

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 155 OF 2017

LEGAL AID NO: LACR/0162/2015

BETWEEN:

OSBOURNE DOUGLAS

APPLICANT

AND:


(1) THE GOVERNOR OF THE CAYMAN ISLANDS

(2) THE DIRECTOR OF PRISONS

RESPONDENTS

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant	Osbourne Douglas, HMP Belmarsh, London, United Kingdom.
Judgment, order, decision or other proceeding in respect of which relief is sought	The decision to transfer prisoner Osbourne Douglas on 22 nd June 2017 from HMP Northward, Cayman Islands to HMP Belmarsh, England and/or the said transfer of Osbourne Douglas on 22 nd June 2017.
Relief Sought	
1. An order <i>Certiorari</i> quashing any decision by the Respondents to transfer and/or consent to the transfer of the Applicant from HMP Northward to HMP Belmarsh.	
2. A <i>Declaration</i> that any decision to transfer and/or consent to the transfer of the Applicant to HMP Belmarsh, England was in breach of section 9 (1) of Schedule 2 of the Constitution of the Cayman Islands Part 1: The Bill of Rights, Freedoms and Responsibilities (the "Bill of Rights").	
3. A <i>Declaration</i> that the continued detention of the Applicant at HMP Belmarsh, England is in breach of section 9 (1) of the Bill of Rights.	
4. An order of <i>Mandamus</i> that the Respondents order the return of the Applicant to HMP Northward, Grand Cayman to serve the remainder of his prison sentence.	

5. Such further, consequential or other relief that this Honourable Court deems is just; and	
6. Costs.	
Name and address of applicant's attorneys	Priestleys, Second Floor, Caribbean Plaza, 878 West Bay Road, George Town, P. O. Box 30310, Grand Cayman, KY1-1202, Cayman Islands
Signed 	Dated 21 st September 2017

GROUNDS ON WHICH RELIEF IS SOUGHT

Factual Background

1. The Applicant is Caymanian. On 26th May 2016, he was convicted of murder and possession of an unlicensed firearm. On 19th December 2016, he was sentenced to life imprisonment for the murder with a minimum tariff of 34 years' imprisonment. He was sentenced to a concurrent term of 10 years' imprisonment for the possession of an unlicensed firearm.
2. The Applicant is currently appealing against both conviction and sentence.
3. On 22nd June 2017, the Applicant was removed from HMP Northward and escorted to an aircraft at Owen Robert International Airport. He was flown to the United Kingdom and transferred to HMP Belmarsh, London where he is currently detained (the "Transfer"). The Transfer operation appeared well planned. His brother Justin Ramoon, convicted of the same offences and also sentenced to life imprisonment, was transferred in a similar manner the following week.
4. The Applicant was not given any notice of the Transfer until he was removed from HMP Northward on 22nd June 2017. He was told informally by a prison officer that the reason for his removal was that there was information that people were coming to the prison to kill him.
5. The Applicant did not consent to the Transfer and seeks his return to the Cayman Islands to serve the remainder of his sentence at HMP Northward. He was not told where he was being transferred to. He was not given any opportunity to make any representations in relation to the transfer. He was not permitted to inform his family or his attorneys about the transfer before it occurred. He has not been told how long he is to remain in the United Kingdom. He has not been given any written or formal reasons or document relating to his removal.

6. A press release issued subsequent to his removal from HMP Northward on the 22nd June 2017 stated

“This evening, 22 June 2017, a prisoner was transported to the United Kingdom under the Colonial Prisoners Removal Act, 1884. The prisoner will be housed by Her Majesty’s Prison and Probation Service until further notice. This removal was authorised by the UK and Cayman Islands Governments in the interests of national security and the public safety of the people of the Cayman Islands.”

7. Prior to his transfer the Applicant had been held in maximum security at HMP Northward. He did not consider himself at risk of any harm from others and he did not pose a risk of harm to the public.
8. The press release makes no mention of the removal being for the safety of the Applicant. No further reasons have ever been given to the Applicant.
9. The Applicant has no family in the United Kingdom. His family are in the Cayman Islands and includes his seven year old daughter, his mother, brother, sister and partner, all of whom visited him regularly at HMP Northward. He also had daily telephone contact with members of his family, often more than once a day.
10. The Applicant is now detained thousands of miles away from his family. Since his transfer he has not had any visits from his family nor has he been permitted to make calls to the Cayman Islands. For obvious reasons, it will not be practicable to receive regular visits from his family in the future.
11. On 31st August 2017, the Applicant’s attorneys wrote to the Respondents requesting reasons for the transfer of the Applicant and disclosure of certain documents.
12. On 14th September 2017, the Respondents replied to the correspondence dated 31st August 2017 via the Attorney General’s Office that “a substantive response will be provided when our instructions are complete”. To date no written reasons, response or disclosure has been received from the Respondents.

