Applications seeking leave to appeal against sentences. The Appellants also contended that the sentences imposed in their respective cases should be reviewed on certain other discrete grounds: the sentence is manifestly excessive; the guidelines in *Richards* are outdated; the sentence did not adequately distinguish the Appellant's case from that of their co-accused; insufficient credit was afforded to the Appellant for their plea and personal mitigation; the sentence for the RIPL offence was manifestly excessive with there being no guideline case for that offence in Guernsey.

[2021] GCA045

IN THE COURT OF APPEAL OF

GUERNSEY

Criminal Division

4 October 2021

Before:

Jonathan Crow, QC

David Perry, QC

Jeremy Storey, QC

Between:

Thomas Michael Barras **First Appellant**

and

Matthew Watt **Second Appellant**

and

Pip Archibald Orchard **Third Appellant**

v

The Law Officers of the Crown

Advocate for the First Appellant:	**Advocate Clare A. Tee**
Advocate for the Second and Third Appellant:	**Advocate Samuel Steel**
Advocate for the Law Officers of the Crown:	**Crown Advocate Chris Dunford**

Perry JA

Introduction

1. This is the judgment of the Court. The three Appellants pleaded guilty in the Royal Court to certain drug trafficking offences (the Third Appellant in separate proceedings) and were sentenced to periods of imprisonment. They are now seeking leave to appeal against their sentences. In each case the Appellants raise a point of principal, namely that the sentencing guidelines set out in the decision of this Court in *Richards v Law Officers of the Crown, 2000-02 GLR 247* are out of date, result in sentences which are manifestly excessive and need to be reviewed, at least in cases where the amount of drugs imported is very small and where the drugs are intended for personal consumption. The Appellants also contend that the sentences imposed in their respective cases should be reviewed on certain other discrete grounds.

2. Before addressing these various arguments it is necessary to introduce the Appellants and provide a brief outline of their separate cases. We should also explain a point of terminology. We use the expression *'appellant'* even though leave to appeal has not hitherto been granted. While this has no bearing on the outcome of the applications, this terminology appears to be consistent with the provisions of Part III of The Court of Appeal (Guernsey) Law 1961, see in particular sections 41 and 43.

Thomas Michael Barras

3. The First Appellant, Thomas Michael Barras, is aged 28 (date of birth 26 August 1993). On 20 May 2020, he was sentenced by the Royal Court (Graeme Dewar McKerrell, Esq., Lieutenant Bailiff and seven Jurats) to a total sentence of 5 years and 9 months' imprisonment. This sentence had two components. First a sentence of 5 years and 9 months' imprisonment in respect of a Count of being knowingly concerned in the fraudulent evasion of the prohibition on importation into Alderney of a controlled drug of Class A (cocaine) contrary to the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, and second, a sentence of 18 months' imprisonment in respect of a Count involving the same offence but this time in respect of a controlled drug of Class B (cannabis). The sentence of 18 months' imprisonment was ordered to take effect concurrently.

Matthew Watt

4. The Second Appellant, Matthew Watt is aged 43 (date of birth 16 September 1978). On 20 May 2020, he appeared with Mr Barras before the same constitution of the Royal Court, and was sentenced to a total sentence of 6 years and 2 months' imprisonment. This sentence had two components. First a sentence of 5 ½ years' imprisonment in respect of a Count of being knowingly concerned in the fraudulent evasion of the prohibition on importation into Alderney of a controlled drug of Class A (cocaine) contrary to the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972 (the offence for which Mr Barras, who was jointly charged received a sentence of 5 years and 9 months' imprisonment), and second, 8 months' imprisonment in respect of a Count of failure to comply with a notice given under section 46 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003, as amended **('the RIPL offence')**. The sentence of 8 months' imprisonment was ordered to run consecutively to the 5 ½ year sentence, hence the total term of 6 years and 2 months' imprisonment.

