

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2023/0286

BETWEEN:

LORNE PARSONS

Claimant

And

HIS EXCELLENCY THE GOVERNOR

Defendant

Appearances: Paul Taylor KC and Danica Penn KC, with them Khyra Powell for the Claimant
Nicosie Dummett with her J'Nae Hopkins for the Defendant

2025: May 27th
December 18th
2026: January 21st

JUDGMENT

[1] **ANDERSON J (Ag):** In this matter, the Claimant has applied for judicial review of a decision of the Defendant, His Excellency the Governor of the Territory of the Virgin Islands (the “**Governor**”), to decline to refer the Claimant’s conviction for murder to the Court of Appeal for re-consideration.

Background

[2] A short history of the Claimant’s litigation history is useful in setting context for the matter before the Governor, as well as the reasons cited in the Governor’s July 23, 2024 decision letter (the “**Decision**”) that is now under scrutiny. On 12th June, 2006 Mr. Parsons was convicted of murder and 2 firearm offences after a trial by jury. He was sentenced to a term of life imprisonment for the murder count and 2 concurrent 6-year terms of imprisonment for the firearm offences. On 13th February, 2007 the Court of Appeal dismissed his appeal against conviction and sentence and

refused leave for him to appeal to the Judicial Committee of the Privy Council (the “**Privy Council**”). He thereafter applied for special leave to appeal both his conviction and sentence, which petition was unopposed by the Crown. His appeal against his conviction was dismissed by the Privy Council on 12th March, 2008, but the matter of his sentence was remitted for consideration on the constitutionality of the mandatory life sentence. He is currently serving a sentence of life imprisonment in relation to the murder conviction.

A change in the law in the Virgin Islands

- [3] A change in the law of the Territory of the Virgin Islands was put in motion on 20th November, 2017 with judgment in the case of **Tyson v R**¹ in which the Court of Appeal affirmed that section 27(1)(b) Jury Act was unconstitutional. The nub of this finding is that the unlimited right to stand by jurors given to the Crown in that section, as compared to the limited right of the accused to stand by 3 jurors, created an imbalance as between the Crown and the accused that infringed upon the latter’s right to a fair trial guaranteed by section 16(1) the Constitution of the Virgin Islands Order in Council 2007 (the “**2007 Constitution**”) (the “**Jury Point**”). A randomly selected jury and equality of arms are constituent aspects of that right.
- [4] Prior to the Court of Appeal’s affirmation of the principle in **Tyson**, the High Court had made such a finding in the case of **The Queen v Andre Penn** Claim No BVIHCR 2009/0031². In **Penn**, His Lordship Ramdhani J. (as he then was) found that the Jury Act should be read with a “substantial modification that the Crown too should have the right to peremptory challenge three jurors for each defendant on trial.” After **Penn**, the Jury Act was “read down” to restrict the Crown’s stand down right to 3 jurors. After **Tyson**, the Jury Act was duly amended to comply with the statement of the principle of law as established by the Court of Appeal.
- [5] According to the Claimant, this meant that his conviction in 2006 under the “old law” viz. the Jury Act prior to its post-**Tyson** amendment, was unsafe in that his jury was selected under that regime.

The Governor’s power

¹ [2017] 92 WIR

² February, 2015

[6] Given the exhaustion of his appeal rights to the Court of Appeal and to the Privy Council, the only means available to Mr. Parsons to revisit his conviction was by way of a petition to the Governor. The specific power of the Governor that he sought to invoke is found in section 56 of the Eastern Caribbean Supreme Court (Virgin Islands) Act³ (the “**ECSC(VI) Act**”) (“**Section 56**” or the “**Section 56 power**”). Section 56 provides as follows: -

- (1) Nothing in this Act shall affect the prerogative of mercy.
- (2) The Governor on the consideration of a petition for the exercise of Her Majesty’s mercy having reference to the conviction of a person on indictment or to the sentence, passed on a person so convicted, may at any time—
 - (a) refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
 - (b) if he or she desires the assistance of the Court of Appeal on a point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Governor with its opinion thereon accordingly.

[7] Section 56 therefore provides a discretionary power to the Governor to refer the whole of a conviction and/or sentence to the Court of Appeal to be determined; or he may refer a point arising for that Court’s opinion should he require assistance on a point. The petition asked for the convictions to be referred for reconsideration and so was directed to the former category that is, section 56(1)(a) of the Act. The Act does not state an object for this section, nor does it prescribe what the Governor should consider or mandate any procedure that he must follow in his decision-making process. There is no right of appeal to his decision and accordingly, the Claimant has filed an application for judicial review.

