



Easter Term
[2023] UKPC 14
Privy Council Appeal No 0041 of 2021

JUDGMENT

**Tafari Morrison (Appellant) v The King (Respondent)
(Jamaica)**

From the Court of Appeal of Jamaica

before

**Lord Reed
Lord Sales
Lord Stephens
Lady Rose
Sir Declan Morgan**

**JUDGMENT GIVEN ON
11 May 2023**

Heard on 25 and 26 January 2023

Appellant

Hugh Southey KC

Philip Dayle

(Instructed by Simons Muirhead & Burton LLP)

Respondent

Peter Knox KC

Adam Riley

(Instructed by Charles Russell Speechlys LLP (London))

SIR DECLAN MORGAN:

1. On 10 April 2013 the appellant pleaded guilty in the High Court Division of the Gun Court in Kingston, Jamaica to three counts; (1) illegal possession of a firearm contrary to section 20(1)(b) of the Firearms Act, (2) robbery with aggravation contrary to section 37(1)(a) of the Larceny Act and (3) wounding with intent to cause grievous bodily harm contrary to section 20(1) of the Offences Against the Person Act 1864 ("OAPA"). He was 16 years old at the time of the offences and 17 at the time of sentence.

2. On 22 July 2010 section 20(2)(b) of the OAPA had been amended to provide for a minimum sentence of 15 years imprisonment where the offence of wounding with intent was committed with the use of a firearm. The appellant appeals the dismissal of his appeal by the Court of Appeal of Jamaica against the imposition of the minimum sentence of 15 years imprisonment on the wounding with a firearm count on the basis that the sentence was prohibited by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 and therefore unlawful.

The circumstances of the offences

3. The victim gave evidence on the first morning of the trial, the appellant having initially pleaded not guilty. At about 10 pm on 28 August 2012 he was walking along a sidewalk talking on his Blackberry Bold cell phone. He noticed a young male in a white t-shirt standing at the side of a car parked a short distance ahead of him. As he approached the car the appellant alighted from the rear door of the car carrying a short gun about 6 inches in length which he pointed directly at the victim.

4. The appellant walked towards the victim, holding the gun with both hands, until he was directly in front of him. The appellant gesticulated with the gun and told the victim to throw the mobile phone to him, which he did. The appellant caught the phone and put it in his pocket. The appellant then pointed the gun at the victim's face at which point the victim attempted to run away.

5. Several shots were fired at the victim as he ran causing a gunshot wound that bled to the right side of his back and a graze to his upper lip. The victim collapsed twice while running and on the second occasion he noted the appellant and the other male picking up spent shells. The appellant and the other male fired two further shots at the victim. The two gunmen then made their escape in the car.

6. The victim was able to make his way to the security post of an apartment block after which he was taken to the local hospital. He was then transferred to the University of West Indies Hospital where he was detained for a week while the gunshot wound to the back was treated. He subsequently received counselling and feared a reprisal as a result of his participation as a witness in the case. He was a student and the incident adversely affected his academic performance.

7. The appellant applied to be rearraigned and pleaded guilty to all counts after the lunch adjournment on the first day of the trial. The sentencing hearing was postponed for a month to enable the court to obtain a social enquiry report on the appellant. Counsel for the appellant introduced his plea with the following remarks about the offences:

“...the crime of Illegal Possession of Firearm and Ammunition and Wounding with Intent are serious charges, and they are in fact, they go beyond being serious, they are heinous charges, ones which claimed the society of Jamaica and, they have had a ruinous and damaging effect on this country.”

8. Having recognised the gravity of the offending and the endemic nature of such crimes in Jamaica counsel submitted that the appellant’s plea of guilty, his age and the influence of an older family member grooming him into a life of crime were all mitigating factors. Marsh J indicated that this was a set of very serious offences involving harm by means of a firearm. Ordinarily the court would have taken into account the tender years of the appellant and the plea of guilty, but the statute tied the court’s hands. On each count on the indictment the judge imposed concurrent sentences of 15 years imprisonment.

9. An application to appeal to the Court of Appeal was lodged on the basis that the sentences of 15 years imprisonment on the counts relating to possession of a firearm and aggravated robbery were manifestly excessive, there being no minimum sentence imposed by statute in respect of those lesser charges, and that the minimum sentence on the wounding with intent count was unconstitutional. Leave was given to argue all points.