Pip Archibald Orchard

5. The Third Appellant, Pip Archibald Orchard, is aged 30 (date of birth 23 May 1991). On 4 May 2021, he appeared before the Royal Court (Judge of the Royal Court Fooks and nine Jurats) and was sentenced to a total sentence of 3 years' imprisonment. This sentence comprised 2 ½ years' imprisonment in respect of a Count of being knowingly concerned in the fraudulent evasion of the prohibition on importation into Guernsey of a controlled drug of Class A (cocaine) imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 and two sentences of 3 months' imprisonment for two like offences involving the importation of a Class C drug, namely alprazolam. These two sentences were ordered to run concurrently to each other and to the sentence of 2 ½ years' imprisonment. An additional consecutive sentence of 6 months' imprisonment was imposed for an offence of driving in a manner dangerous to the public contrary to section 10(a) of the Road Traffic (Guernsey) Ordinance 2019, with an additional concurrent 6 months' imprisonment for an offence of driving with excess alcohol contrary to section 2(2)(a) of the Road Traffic (Drink Driving) (Guernsey) Law, 1989.

The Facts: The First and Second Appellants

6. As the Lieutenant Bailiff noted in his sentencing remarks, the facts of the First and Second Appellants' cases are relatively straightforward. On 28 December 2019 the two Appellants travelled together from Alderney to Port Diélette, Trouville, France in a Rib boat owned and piloted by Mr Watt. During their time in France they acquired a quantity of drugs and returned to Alderney. They arrived at the Commercial Quay where they were stopped by Law Enforcement officers. On being questioned Mr Barras immediately admitted that he was in possession of cannabis: *"Yes, I have about 100 grams of cannabis in my pocket."* Both men were arrested and taken to Alderney Police Station. While in custody, Mr Watt was found to be in possession of a quantity of cocaine. When interviewed, the Appellants gave differing accounts of the circumstances leading to their arrest. Mr Barras claimed to have been unaware that drugs would be purchased in France to bring back to Alderney but an analysis of chat group messages on his phone suggested otherwise: *"I'm going to France tomorrow, keep it on a lowdown but if anyone wants any 'Pot' let me know, need cash today though and also cocaine."* As the Lieutenant Bailiff noted in his sentencing remarks, this showed *"that before the trip* [Mr Barras] *has positively offered* [his] *services as a courier to acquire drugs (both Class A and B) in France for others and to bring them back to Alderney."* For his part Mr Watt claimed that there had been no such plan and that he had acquired the cocaine opportunistically. He maintained that while he intended to share what he had acquired with Mr Barras, his portion was for his personal use only.

7. The circumstances giving rise to the RIPL offence were equally simple. Mobile phones were seized from both men. Mr Watt refused to provide the password to enable his phone to be examined. He later gave as the reason for his refusal the fact that the phone contained images of a sensitive nature that the person depicted, a former partner, would not want others to see.

8. The indictment before the Royal Court contained three Counts. The first Count alleged that the First and Second Appellants had been jointly concerned in the importation to Alderney of a Class A drug, namely cocaine. The quantity involved was 12.85 grams with a local street value of between £1285 and £1927.50. The maximum penalty for this offence is life imprisonment.

9. The second Count, against Mr Barras alone, alleged that he had been concerned in the importation into Alderney of a Class B drug, namely cannabis. The quantity involved was 19.22 grams with a local street value of between £384.40 and £576.60. The maximum penalty for this offence is 21 years' imprisonment.

10. The third Count, against Mr Watt alone, alleged that between 21 and 29 January 2020, he failed to disclose information required by a notice issued pursuant to section 46 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003, as amended. The maximum penalty for this offence is 2 years' imprisonment.