The Petition

[8] Mr. Parsons petitioned the Governor on February 1, 2022 (the “**Petition**”). The Petition and its supporting documents were reproduced in full before this court. The court may not express a summary any more helpfully than by its own paragraph 4:

³ Formerly the West Indies Associated States Supreme Court (Virgin Islands) (**VIASSC**) Act Cap 80 and referred to as such in the papers and submissions

4. This Petition is based on the central submission that an essential part of the jury selection process utilized in Mr. Parson's trial – section 27(b) of the Jury Act, Cap 36, Revised Laws of the Virgin Islands 1992 – was subsequently held to violate at defendant's fair trial rights. The consequence of this is that Mr. Parson's trial was unfair, and his convictions rendered unsafe and unsatisfactory and must be quashed.

[9] A chronology provided in the Petition showed that:

- | | | |
|------|------------------|--|
| i. | 15 June 2006 | Mr. Parsons was convicted of murder and two firearms Offences |
| ii. | 13 February 2007 | Decision of the Court of Appeal in Parsons and others v The Queen |
| iii. | 15 June 2007 | Virgin Islands Constitution Order 2007 came into force |
| iv. | 12 March 2008 | Mr. Parsons' application for leave to appeal to the Judicial Committee of the Privy Council was refused. |
| v. | 18 February 2015 | Decision of the High Court in The Queen v Andre Penn |
| vi. | 20 November 2017 | Decision of the Court of Appeal of the ECSC in Tyson v R |

[10] The **Penn** and **Tyson** Judgments were analysed in some detail. Thereafter the Petition sought to persuade the Governor that the right to a fair trial existed in the jurisdiction prior to the time of Mr. Parson's conviction. This course was deemed necessary because the Petitioner recognised that the 2007 Constitution was not in force at the time of his convictions in 2006. Therefore, the specific provisions of that Constitution which were examined in **Penn** and **Tyson**, were not yet in force. The argument made was that common law and international law provisions applicable to the Virgin Islands had already conferred a right to a fair trial per se. I do not propose to detail these arguments given that I am prepared to proceed on the footing that the right to a fair trial existed in the Virgin Island prior to the promulgation of its 2007 Constitution.

[11] Finally, the Petition submitted that the jury selection process under section 27(b) JA as utilised in Mr. Parson's trial was unfair/in violation of his constitutional rights. He asserted that at his trial the Crown stood 9 jurors down without cause, a number equivalent to an entire jury panel. As such, he says, it is clear that his conviction was unsafe.

The Governor's Response

[12] The way the Governor responded to the Petition forms part of the challenge and so it is necessary to set out some of this history as well. A truncated chronology according to Mr. Parsons' Affidavit evidence shows that the following took place upon submission of the Petition:

- | | |
|-------------------------|---|
| i. February 1, 2022 | Petition on his behalf submitted to the Governor |
| ii. July 22, 2022 | Letter received from the Attorney General's Chambers setting out 4 reasons why the Petition should not be granted; Petition dismissed |
| iii. September 12, 2022 | Response from Mr. Parsons to the 4 reasons set out |
| iv. February 16, 2023 | Letter from the Attorney General's Chambers setting out Governor's second response (decision) dated January 27, 2022 and Mr. Parsons' response dated September 12, 2022; Petition dismissed |
| v. April 29, 2023 | Mr. Parsons sends first pre-action letter to the Governor |
| vi. June 27, 2023 | Governor issues letter stating that the Petition had been reconsidered and the decision re-made. Decision remains to dismiss the Petition |

[13] The letters of July 22, 2022 and January 27, 2023 each communicated substantive responses to the Petition (decisions) through the office of the Attorney General and in each one of them the Governor declined to refer the matter for reconsideration by the Court of Appeal. A letter before claim was issued by Mr. Parson's attorneys on 20th April, 2023. It argued among other things that the central case in the Petition was not "*how one must construe the decision of Justice Ramdhani on closed cases in the Virgin Islands*" but "*whether the Petitioner's fair trial rights were violated at the time of his trial in 2006 under the existing law at the time*". After that, the Governor issued under his own hand, what was to be his final letter communicating a substantive decision, stating itself to be a "Reconsidered Decision" dated July 27, 2023.

- [14] When further pre-action letters took the matter no further, the Claimant applied to the court for this judicial review. Given how the Claimant has framed his complaint as well as the fact that the final Decision made reference to material exchanged between the parties, it is necessary to set out some of this material.