Grounds for relief

a) Unlawful Decision

13. The factual or legal basis for any decision to remove the Applicant is not known since no formal reasons have been given. Accordingly, there is insufficient information to enable the Applicant to challenge the basis of the substantive decision. The Applicant reserves his position to amend and amplify the grounds for relief in light of any reasons which may subsequently be given.

14. The press release dated 22nd June 2017 indicates that the decision was made pursuant to the Colonial Prisoners Removal Act, 1884. The Act requires the concurrence of the Cayman Islands Government for a transfer of a prisoner from the Cayman Islands.
15. Pursuant to Article 24 of the Bill of Rights it is unlawful for a public official to make a decision or act in a way that is incompatible with the Bill of Rights. Any decision made to transfer the Applicant, whether pursuant to this legislation or otherwise, must be exercised in a way which is compatible with the Bill of Rights.
16. It is submitted that the decision to transfer the Applicant to the United Kingdom is unlawful in that the transfer is in breach of his constitutional right to private and family life as set out at Article 9 (1) of the Bill of Rights. This right is framed in similar terms to Article 8 of the European Convention on Human Rights (“the Convention”) to which the Cayman Islands is also a signatory.
17. The leading authority on prisoner interference with Article 8 of the Convention in these circumstances is the decision of the European Court of Human Rights in *Vintman v Ukraine* [2014] ECHR 28403/05 (“Vintman”). In that case a prisoner in the Ukraine sentenced to life imprisonment for murder had been incarcerated hundreds of kilometers away from his family. The train journey across the Ukraine to the prison was 12 to 16 hours.
18. In *Vintman* it was held that there was a breach of Article 8 in failing to transfer him to a prison closer to home. The interference was held to be disproportionate to the legitimate aims to prevent overcrowding and ensuring discipline in prisons.
19. At paragraph 78 of its judgement, addressing the question of whether there was an interference with the applicant’s rights under Article 8 of the Convention, the Court said as follows:

“The Court has also held in its case law that the Convention does not grant prisoners the right to choose their place of detention, and the fact that prisoners are separated from their families, and at some distance from them, is an inevitable consequence of their imprisonment. Nevertheless, detaining an individual in a prison which is so far away from his or her family that visits are made very difficult or even impossible may in some circumstances amount to an interference with family life, as the opportunity for family members to visit the prisoner is vital to maintaining family life...It is therefore an essential part of prisoner’s right to respect for family life that the prison authorities assist them in maintaining contact with their close family.”

20. It is submitted that the test above “*that visits are made very difficult or even impossible*” is clearly met in the Applicant’s case. The distances involved are far greater than in *Vintman*. The Applicant is many thousands of miles from home and his family and is detained in a different country separated by an ocean. The time to travel from Grand Cayman to Belmarsh will be far longer than 12-16 hours. Further to this the costs of travel are prohibitively expensive to the Applicant's family. A visit will inevitably involve the additional burdens and expenses of overnight accommodation, subsistence and local travel.

The effects of the transfer to date are that the Applicant has not had visit from any member of his family in the last three months, indeed he has not even been allowed a phone call.

21. It is submitted that here has plainly been an interference with the Applicants right to private and family life. The approach of the Courts in the UK and Strasbourg is to consider whether the interference with the right to private and family life (1) pursues a legitimate aim (2) is necessary and proportionate and (3) is in accordance with law.
22. In the Applicant's case, in the absence of reasons, the above three questions cannot be answered. In light of the decision in *Vintman* and the circumstances of the transfer as known in this case, it is difficult to envisage what legitimate aims could be necessary and proportionate to the severe interference with the Applicant's right to private life.

b) Procedural Unfairness

23. It is submitted that any decision to transfer the Applicant was made contrary to principles of natural justice and procedural fairness.
24. The statutory basis for any decision appears to be the Colonial Prisoners Removal Act 1884 ("the Act"), although there has been no formal indication of this to the Applicant. Section 2 of the Act provides the various bases upon which a prisoner can be removed. On the assumption that the Transfer was pursuant to the Act, it is not known which basis, or bases were relied upon, either in fact or in law, or whether some additional/alternative basis was relied upon.
25. The Applicant has not been provided with any opportunity to make representations as to his removal and has not been provided with sufficient information with which to make such representations.
26. The Act, if applicable, does not provide for any procedure for such representations to be made. There are no other safeguards afforded to the prisoner by the legislation in terms of procedure for representations or a right to appeal.
27. It is submitted that the failure to allow representations in this case, is contrary to well established principles of natural justice, which apply equally to decisions made in relation to serving prisoners. These general principles were set out by the House of Lords in *Regina v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531.