The legislative background

10. The Juveniles Act 1951 (Jamaica) (“the 1951 Act”) introduced measures for the treatment of children under 14 and juveniles under 17 years old under the criminal law. It provided for the establishment of juvenile courts. In the case of juveniles

charged with offences under Schedule 3, which included a number of offences against the OAPA, the juvenile court was required to remit the case to the appropriate adult court. Section 29(2) stated that no juvenile should be sentenced to imprisonment. An exception was made in section 29(3) where the juvenile was convicted of an offence contained in Schedule 3 to the 1951 Act and the court was satisfied that no other lawful disposal of the case would be suitable.

11. The 1951 Act was in force when Jamaica gained independence and established its constitution by means of the Jamaica (Constitution) Order in Council 1962 (“the Constitution”). Subject to certain non-material circumstances the Constitution provided that if any law was inconsistent with the Constitution, it was the Constitution that should prevail and the other law, to the extent of the inconsistency, should be void.

12. Chapter III of the Constitution provided for fundamental rights and freedoms and Article 17 of that chapter provided that no person should be subjected to torture or to inhuman or degrading punishment or other treatment. That provision reflected the terms of Article 3 of the European Convention on Human Rights (“ECHR”) which applied to Jamaica from 1953 when the Convention came into force until independence. There was an exception to the protection of Article 17 for the continuation of punishments authorised under the law of Jamaica immediately before its entry into force.

13. In 1975 Jamaica ratified the International Covenant on Civil and Political Rights (“ICCPR”), Article 10 of which provides that juveniles convicted of crime should be segregated from adults and accorded treatment appropriate to their age and legal status. No alteration was made to the 1951 Act save that in 1985 section 29(3) of the 1951 Act was amended to provide that juveniles convicted of offences set out in Schedule 3 could be held in adult correction centres.

14. In May 1991 Jamaica ratified the United Nations Convention on the Rights of the Child (“UNCRC”). Article 3 of the Convention states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The UNCRC provides for a number of specific rights for the protection of children including the importance of the child’s place in the family (Article 8 and following), the right of children to be heard (Article 13), freedom of thought, conscience and religion (Article 14), access to health (Article 24) and education (Article 28), a minimum age for employment (Article 32), a minimum age of responsibility for crime (Article 40) and appropriate treatment by the justice system (Article 37).

15. In respect of the latter Article 37 of the UNCRC provides that children under 18 should not be subject to the death penalty and that the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time. In 2019 the UN Committee on the Rights of the Child issued a general comment stating that mandatory minimum sentences were incompatible with the child justice principle of proportionality and with the requirement that detention was to be a measure of last resort and for the shortest appropriate period.

16. The Child Care and Protection Act 2004 (“the CCPA”) repealed the 1951 Act as amended and provided a revised system of childcare, intended to reflect Jamaica’s ratification of the UNCRC in 1991. Section 2(1) defined a child as meaning anyone under 18 years of age. Section 2(3) stated that the best interests of the child was the paramount consideration in the interpretation and administration of the Act. Section 3 set out the objects of the Act which were to promote the best interests, safety and well-being of children, to support the family unit as the best environment for children and “to recognise the special needs of children in conflict with the law”.

17. Part I of the CCPA provided for the care and protection of the child including provisions enabling the child to give evidence in proceedings whether in person or by deposition. That is a practical example of the child’s right to be heard. Part II of the Act dealt with the general consideration of care and protection and imposed a duty in section 27 on those responsible for a child to provide adequate health care. Section 28 imposed a similar duty for children between 4 and 16 to attend school. Section 33 provided that a child under 13 may not be employed in work.

18. Part IV dealt with children detained or brought before a court. Section 63 conclusively presumed that a child under 12 cannot be guilty of a criminal offence. Section 65 provided that every court dealing with a child offender must have regard to the child’s best interests. Section 66 provided for separation of children charged with offences from adults. Section 68 provided for remand of children, where necessary, to a juvenile remand centre. In the case of children aged 14 or older remand, in certain circumstances, could be to an adult correctional centre.