The Decision Letters

The first decision letter of July 22, 2022

- [15] In this letter, the Attorney General wrote that:
- a. The petition appeared to be procedurally defective, the Petition having not been applied for pursuant to section 43 constitution.
 - b. Regarding the substantive petition,
“I do not find that his Excellency sits as a judicial tribunal in the truest sense of the word or at all and therefore in the particular case on the facts as I find them, I would not have advised His Excellency and the Advisory Committee to refer this case to the Court of Appeal, essentially overruling the Privy Council, for a retrial of same: **Reyes v R** [2002] UKPC 11”
 - c. In any event, having regard to the fact that Mr. Parsons’ conviction was upheld at the Court of Appeal, after it was examined on its merits, while subsequent leave to appeal to the Privy Council was denied by the Privy Council, in the circumstances of this case I would have advised His Excellency and the Advisory Committee not to exercise His Excellency’s discretion in your client’s favour.
 - d. Lastly, on the merits, if the previous reasons are incorrect, similar arguments as those that underpin the substantive portion of Mr. Parson’s Petition regarding jury selection and were considered were found to be without merit. **Leveck Roberts v Her Majesty The Queen, Khyri Smith-Williams v Her Majesty the Queen et al** [2021] CA (Bda)Crim.

Petitioner's response to the first decision letter

- [16] The Petitioner responded on September 12, 2022 suggesting that the Governor's first letter contained fundamental errors of law. These included that: the petition is made pursuant to section 56(2)(a) Cap 80 under the prerogative of mercy and not for a pardon (section 43, Constitution); the Governor is not required to sit in a judicial capacity. It envisages circumstances in which all appellate remedies have been exhausted; the previous findings of the Court of Appeal and Privy Council are irrelevant in relation to the Petition; the complaint about violation of the Appellant's fair trial right has not been previously considered or adjudicated; the Attorney General's reliance on **Roberts and others** is erroneous as **Roberts** is not binding on the British Virgin Islands (BVI). The need for finality is relegated in this scenario because section 56 specifically treats with the circumstance where previously concluded appellate proceedings are reopened.

The Governor's second decision letter of January 27, 2023

- [17] Under cover letter dated February 16, 2023, another communication was sent, stating itself to be a decision in response to the Petition and to the Petitioner's letter of September 12, 2022 addressing the first decision letter. The Petition was again dismissed.
- [18] The stated reasons in this Decision are as follows: There is no admission that there was a breach of Mr. Parsons' constitutional rights "as they existed at the time of his conviction"; there is no acceptance that there was a miscarriage of justice "as against Mr. Parsons based on the law as it then stood"; the Petitioner admitted that there was no breach of the Constitution at the time in force in the Virgin Islands; there can be no retrospective breach of the Mr. Parsons' constitutional rights under the 2007 Constitution; The issue of validity of actions taken under existing laws was discussed in **Ramesh Lawrence Maharaj v The Attorney General of Trinidad and Tobago** Appeal No. 21 of 1977 at p. 7, para 4 . This meant (it was set out) that "actions which were lawful under pre-existing laws are saved and shielded from a retrospective reviewing/interpretation of old legislation using the 2007 Constitution to delegitimize actions validly taken before the appointed day." The case of **Leveck Roberts** whilst not binding on the ECSC, was persuasive authority and had a comparable factual matrix to the facts now under consideration.

[19] Apart from what was set out in the authorities cited, the Governor's response stated that on consideration of the merit of the Petition, he was of the view that:

- i. The wishes of Mr. Parsons must be balanced against the impact that re-opening the "safe conviction" would have on the murder victim's family.
- ii. Even if all of the previously cited reasons are inadequate, the manner of the murder was gruesome.
- iii. Leniency was granted by the sentencing judge.
- iv. Mr. Parsons is eligible to be paroled after serving the minimum time set by the sentencing judge.

[20] Also:

"In reviewing the law as it validly stood when Mr. Parsons was convicted, we are not persuaded to advise his Excellency that the prerogative of mercy should be invoked to refer the matter back to the Court of Appeal for a re-hearing as there was no miscarriage of justice or breach of Mr. Parsons' constitutional rights under the Juries Act vis-à-vis the 1976 Constitution of the Virgin Islands."

The final and impugned decision letter of July 27, 2023

[21] In response the last decision letter, that is the subject of this judicial review, was issued (the "**Decision Letter**" or the "**Decision**"). In this Decision Letter of July 27, 2023, the Governor first acknowledged the Petitioner's concerns about the jury selection process utilized in the Petitioner's trial at the High Court. It then noted Mr. Parsons' contention that the jury selection process violated his right to a fair trial as it existed pursuant to Article 6 of the European Convention on Human Rights, the International Convention on Civil and Political Rights, and the 2007 Constitution.