"My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of

the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

My Lords, the Secretary of State properly accepts that whatever the position may have been in the past these principles apply in their generality to prisoners, including persons serving life sentences for murder, although their particular situation and the particular statutory regime under which they are detained may require the principles to be applied in a special way."

28. It is a requirement of section 19 of the Bill of Rights that all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair. It is submitted that in order to comply with common law rules of a natural justice and/or section 19 of the Bill of Rights any decision made pursuant to the antique statutory basis for the Transfer would have to be conducted in a way that was procedurally fair in accordance with modern standards of procedural fairness.
29. Such modern procedural fairness would require the ability to make representations in these circumstances. It is submitted that there was nothing about the method of removal and subsequent removal of his brother a week later which indicated an urgency or a reason to prevent such representations being made. In any event it would be difficult to override the requirement for procedural fairness on that basis. In *R v Secretary of State for the Home Department 2004 EWCA Civ 1750* it was held that the failure of the defendant to give the claimant an opportunity to be heard on an allegation that led to being removed to a segregation unit was in breach of natural justice and unlawful.
30. In that case Hooper LJ considered arguments in relation to matters of urgency and administrative necessity in denying these procedural rights and stated as follows

"I accept the importance of the prison service being able to make decisions which are operationally important without having to go through the technical requirements of providing opportunities for making representations. However, the rules of fairness and natural justice are flexible and not static; they are capable of developing not only in relation to contemporary society, but also to meet proper operational requirements. The ability of the prison service to meet both their operational needs for the prisoners and the needs for the prisoner to be treated fairly can usually be achieved within the panoply of the requirements of fairness. On the whole, the courts will require considerable persuasion that administrative convenience justifies a departure from the principles of fairness which would be appropriate in a particular situation."
31. Further, where decisions interfere with the right to private and family life it is submitted that established jurisprudence requires that fair procedures must exist and be afforded to an affected individual to safeguard those rights. Compliance with section 9(1) of the Bill of Rights therefore requires procedural fairness as well as substantive compliance.

32. Those standards and requirements of natural justice, which include the opportunity to be heard, have been applied where a prisoner's equivalent rights pursuant Article 8 of the Convention were at risk in *The Queen on the Application of CD, AD (By his Litigation Friend the Official Solicitor) v The Secretary of State for the Home Department* [2003] EWHC 155 Admin. In that case it was acknowledged at paragraph 24 that

"the Strasbourg jurisprudence makes it clear that Article 8 the right to private life may impact not only upon the substance of a decision but also upon the procedure pursuant to which it is reached."

33. It was held that such procedure required an allowance to make representations in relation to those rights so that they are considered and safeguarded. The failure to allow the opportunity to be heard in relation to those rights was accordingly found to be procedural unfair.

34. Finally, it is submitted that the failure to give written reasons in this case is in itself a breach of the requirements of procedural fairness. As confirmed by Henderson J in *National Roads Authority v Bodden, Thompson and Wright* [2014 (2) CILR 47]:

"The Cayman Islands Constitution Order 2009 Schedule 2, section 19 contains, under the heading "lawful administrative action" a right to reasons:

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

The constitutional guarantee and the right of appeal on a question of law mean that a decision of the [relevant public body] must meet certain minimal standards. It is not enough to state a result on the principle issues; the parties are entitled to know the reasoning and the primary finding of fact which led the [relevant public body] to its conclusions"

35. Henderson J went on to cite, with approval the following dicta in the House of Lords in *South Bucks. D.C. v Porter (No. 2) (3)* [2004] 1 W.L.R. 1953:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was decided and what conclusions were reached on the principal important controversial issue, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such

adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration ... A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision"

36. The Respondent has been adversely affected by a decision of a public official and has requested written reasons. He has not been given written reasons within a reasonable period of time since the request.
37. As a result of this the Applicant is severely prejudiced as he is unable to assess whether the adverse decision was carried out in accordance with the law or otherwise be able to effectively challenge the substantive basis for the decision.

Dated the 21st day of September 2017

Filed the 21st day of September 2017



PRIESTLEYS

Attorneys -at-Law for the Applicant