19. Section 71 provided for the establishment of Children’s Courts. Section 72 provided that children should be dealt with by a Children’s Court unless they were aged 14 or older and were charged with an offence specified in the fourth schedule to the CCPA or were jointly charged with an adult. The offences in the fourth schedule included murder, manslaughter, any firearms offence under the Gun Act and a range of offences under the OAPA including section 20 of that Act. In such a case the committal

hearing was to be dealt with in the Children's Court and the case remitted to the appropriate court, in this case the Gun Court.

20. Section 78 prohibited the imposition of a sentence of death on a person under 18 years. In the case of a child aged under 14, convicted of an offence under the fourth schedule, a maximum sentence of 25 years was stipulated.

21. This review of CCPA demonstrates that it implemented many of the provisions contained in the UNCRC but the different treatment of those aged 14 or older in respect of serious crime continued to reflect the policy approach taken in the 1951 Act. To that extent there was a deliberate decision taken not to implement the terms of the Convention. In that regard it is also of some significance that the legislation did not adopt the requirement that the detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period.

22. The next material legislative development was the amendment in July 2010 of section 20 of the OAPA which established the offence of wounding with intent to cause grievous bodily harm. The offence carried a maximum sentence of life imprisonment but the amendment provided that where the wounding was caused by the use of a firearm the offender was liable to imprisonment for life, or such other term, not being less than fifteen years, as the Court considered appropriate. The minimum sentence applied to any child offender aged 12 or more.

23. Jamaica subsequently passed section 42 of the Criminal Justice (Amendment) Act 2015 which establishes a mechanism for relief from the effects of the minimum sentence provisions where the Court of Appeal considers such a penalty manifestly excessive and unjust. No application on behalf of the appellant was made under this provision and the Board does not, therefore, express any view about the operation of that legislation.

24. The Charter of Fundamental Freedoms (Constitutional Amendment) Act 2011 ("the Charter") implemented the recommendation of a Constitutional Committee established by Parliament that Chapter III of the Constitution of Jamaica should be replaced by a new Chapter which provided more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica.

25. Section 13(1) of the Charter provided that the rights and freedoms set out provided protection to the extent that they did not prejudice the rights and freedoms of others. Section 13(2) guaranteed the rights and freedoms set out in subsections (3)

and (6) and in the following 4 subsections. Parliament was to pass no law and no organ of the State take any action which abrogated, abridged or infringed those rights.

26. The rights and freedoms set out in section 13(3) and (6) included the following:

“(k) the right of every child-

(i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State;

(ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels.

...

(o) the right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and (7).

(6) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.”

27. There was an exception to the right established by section 13(6) in section 13(7):

“(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.”

The Court of Appeal

28. The Court of Appeal accepted that the minimum sentence provisions did not apply to the counts alleging illegal possession of a firearm and robbery with aggravation and determined the appeal on those counts by reference to whether the sentences were wrong in principle by reason of being manifestly excessive. The Court relied upon the established approach and methodology to be applied to sentencing in Jamaica:

- “a. identify the sentence range;

- b. identify the appropriate starting point within the range

- c. consider any relevant aggravating factors;

- d. consider any relevant mitigating factors (including personal mitigation);

- e. consider, where appropriate, any reduction for a guilty plea;

- f. decide on the appropriate sentence (giving reasons);

- g. give credit for time spent in custody, awaiting trial for the offence (where applicable).”

29. The Court noted that the judge at first instance had failed to identify any appropriate sentencing range for those counts or a starting point within that range or acknowledge that the appellant had no previous convictions or that he had spent 8 months in custody prior to being sentenced. The Court, therefore, set aside the 15 years concurrent sentences and substituted appropriate sentences consistent with sentencing guidelines.

30. On the count alleging illegal possession of a firearm the Court identified a range of 7-15 years with a starting point of 10 years. Various aggravating and mitigating factors were applied and a 20% discount allowed for the guilty plea. A further allowance for the 8 months spent in custody resulted in the substitution of a

concurrent sentence of nine years. On the robbery with aggravation count the range was 10-15 years with a starting point of 12 years resulting in a substituted sentence of 10 years and four months.