[22] Then, under the heading "**Decision Re-considered; Decision Remade**", the Governor referred to the exchange of correspondence that I have cited above, which ensued after his first "decision letter" of July 22, 2022 in which he initially dismissed the Petition. He stated that he specifically considered the representations raised in Mr. Parsons' communications dated February 1, 2022; June 27, 2022; September 12, 2022 and April 20, 2023. The letter went on to say:

“After a careful and deliberate reconsideration of the matter, I hereby advise that I have again come to the decision not to refer the matter to the Court of Appeal pursuant to section 56 of the West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80 for the reasons which follow below.

Decision: Petition Refused

Right to a fair trial has always existed – issue never raised at the Privy Council in 2008

As you have rightly indicated, the right to a fair trial has always existed. Yet this point of law appears not to have been raised by Mr. Parsons before the High Court, Court of Appeal or the Privy Council.

Additionally, the Privy Council considered the merits of this case, independent of the jury, and did not agree with his submissions that there was a miscarriage of justice. Instead, the Board dismissed his appeal against conviction.

The need for finality of judgments coupled with the delay of fourteen (14) years in presenting this Petition

I have considered that there is a need for finality and certainty in the administration of justice. In this regard, I note that there has been an interval of approximately fourteen (14) years between the conclusion of Mr. Parson's matter in the Privy Council, to the request in this Petition. I note further that no new/fresh evidence has been presented in this Petition. I consider the unexplained delay to be reasonable and that it would militate against the need for finality and certainty in the administration of justice (**Leveck Roberts v The Queen; Quincy Bragman v The Queen; Khyri Smith Williams v The Queen** [2021] CA (Bda) (Crim).

Moreover the unexplained delay has been considered against the backdrop of my efforts in seeking to balance the public/community's interest and more particularly the interest of the victim's family as against the wishes of Mr. Parsons. The requirement to conduct this balancing exercise between these competing interests was recognized as inherent in the European Convention on Human Rights and inherent in the administration of justice by the Strasbourg Courts: (**Steven Grant v R** [2006] UKPC 2 at paragraph 17). In conducting this balancing exercise, I note again the merits of Mr. Parsons' convictions were not challenged in this Petition, and conclude that the public/community interest would be better served by refusing the Petition.

Accordingly, having carefully considered all your representations and re-made by decision, please treat this as my final decision in this matter.”

- [23] The Claimant has asked for a declaration that the Decision conveyed by the letter is unlawful; that it should be quashed; and the Governor should be required to re-take his decision in accordance with the law.

The limits of the court’s proper enquiry into the Governor’s decision

- [24] The court must consider the breadth of the discretion conferred on the Governor by section 56(1)(a) and the limits of the court’s proper enquiry into the exercise of that discretion in its judicial review jurisdiction.
- [25] It has been emphasised in numerous authorities that the court’s judicial review jurisdiction is distinct from the appellate jurisdiction. The court has a supervisory role⁴ and it is therefore not open to the court to substitute its own view for that of the Governor’s. To this end, I note the guidance in the judgment of Her Ladyship the Honourable Chief Justice Pereira (as she then was) in Claim No. SLUHCV2022/0019 **Magistrate Bertlyn Reynolds and Financial Intelligence Agency v Peter Hippolyte et al**⁵, that a judicial review is not an original hearing of a matter and the court is limited to evaluating it within established judicial review principles only.
- [26] As to a challenge on the basis of unreasonableness, the standard is that of **Wednesbury** unreasonableness, the familiar question being whether the decision was so unreasonable that no reasonable authority could come to it. To adopt more precisely the language from that case, **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223, the Claimant would have to convince this court that the Defendant “contravened the law”. As to how this should be assessed in the context of the exercise of a statutory power, the court stated at p.228 that:

⁴ Halsbury’s Laws of England > Statutes and Legislative Process (Volume 96 (2024)) > 2. Acts of the United Kingdom Parliament > (6) Operation of Acts > (ii) Functions of the Executive > B. Duties as to Administrative Decision Making (paragraph 341. Duty to observe rationality)

⁵ Delivered April 16, 2024

If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters must not be germane to the matter in question, the authority must disregard those irrelevant collateral matters”.

- [27] The court may determine whether the considerations that were included by the Governor were outside the bands of reasonableness contemplated in the statute. It has been said that this phraseology is now replaced by the term irrationality in **R v Inland Revenue Commissioner ex parte Taylor (No. 2)** [1981] 3 All ER 353⁶. In **R v Secretary of State for the Environment ex parte Hammersmith and others** [1991] 1 AC 521 irrationality is said to have to reach the threshold of being perverse. In my view this amounts to a position that the court does not have to agree with every point made in his Decision, but must determine whether they were reasonably conceivable and whether the result is perverse in the round.