Procedural History: The First and Second Appellants

11. Mr Barras and Mr Watt first appeared before the Court of Alderney on 30 December 2019 and they were released on conditional bail. Summary Jurisdiction was declined on 5 March 2020 and the case was transferred to the Ordinary Division of the Royal Court in Guernsey on 16 March 2020. They were then immediately committed to stand trial and appeared before the Royal Court on 15 April 2020 when they formally entered guilty pleas to the indictment. They remained on conditional bail throughout the proceedings

Personal Circumstances: The First and Second Appellants

12. At the time he came to be sentenced Mr Barras was aged 26. Having been born in Alderney, where he had lived until the age of 16, he was ordinarily resident in Burgess Hill, West Sussex, where he was employed as an air conditioning engineer. He has a number of previous convictions including in 2015 for the importation (through the post) of 5.5 grams of cannabis into Guernsey for which he was sentenced to a community service order of 120 hours as a direct alternative to 6 months' imprisonment. He admitted to the States of Guernsey Probation Service that he was a regular smoker of cannabis and that he was likely to remain a user of the drug. On this basis, it was not considered appropriate to refer him for assessment by the Criminal Justice Substance Service. The author of the Probation Service report, dated 18 May 2020, noted:

> *"Mr Barras was fairly candid about his behaviour during our discussion and, as an individual who has previously been convicted and punished for importation of cannabis, albeit on a smaller scale, he is clearly not in a position to state that he did not know or understand the likely implications of his behaviour. It is clear to me that Mr Barras made a choice to carry out these offences in order to benefit himself, irrespective of the law. Whilst he understands that there is a generally held belief that cannabis affects communities and can lead into crime and potentially more serious drug use, he does not share these views himself."*

During his time on conditional bail, which coincided with the COVID-19 lockdown, he had undertaken community work in Alderney.

13. At the time he came to be sentenced Mr Watt was aged 41 and living in rented accommodation in Alderney which he shared for half of the week with his 8-year old son. He ordinarily worked as a labourer. He has previous convictions for possession of cannabis and MDMA (a Class A drug) in 2000 and also for cultivation of cannabis for which in 2007 he received a 12 months sentence of imprisonment. The author of the Probation Service report, dated 15 May 2020, assessed him as someone who presented a *'moderate likelihood of re-offending'* (largely the result of his views on illicit substance use, which he condones), and for these reasons he was not considered a candidate for Probation supervision. It was noted:

> *"Mr Watt understands that importation of illicit substances is a very serious offence and is expecting a term of imprisonment today. He is remorseful for them, particularly with regard to the impact it will have on his relationship with his son who resides in Alderney. He has also acknowledged and is sorry for the impact his absence will have on his son's mother and her family."*

The Sentence: The First and Second Appellants

14. In the course of his sentencing remarks, the highly experienced Lieutenant Bailiff noted that the Royal Court *"must loyally follow the guidance provided by the Court of Appeal in the case of Richards and others"*. Applying that guidance, the starting point for the importation of an amount of cocaine that is just short of 13 grams was identified as being around the midway point in a sentencing band of 7-9 years' imprisonment, and the starting point for the importation of cannabis at the bottom end of the sentencing band of 3-6 years' imprisonment.

15. The Lieutenant Bailiff explained the basis of the sentences in each case as follows:

> *"Mr Barras – we take as our initial starting point a sentence of around 8 years but note there are aggravating factors such as your previous convictions, the fact you offered to supply, and your likely continued illegal cannabis use, which takes us closer to a starting point of 8.5 years. The court however notes the mitigation through an*

early guilty plea, although such was perhaps inevitable, all that has been said and written on your behalf and the good work that you have done in Alderney. Taking all that into account the final position the court has reached is as follows. Recognising as I have said, that you have imported two different types of drug which is in itself an aggravating feature, but we will deal with these sentences concurrently:

- *For the importation of the Class A drug – 5 years and 9 months' imprisonment.*
- *For the importation of the Class B drug – 18 months' imprisonment to run concurrently.*
- ***Making a TOTAL of 5 years and 9 months***

Mr Watt – the importation of the cocaine was a joint enterprise, as I have said, and you stand and fall together with Mr Barras in respect of that. Again, an initial starting point of 8 years is correct, but there are aggravating features even if you were more lightly convicted in the past and in particular, the court is sceptical that you acquired the cocaine by chance. But again, a starting point of 8.5 years would seem appropriate, but which in your case, after taking into account the mitigation, we reduce to a final figure of 5.5 years, including mitigation to include your early guilty plea. The RIPL offence is of course a serious one committed in the course of the same investigation, but as a separate and deliberate decision and it has to be marked accordingly.