31. The compatibility of the minimum sentence of 15 years for wounding with intent with the Charter was raised for the first time in the Court of Appeal. The Court examined the issue by reference to sections 13(3)(k)(i) and 13(6) and (7) of the Charter. It noted that section 13(7) explicitly prohibited scrutiny by the court of laws passed before the commencement of the Charter which authorised the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Chapter on 7 April 2011. The amendment to section 20 of the OAPA was effected on 22 July 2010. The Court concluded that the amendment was preserved from inconsistency with the Charter, was constitutional and saved from scrutiny by the Court.

32. Although that finding determined the appeal the Court went on to give some indication of what the sentence would have been if individuation and proportionality were considered. Relying on judicial sentencing guidelines established after the first instance decision the normal range for wounding with intent with a firearm was 15-20 years. Since the offender was a child at the time he committed the offence the Court took a starting point of 15 years at “the low end” of the range.

33. The Court then considered the aggravating factors:

“i. The incident occurred at night as the victim walked home alone.

ii. The offender was with another person armed with a firearm.

iii. There was a deliberate intent to cause harm by shooting after stealing the phone.

iv. The appellant continued to fire shots even after the victim had fallen to the ground.

v. The appellant showed forensic awareness collecting shells to cover his tracks.

vi. The effect on the victim was significant.”

34. The Court noted in mitigation that he was 16 years old at the time of the commission of the offence. It should be noted that this factor was double counted as it had already been used in determining the choice of starting point. He had responsibility for his disabled mother and had no father figure. He had been expelled from school and lived in a rather vulnerable community. He was exposed to negative influences. He also had no previous convictions.

35. Those factors suggested a provisional sentence of 17 years after a trial. The Court allowed a 20% discount for the late plea leading to a sentence of 13 years and six months. That was further reduced to 12 years and 10 months because of the period already spent in custody. The Court found that in those circumstances a mandatory minimum sentence of 15 years was neither grossly or wholly disproportionate or manifestly burdensome or excessive.

The issues in the appeal

36. There are four issues in the appeal:

(i) Did section 13(7) of the Charter prohibit the Court from scrutinising the sentence?

(ii) If not, was the sentence unlawful because section 13(k)(i) of the Charter imposed a constitutional obligation to impose a sentence of detention as a last resort and for the shortest appropriate period?

(iii) Alternatively, was the sentence unlawful because it was prohibited by section 13(6) of the Charter?

(iv) In the event that the minimum sentence is in breach of the Charter what effect, if any, does that have on the lawfulness of the minimum sentence provision?

Consideration

Did section 13(7) of the Charter prohibit the Court from scrutinising the sentence?

37. Both parties submitted that the Court had erred in failing to scrutinise the compatibility of the sentence with the Charter. There are two reasons why the Board agrees with those submissions. The first is that Article 17 of the Constitution established in 1962 expressly provided that no person should be subjected to torture or to inhuman or degrading punishment or other treatment. The amendment to section 20 of the OAPA was passed after the Constitution came into effect so was not affected by the proviso for existing laws. It followed that any minimum sentence which was incompatible with Article 17 of the Constitution was unlawful prior to the commencement of the Charter and could not, therefore, be saved by section 13(7) of the Charter which only applied to sentences that were lawful and therefore not incompatible with the Constitution.

38. Secondly, the right at issue in this case includes the right to be protected from torture as well as inhuman or degrading punishment or treatment. That is a right of such importance that any qualification of the right would be strictly construed. It follows that any legislative provision purporting to except an entitlement to the protection of the right should be at least as strictly construed.

39. Section 13(7) of the Charter is a savings clause for existing legislation similar to those found in several Caribbean constitutions. In *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259, followed in *Bowe v The Queen* [2006] UKPC 10; [2006] 1 WLR 1623, the Board highlighted the distinction between conduct which was authorised and that which was required. The same distinction applies here. Section 13(7) preserved the authority of the courts to impose a sentence of 15 years or more for the offence contrary to section 20 of the OAPA but did not preserve the requirement to do so. Where the fundamental rights established by the Charter rendered a minimum sentence incompatible, it was the Charter that prevailed and the sentence was unlawful.

Was the sentence unlawful because section 13(k)(i) of the Charter imposed a constitutional obligation to impose a sentence of detention as a last resort and for the shortest appropriate period?