The breadth of the discretion and how it may be lawfully exercised/ did the Governor act lawfully

- [28] I was unable to find authorities on previous challenges to the exercise of this specific power in this jurisdiction. However, the language of Section 56 is largely similar (not identical) to the now-repealed section 17 of England and Wales’s Criminal Appeals Act (CAA) 1968 (“**section 17**” or the “**section 17 power**”), which granted a relevant Secretary of State (the “**Secretary**” or typically the “**Home Secretary**”) the power to refer matters to the Court of Appeal for reconsideration. As in the ECSC (VI) Act, the Home Secretary’s statutory discretion was widely worded with no prescribed procedure as to what the Home Secretary should do and no limiting language as to what that office should consider upon receipt of an application by a convicted person to refer their conviction or sentence. A review of authorities on challenges to the section 17 power gave useful assistance in understanding how the power has been previously interpreted in the relevant courts.
- [29] The exercise of the section 17 CAA power was treated as justiciable, but with a high threshold for the court’s interference with it. The following dictum from the decision of Bingham J in **The Queen**

⁶ Halsbury’s Laws of England > Statutes and Legislative Process (Volume 96 (2024)) > 2. Acts of the United Kingdom Parliament > (6) Operation of Acts > (ii) Functions of the Executive > B. Duties as to Administrative Decision Making (paragraph 341. Duty to observe rationality)

v The Secretary of State for the Home Office ex parte Paul Cleeland (unreported) on 8th October 1987 appeared frequently with approval in later cases and appeared to frame the English approach:

“Two things I think are clear from a reading of that section. First, it is a section directed to enable the Home Secretary to seek the opinion of the court where concern has risen as to the correctness of a defendant’s conviction, even though the full process of ordinary criminal appeal has been exhausted”. One could and should substitute “sentence” for “conviction” in this case. The second thing that is, I think, clear is that the decision to refer is that of the Secretary of State’ if he thinks fit. The use of that language does not, of course, make his decision proof against judicial review but *it does make it quite plain that the decision is entrusted to him and it is one which this court should not, in my judgment, at all readily interfere unless strong grounds for doing so are shown*”.(emphasis added)

[30] The courts also deferred to the Home Secretary as to what policy it adopted in treating with section 17 applications. To my mind this is at least partially explained by the lack of prescriptive wording of the statute itself. In **Re Findlay** [1985] AC 318⁷ the House of Lords considered a challenge to the lawfulness of a policy formulated by the Home Secretary concerning parole. The court approved the following as a correct statement of principle concerning the “the proper exercise of an administrative discretion in a situation where a statute permits but does not require consideration of certain matters”:

“What has to be emphasized is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.” **Creedz Inc v Governor General** [1981] NZLR 172 at p. 183.

[31] **Re Findlay** also demonstrated that each case should be approached within its particular context and on its own facts.

[32] The case of **R v The Secretary of State for the Home Department ex parte Garner** [1989] Lexis Citation 2996 illustrated the high threshold for the court's interference with the exercise of the Home Secretary's discretion. **Garner** concerned a challenge to a refusal to refer a matter where the determination of an appeal was completed whilst a concurrent court made another determination that affected the relevant law. The applicant did not have the benefit of this other decision, which would have clarified a point of law in his favour. The applicant appealed his sentence and the full court invited the Secretary of State to refer the matter to the court under section 17 CAA. The Secretary of State declined to do so, and the appellant's judicial review application against that decision was dismissed. The court found force in the applicant's argument that he suffered an injustice, but ultimately that the Secretary's decision was made on a different basis. **Garner** therefore also demonstrated that the fact of a change of law does not per se create an imperative for a referral to be made.

[33] The Court of Appeal case of **R v Secretary of State for the Home Department ex parte Pegg** [1990] Lexis Citation 1877 also cited **ex parte Cleeland** with approval. **Pegg** concerned a challenge to the Home Secretary's refusal to make a referral to the Court of Appeal where a change in the law took place after the petitioner's conviction, wherein, the judge's summing up would therefore not have conformed to the correct formulation of self-defence which was in issue. The Home Secretary concluded that the change in the law would not have made a difference to the outcome and refused the petition for referral, which was subsequently challenged by judicial review. The court said this in **ex parte Pegg**:

The matter is entirely within his discretion, and unless he misdirected himself or failed to take account of matters that he ought to have taken account of, then his discretion must stand would not be reviewable".

A person entrusted with a power of review of this kind of conviction, which may itself have been the subject of an appeal (as here) may be expected to enjoy a wide discretion. The Home Secretary's approach permits him, in my judgment, to make up his mind in the light of the considerations put to him whether doubt appears to have been cast on the safety of the conviction. It seems clear from his use of that expression in relation to what in the letter were called "the implications of the

Beckford [1988] AC 130, [1987] 3 ALL ER 425 the decision" that he was using it to embrace what a lawyer might identify separately as a wrong decision on a point of law. In my judgment the Home Secretary's adoption of that approach in this case was not in principle exceptionable.

