) “would, in relation to all but the most minor of offences, inevitably
31 attract an immediate custodial sentence, the severity of which would depend upon the

⁴ [1999] 1 Cr App R 422
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1 presence or absence of aggravating features, bearing in mind that the statutory maximum
2 of seven years had to accommodate the most serious offences.” The Court said that the
3 deterrent effect had to be considered given the increase in offending in the United
4 Kingdom. The sentences were reduced to two and a half years' imprisonment and three
5 and a half years' imprisonment respectively.



6
7 74. The Court identified the aggravating features as including: -

- 8
- 9 • It was a repeat offence.
 - 10 • It was committed for financial gain.
 - 11 • The roles played by the defendants.
 - 12 • It facilitated the entry of strangers rather than family.
 - 13 • It involved a large number of illegal entrants.
 - 14 • High degree of planning and organisation.
- 15

16 75. Counsel for the appellant submitted that the instant case is the only case of human
17 smuggling in the Cayman Islands and the sentence should therefore be considerably
18 lower.

19
20 76. Counsel noted that in referring to the case of *Stark*, the Magistrate noted that the sentence
21 imposed was five years, but that sentence had in fact been reduced on appeal to three
22 and a half years'.

23
24 77. By reference to the case of *Ahmed Aziz, Mohammed Niaz and Stephen Cronin v R*⁵, a
25 case involving two illegal immigrants, Counsel submitted that the appropriate sentence
26 for the instant case is in the region of twenty-seven months. In that case, the appellants
27 Aziz and Niaz were sentenced to eighteen months imprisonment after guilty pleas.

28
29 78. In the case of *Helmet Ungruh v R*⁶ a sentence of four and a half years was imposed in
30 respect of the illegal entry of fifteen migrants. This was after a trial in which the evidence
31 was that a boat had been hired for the purpose of the enterprise.

⁵ [1996] 2 Cr. App. R. (S) 44

⁶ [1996] 2 Cr. App. R (S.) 205

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1 79. Counsel submitted that all sentences of over three years involved a large number of
2 migrants. Counsel said that even with the aggravating features of financial gain and poor
3 treatment of the two passengers it is difficult to see how the appropriate sentence could
4 be more than thirty months for the first appellant.

5
6 80. Counsel for the Respondent in reply submitted that the Magistrate correctly identified
7 the aggravating factors as being that: -

- 8
9
- The appellants' actions were deliberate.
 - The appellants acted for financial gain.
 - There was a significant degree of planning involved, and there appeared to be a
12 network where people are put in contact with boats.
 - The victims were vulnerable persons fleeing war.
 - The victims were subjected to physical and mental abuse (they were starved,
15 called racist and abusive names, left to the elements, and locked inside the
16 cabin).
- 17

18 81. I accept the submissions of Counsel for the appellant on this aspect. It is evident from
19 the Magistrates' Sentence Judgment that there was a misapplication of the case of *Stark*
20 and it does not appear to have been drawn to the attention of the Court that the actual
21 sentence was three and a half years' and not five years. There were some nine migrants
22 involved in that case, and this was after a guilty plea.

23
24 82. Considering the precedents cited the sentence imposed in the instant case does appear to
25 this Court to be manifestly excessive. The appropriate sentence for the first appellant in
26 light of all the aggravating features in this case is one of 33 months.

27
28 83. This is arrived at by taking the sentence in *Aziz* as a starting point, uplifting for the not
29 guilty plea (27 months) (and the other circumstances particular to the instant case) for a
30 sentence of 30 months, adding 6 months for the aggravating factor of the ill treatment of
31 the passengers (and a reduction of 3 months for personal circumstances including no
32 previous convictions and good character).

1 84. The appeal against sentence for the offence of Human Smuggling is allowed. The
2 sentence of 48 months imposed on the first appellant is set aside and the sentence of 33
3 months substituted.

4
5 85. The sentence of the second appellant for the offence of Human Smuggling is reduced by
6 the corresponding amount. The appeal against sentence is allowed. The sentence of 40
7 months is set aside, and a sentence of 25 months is substituted.

8
9 86. In respect of the sentences for the offence of Illegal Landing the submissions of Counsel
10 for the appellant are accepted. The time period between arrival and landing and being
11 found was a short period of hours. The appeals are allowed in respect of those sentences.
12 The sentences imposed on the first and second appellants of 18 months and 12 months
13 imprisonment are reduced to 12 months and 6 months respectively.

14
15 87. The sentences imposed for the offences of Failure to Complete a Landing Card do not
16 appear to be manifestly excessive or wrong in principle. The appeals against sentences
17 are dismissed and the sentences imposed by the Summary Court are affirmed in respect
18 of each appellant.

19
20 88. All the sentences are to run concurrently. Time served from the 14th May 2024 is to be
21 deducted in respect of each appellant.

22
23 **Dated this the 16th day of June 2025**

24 

25 **Honourable Justice Cheryll Richards K.C.**
26 **Judge of the Grand Court**