40. The appellant submitted that Article 37 of the UNCRC required that when sentencing children it was necessary to examine the individual circumstances of the offence and the offender and determine first, whether detention was necessary and, secondly, if so, the shortest appropriate period of detention. It was accepted that ratification of the UNCRC by Jamaica did not import those requirements into domestic law but it was argued that section 13(3)(k)(i) of the Charter should be given a broad and purposive construction to achieve the same outcome.

41. The Board does not accept that submission. The legislative history demonstrates that those elements of the UNCRC were omitted from the CCPA. The appellant's submission proceeds on the basis that the new provision was sufficient to achieve a change of that policy. The words of section 13(3)(k)(i) of the Charter are unspecific and concerned with general protection for children rather than sentencing policy. Such a provision in the context of the general protection of children is an unlikely vehicle to transport the detailed rights for which the appellant contends into the Charter.

42. Secondly, the Charter was the product of recommendations by the Constitutional Commission ("the Commission") which produced its final report on 28 February 1994. The provisions which were inserted at section 13(3)(k) were discussed in paragraphs 17 and 18 of the Analysis of Particular Issues by the Commission:

"17 It is our view that the right to free primary education and the right to protection from environmental abuse are two socio-economic rights which at the minimum should be accepted as state obligations. Accordingly, these have been incorporated in the proposed Charter of Rights.

18 We also concluded that it is desirable to provide children with constitutional guarantees against abuse and exploitation. Accordingly, we have inserted in the draft Charter protection for:

'the right of every child to such measures of protection as are required by the status of a minor or as part of the family, society and the state'

In addition, we strongly recommend the establishment by legislation of a public office, or the employment of a public officer charged with the responsibility of representing children whose rights are infringed."

43. The context of these two paragraphs indicates that the proposals were concerned with socio-economic rights, particularly those affecting children. That is why these two provisions are placed in separate sub-paragraphs in the same sub-section. It is also striking that the Commission, within these provisions, does not mention the UNCRC which had been ratified by Jamaica approximately three years before its final report.

44. Thirdly, section 14 of the Charter deals with freedom of the person in the context of the criminal law. If it were intended to impose detailed provisions governing the sentencing and detention of children in the Charter that is where they naturally would have been incorporated. No such provisions are found.

45. Fourthly, the review of legislation set out above has demonstrated that it has long been the policy of the legislature in Jamaica to draw a distinction between the treatment of children under 14 and older children. By way of example, in respect of older children Jamaica has not adopted those provisions in the UNCRC and Article 10 of the ICCPR which require segregation of children from adults.

46. The same is true in respect of sentencing. The decision of the legislature to impose minimum sentences on children for certain crimes involving firearms in July 2010 demonstrates a positive legislative decision not to implement those features of the UNCRC requiring detention of children for the shortest possible time. The Charter was adopted by the legislature in April 2011 some 10 months after the amendment of section 20 of the OAPA. It is not possible to infer from section 13(3)(k)(i) any intention to alter the thrust of Jamaica's approach to sentencing for gun crime. The persistence of that problem is apparent from the remarks of the appellant's counsel at the time of the plea.

47. Finally, similar wording to section 13(3)(k)(i) can be found in Article 24 of the ICCPR:

“1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

Jamaica also ratified the American Convention on Human Rights (“the ACHR”) in 1978. Paragraph 19 of the ACHR provides:

“Article 19. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”

48. In each case those provisions are accompanied by provisions providing for the right to a name or the acquisition of a nationality. These general, unspecified words do

not concern sentencing policy. The appellant relied on the finding of the Inter-American Court of Human Rights in *Juvenile Reeducation Institute v Paraguay* Serie C No 112 that there had been a finding of a breach of Article 19 of the ACHR. The allegation in that case, however, concerned the wretched conditions in which juveniles were detained resulting in three fires in which detainees died. The case did not concern sentencing policy and provides no support for the appellant's submissions.

Was the sentence unlawful because it was prohibited by section 13(6) of the Charter?

49. In determining the appeal in respect of the counts alleging illegal possession of a firearm and robbery with aggravation the Court of Appeal was required to consider whether the sentences were wrong in principle. In this case that included applying the judicially established principle that time spent on remand should count as time already served and deciding whether the judge had regard to the guidance on the range of sentences and starting points and acknowledged that the offender had no previous convictions. The sentence was found to be wrong in principle because the judge had failed to take those factors into account and that had rendered the sentences manifestly excessive.