[34] Continuing on, the court in **Pegg** said this:

... The Secretary of State accepts that a new consideration of substance may include a change in the law. In the present case the Secretary of State has had regard to all the facts and circumstances of the case, including the restatement of the law in Beckford. The Secretary of State has concluded that any change in the law does not affect the safety of the conviction of the applicant. He does not think in all the circumstances that any failure by the trial judge fully to direct the jury on self-defence might have caused a miscarriage of justice.

In my judgment the Home Secretary was quite entitled to take the view that, despite such change as has been effected by Beckford's case in the common law approach to self-defence, no different result could be expected here. That conclusion was very far from being traversed and it gives no ground for interference by this court. The other matters taken into account in this context by the Home Secretary were background matters. It was not inappropriate for him to mention them, and they do nothing to invalidate his conclusion.

[35] The ability of the Secretary to formulate and be guided by a self-determined approach was again referred to in **R v Secretary of State for the Home Department ex parte McCallion** [1992] Lexis Citation 2521. In that case, a part of the Home Secretary's policy was not to refer a matter where a previous point that could have been raised before the court, was now being made. It appeared that the Home Secretary later reversed this policy, demonstrating the principle that the policy is allowed to be flexible:

Of course, if there has been a miscarriage of justice or a possible miscarriage of justice, that is something which, at this stage, can only be rectified by the Secretary of State by the use of section 17 of the 1968 Act, the terms of which I have already quoted and which are self-evidently very wide. In applying his powers under the section, the Secretary of State makes use of a policy, and Mr. Pleming concedes that it is permissible for him to have such a policy. That policy is first set out, so far as this case is concerned, in the letter of 22nd October 1991, from which I have already quoted. Mr. Pannick concedes that in dealing with the present case, the way in which the Secretary of State

applies his policy has at times been clumsily expressed, but that, in reality, it is not an inflexible policy and allowance is made for the possibility of referring back to the Court of Appeal the point which was available to be argued at the original trial in the Court of Appeal. He contends that in the light of the policy a proper approach was adopted, at least at the end, so far as this application was concerned and the Secretary of State's response to it. That it is appropriate in this sort of situation for the Secretary of State to have a policy seems to me to be apparent from the decision of the House of Lords in the case of **In re Findlay [1985] AC 318**.

[36] The judicial review application was ultimately dismissed.

[37] In contrast to the previous cases cited, **Regina v Home Secretary ex parte Hickey et al (No. 2)** [1995] QB 734 on which the Claimant relied, concerned a challenge to the determinative process of the Secretary of State rather than to his substantive decision. It involved 4 cases and the issue for the court was the extent of the Secretary of State's duty of disclosure. The formulation in question that the Claimant relies on is as follows:

Provided only and always that there indeed exists substantial new evidence or other consideration in the case and he will not, therefore, be inviting the court to merely re-examine essentially the selfsame case as it will already have rejected, the Secretary of State should to my mind ask himself this question: could the new material reasonably cause the Court of Appeal to regard the verdict as unsafe? If it could, then I would expect him without more ado to refer the case for rehearing as an appeal. This surely is the policy of the legislation: any other approach risks the executive usurping rather than promoting the function of the court.

[38] As I set out later, this was not the only way in which the policy is described. In any event, the judicial review application in relation to disclosure, was granted.

Unlawfulness

[39] Returning to the grounds of the application, the Claimant argued under the general rubric of unlawfulness, which he says arose from the Governor coming to "three separate, disparate and inconsistent decisions". He invited the court to view the 3 decision letters individually and cumulatively and says that they demonstrate the Defendant's unlawful approach to the Petition. He complains that irrelevant considerations were taken into account such as the decisions of other

courts; delay in bringing the Petition; and exhaustion of the appellate process. He has also complained that relevant matters were not considered. Particularly that the findings in **Tyson** meant that his trial was conducted in an unconstitutional manner and that this in turn meant that his conviction was unsafe and/or that there was a miscarriage of justice. As such, he contends, the only lawful thing that the Governor could have done was to refer his matter to the Court of Appeal for a rehearing. He also invited the court to find that the Governor's approach to whether he should refer, should be that as set out in the case of **ex parte Hickey**.

Should the Governor have followed the approach set out in ex parte Hickey

[40] The Claimant asserted that the Governor should follow the approach set out in **Regina v Home Secretary ex parte Hickey (No. 2)**⁸, submitting that the case laid down a "test" that the Home Secretary should apply in section 17 cases; and thereby a test that the Governor should apply in his section 56 capacity. There is strong judicial precedent in these matters in favour of the decision-maker's pre-eminence in the exercise of his own functions; and moreso in the exercise of certain prerogative powers. It would be convenient at this juncture to recall the respectful treatment of the court to such powers as exemplified in **Regina v Secretary of State for the Home Department ex parte Bentley**⁹ which considered the exercise of the prerogative of mercy in the form of a pardon. There, the court considered that although "it has no power to direct the way in which the prerogative of mercy should be exercised, it has some role to play"; and that each case was entitled to be considered on its own merits.

[41] Even if this analogy is wrong, I do not agree with the Claimant's characterization of the result of **ex parte Hickey (No. 2)** as "laying down a test". A more precise statement of the approach was referred to in the judgment of Brown, J. at page 739:

... it is convenient first to note the broad policy adopted by the Secretary of State towards the substantive exercise of his section 17 power. As appears from the Secretary of State's evidence in these cases (and indeed in a number of decided cases) is that:

⁸ [1995] QB 734

⁹ 1994 QB 349 at p. 365

“the Secretary of State does not *normally* exercise his power to refer a case to the Court of Appeal unless there is some new evidence or other consideration of substance *which has not been before the court (and which was not previously available to be brought before the court) and which appears to cast doubt on the safety of the conviction.*”

The policy is said not to be inflexible: *exceptionally the Secretary of State may consider referring a case for another reason (perhaps despite the new material having previously been made available to be brought before the court). In applying the policy the Secretary of State will look at the case in the round....*(emphases added)

- [42] From the above it can be seen that there are some qualifications on the narrow extract that was relied upon by the Claimant. Moreover, the court was reciting the Secretary’s policy, which it later *re-stated* with approval.
- [43] I find that the Governor is bound by established legal principles in how he may lawfully exercise his discretion to wit he must be rational, he may not act perversely and so on. I find that is not appropriate for this court to bind the Governor specifically to the phraseology used by the English Court of Appeal in **ex parte Hickey (No. 2)** although that authority and indeed the other authorities relied upon, may provide useful signposts to guide the Governor. He is entitled to form his own approach, and it is he who must determine the boundaries of the exercise of his statutory power under section 56 ECSC (VI) Act. The court’s enquiry into the exercise of his power should not be as to whether he is simply wrong (as if on appeal) but whether he has acted so far outside of his statutory function that the court must intervene.
- [44] The court also declines the Claimant’s suggestion at ground d((ii) of its claim that the Governor’s power might be considered analogous to the Criminal Cases Review Commission (CCRC). The CCRC was established under section 9, Criminal Appeals Act 1995 and with its establishment, section 17 CAA was repealed, so that the power of referral no longer lies with the Secretary of State but with the Commission. The establishment of this Commission and the principles under which referrals are now made, were the subject of specific legislative intent and are guided by particular language in the legislation referring to the principles under which referrals are made and considered. There is no juridical basis that I am aware of, on which the court could direct that that a

body should adopt the approach of a statutory body where there is another, current legislative regime in place in the TVI.

Did the issuance of 3 different decisions demonstrate unlawfulness

- [45] The rendering of a decision does not make the Governor functus officio **ex parte Cleeland; ex parte Hickey**. There is therefore nothing wrong in principle with an interactive process whereby a petitioner takes an opportunity to make further representations and a decision is reconsidered.
- [46] The real issue was that there were indeed inconsistencies, particularly between the first and second decision letters and I agree with the Claimant's contention that there were obvious errors in at least one instance. However, at the hearing the Claimant conceded that that the impugned decision was the final Decision letter of July 27, 2023. This Decision is the only one that came under the direct hand of the Governor and was also distinctive in its tone, style and content. It acknowledged the Petitioner's previous representations by the Claimant and stated itself to be a "Reconsidered Decision". It sets out the reasons for his position and thereby frames how he approached the petition. I can see no good reason to go behind what was set out on the face of this Decision. To my mind, this deals with the complaint that the "3 decisions" cumulatively demonstrate an unlawful approach.
- [47] It also disposed of much of the complaint about taking irrelevant matters into account. This included the reliance on non-binding authorities. Where this is concerned, I would add that the basis of the petition did, in fact, require the consideration of legal issues. Had it been a case of new evidence the matter was more likely to be straightforward as there are any number of scenarios in which compelling new evidence demands that a conviction should be revisited. There may for example be a reliable confession by another person to the offence, or the discovery of new evidence in the form of eyewitness or identification evidence including forensic evidence which exculpates the convicted person. The Decision noted that Mr. Parsons' matter did not feature any new evidence and so it was necessary for the Governor to be informed by his legal advisors as he saw fit, including an assessment of the state of the relevant law.