50. The legal approach to the determination of the constitutionality of a minimum sentence is quite different. The Court must determine whether the imposition of the minimum sentence constitutes inhuman or degrading punishment or treatment. Such treatment is contrary to the Universal Declaration on Human Rights, the United Nations Convention on Torture, the ICCPR, the ACHR and Article 3 of the ECHR. The protection against such treatment is typically a feature of every Caribbean constitution.

51. The test for such a finding is stringent. The issue is whether the imposition of the sentence is grossly disproportionate. The cases provide an indication of the stringency of the test. In *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235 the issue was whether the mandatory death penalty for murder was inhuman or degrading and therefore prohibited by the constitution. The Board considered that to deny the offender the opportunity to persuade the court that the sentence of death was disproportionate was to treat him as no human should be treated and to deny his basic humanity.

52. In *Vintner v United Kingdom* (2012) 55 EHRR 34 the European Court of Human Rights accepted that a grossly disproportionate sentence could constitute inhuman or degrading treatment at the point of imposition, however it recognised that the test was strict. The Court quoted with approval the observation of the Supreme Court of

Canada in *R v Latimer* (2001) 1 SCR 3 that it will only be in “rare and unique occasions” that the test will be met.

53. Applying those principles to this case the sentences passed on the illegal possession of a firearm and the robbery with aggravation demonstrate that the more serious section 20 offence was one on which a very substantial period of imprisonment was appropriate. As the aggravating factors set out at para 33 above demonstrate, the principal additional features on this count were the casual use of potentially lethal violence by shooting at the victim after the robbery and the disturbing forensic awareness and care in collecting the spent cartridges afterwards. As the background to this case makes clear it is the use of guns that has damaged Jamaican society and consequently attracts a sentence with a bigger deterrent element.

54. The Court of Appeal found that a sentence of just under 13 years imprisonment would have been appropriate in the absence of a minimum sentence provision. As indicated earlier the Court appears to have double counted the discount for the appellant’s age. In any event the Board is satisfied that it cannot be said that the sentence imposed was grossly disproportionate and hence that it could be incompatible with the Charter on the basis that it was an inhuman or degrading punishment or treatment.

In the event that the minimum sentence is in breach of the Charter what effect, if any, does that have on the lawfulness of the minimum sentence provision?

55. The Board is satisfied that the minimum sentence imposed in this case was not incompatible with the Charter but accepts that considering the wide operation of the provision to children there may be cases where the minimum sentence would constitute inhuman or degrading punishment or treatment. That does not, however, require the Board to strike down that portion of section 20 of the OAPA containing the minimum sentence provision.

56. In *Gangasing Aubeeluch v Mauritius* [2010] UKPC 13 the Board set aside a minimum sentence of three years imprisonment on the basis that it was incompatible with section 7 of the Mauritius Constitution. The Board considered whether it should strike down the provision but concluded that would be inappropriate. It made no order other than to set aside the sentence of three years and remit the case to the Supreme Court.

57. The underlying principle in such cases was considered by the UK Supreme Court in *Reference by the Attorney General for Northern Ireland-Abortion Services (Safe*

Access Zones) (Northern Ireland) Bill [2022] UKSC 32; [2023] AC 505. In that case the Supreme Court was asked to consider whether the provision in the Bill for safe access zones in which intentionally or recklessly influencing a person seeking or providing abortion services was criminalised without provision for a reasonable excuse defence was beyond the competence of the Northern Ireland Assembly because of the rights to freedom of conscience, speech and assembly protected by the ECHR and made effective in domestic law by the Human Rights Act 1998.

58. It was submitted on behalf of the Attorney General for Northern Ireland that the provision should be struck down if it was demonstrated that the provision would inevitably operate incompatibly in a legally significant number of cases. Lord Reed wrote the only judgment and rejected that submission holding that the appropriate test was that stated in *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29; [2016] HRLR 19 at paragraph 88:

“This court has explained that an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights”

59. The Board is satisfied that the same principle applies in this case. There is no evidence that the minimum sentence provision in section 20 of the OAPA satisfies that test.

Conclusion

60. For the reasons given the Board will humbly advise His Majesty that the appeal be dismissed.