- [48] I find that the Governor acted within his statutory powers in his determination of whether he should refer the matter to the Court of Appeal. Even considering the matter within the principles suggested by the Claimant, it seems unremarkable that the Governor's considerations included that the merit of the conviction was not challenged; that there was no fresh evidence which cast doubt on the correctness of the conviction; and that it did not serve the public interest in re-opening this matter. The Claimant accepted that the public interest was a legitimate consideration. The weight attached to each consideration is a matter for the decision-maker and not the court.
- [49] On the issue of timing of the petition, I agree with learned King's Counsel Mr. Taylor's submissions that the statute does not set time limits and specifically includes scenarios in which time to engage the court (particularly time to appeal a decision) would have run. However in examining the Decision, the related issues of time and delay were ultimately also considered within the context of the public interest.
- [50] In the round, I am not persuaded that there is any error in this approach, or any error in the factors that he set out, that amounts to such an error in law that it demands this court's intervention.
- [51] Having determined that the content of the Decision does not betray unlawfulness in judicial review terms, I wish to comment on the submission that there was only one, lawful act that the Governor could have carried out. This suggests that the Jury Point was sufficient by itself to demand a referral. Put shortly, to suggest that 1 factor should be determinative of an outcome in these circumstances appears to me to be imposing an unlawful fetter on the exercise of the Governor's discretion. The Decision ultimately conveyed that the Jury Point was not, by itself, sufficient to exercise his discretion to refer. Such a course is not offensive to the law.
- [52] Although the correctness of the petition's basis is not a part of my review function, at a hearing for further submissions, the Claimant produced the recent Court of Appeal decision in¹⁰ **Antonio Stoutt v The Commissioner of Police** as support for its case that the Governor was blatantly wrong in declining to refer his matter. The court was asked to direct that the Governor reconsider the petition with this authority in hand. Having considered **Antonio Stoutt**, I see no useful

¹⁰ Claim No BVIMCRAP 2015/006 delivered on October 17, 2025

assistance that it may give the Claimant. This is because the declaration of the retrospective application of a change in the law arising from declarations of the court, was limited to criminal matters that were ongoing or pending in the court. Given that Mr. Parsons' criminal proceedings concluded in 2008, long before the declaration in **Penn** in 2015 or the affirmation in **Tyson** in 2017, this authority does not advance his case.

Delay

- [53] Despite the matter having been determined on the bases set out above, I consider that the issue of delay should be dealt with in deference to the arguments raised by Counsel.
- [54] At the beginning of the hearing, it was brought to the court's attention that an Affidavit had been lately filed by the Claimant addressing the issue of delay. After some exchange between Counsel on both sides, the Claimant expressed his satisfaction not to rely on that Affidavit. However, the Defendant advanced a position that both the application for judicial review and the petition were brought late; and appeared to rely on Rule 56.4(1) Civil Procedure Rules (CPR) to influence the court's consideration of both proceedings in this context.
- [55] Rule 56.4(1) CPR provides that the court may refuse to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application. Rule 56.4(2) provides that when considering to grant or refuse relief because of delay the judge must consider whether the granting of leave or relief would be most likely to (a) be detrimental to good administration or (b) cause substantial hardship or to substantially prejudice the rights of any person. To my mind, the "application" referred to in the rule is the application to this court for judicial review. It does not, in this context, refer to the Claimant's petition to the Governor. I also find that there was no unreasonable delay by the Claimant in asking for the Governor's Decision to be judicially reviewed, which application was made within a year of the Decision. There was also a further period within that year when the Claimant wrote again to the Governor before appreciating that he would not reconsider his decision further. The time gap was therefore eminently reasonable.

[56] There was a complaint by the Claimant that he was prejudiced in the 14 months between when he submitted the final petition and when he received the final decision. The court does not accept this complaint as being a reasonable one. The Claimant's representations were actively being considered by the Governor as demonstrated in the exchange of correspondence previously detailed herein. The fact that the petitioner was ultimately unsuccessful does not, in my respectful view, entitle the petitioner to now criticize the process because it ultimately took more time. This complaint of prejudice is without merit.

[57] I should mention that 2 arguments made in the pleadings were not advanced. Learned King's Counsel indicated that he was unable to advance an argument that the matter was pre-determined and so this part of the complaint fell away. The complaint that the Governor impermissibly delegated his power to the Attorney General was also not advanced, appropriately in my view, given the manner in which the final Decision was dispatched.

[58] The orders of the court are therefore as follows:-

- a. The application for judicial review of the decision of the Governor set out in his letter of July 27, 2023 in response to the Claimant's application for referral of his conviction to the Court of Appeal is dismissed.
- b. No order as to costs.

[59] The court thanks the parties for their articulate submissions.

Akilah Anderson
High Court Judge (Ag.)



By the Court

Registrar