- *For the importation of the Class A drug – 5 years and 6 months' imprisonment*
- *For the RIPL offence – 8 months that is to run consecutively*
- ***Making a TOTAL of 6 years and 2 months from today."***

16. The Royal Court also made a destruction order in relation to the drugs, and in Mr Watt's case a property forfeiture order in relation to his boat and mobile phone.

The Application for Leave to Appeal: The First Appellant

17. The First Appellant's initial application for leave to appeal, dated 28 May 2020, did not contain any specific grounds of appeal. Then, in December 2020, grounds of appeal were settled by the First Appellant's legal representatives. These are two in number. First, that the sentence in respect of the cocaine importation was manifestly excessive because the amount imported was not treated as being split equally between the two accused. Second, that the guidelines in *Richards, supra,* should be reconsidered because they are outdated.

18. On 8 January 2021, the Bailiff, in a fully reasoned decision, referred the application for leave to appeal to the plenary Court to be considered together with the Second Appellant's case. The Bailiff helpfully directed the Respondent to provide the Court of Appeal with information concerning the extent of the drug problem in the Bailiwick Islands, particularly Guernsey.

The Application for Leave to Appeal: The Second Appellant

19. The Second Appellant's application for leave to appeal against sentence, dated 29 May 2020, contains three grounds of appeal. The first is that the sentence did not adequately distinguish his case from that of his co-accused, the First Appellant. In particular, reliance is placed on the fact that the First Appellant was sentenced to a concurrent term for a second drug trafficking offence (the importation of cannabis) and had a recent relevant conviction for another drug trafficking offence (importing cannabis in 2015). It is argued that these aggravating factors should have resulted in a greater difference between the sentences imposed on the same Count. The second ground is that insufficient credit was afforded to the Second Appellant for his plea and personal mitigation. The third ground is that the sentence for the RIPL offence is manifestly excessive, there being no guideline case for that offence in Guernsey.

20. On 10 June 2020, in a fully reasoned decision, the Bailiff referred the application for leave to appeal to the plenary Court and his essential reason for doing so was explained in the following way:

> *"Although I have come close to granting leave in respect of the 8-month sentence for the RIPL offence because there may well be merit in the Court of Appeal providing some guidance to the lower courts in relation to this type of offending. I have decided that the better course of action, where I am not minded to give leave in respect of the longer sentence of 5 ½ years for the cocaine importation, is to refer the whole of the application to the plenary court. In that matter, it will be the plenary sitting that can decide in the round whether to grant leave other than being presented with a partial granting of leave only and still having to consider whether to grant leave in relation to the longer element of the overall sentence. Further, the plenary sitting will have the benefit of fuller reasoning on behalf of the Applicant than appears from the bare pleading of these grounds from which to reach its decision."*

The Facts: The Third Appellant

21. The facts in relation to the Third Appellant's case can be shortly stated. On 18 August 2020, customs officers intercepted a package which had been sent to an Emily Fields at an address in George Road (not being the Third Appellant's address), and which was found to contain 2.95 grams of cocaine. On 25 August 2020, customs officers intercepted a second package addressed to the same address but to a different person, Emma Johnston. This was found to contain 15 tablets of the Class C drug alprazolam. A missed delivery form was left at the address on 28 August 2020 and the Third Appellant unsuccessfully attempted to collect the first package later that day. He again attempted to collect the first package on 29 August 2020 and was arrested following his arrival at the post office. A search of his home address led to the discovery of paperwork in relation to the address to which the packages were delivered and also the names of the addressees.

22. On 1 September 2020, customs officers intercepted a further package, containing a further 15 tablets of alprazolam, addressed to Emily Field at the George Road address. This package had been ordered prior to The Third Appellant's arrest on 29 August 2020.

23. When interviewed under caution on 29 August 2020, the Third Appellant denied any knowledge of the events under investigation. In a subsequent interview, on 12 November 2020, he answered no comment to the questions put to him.

24. The 2.95 grams of cocaine is valued locally at between £295 and £442.50 and the 30 alprazolam tablets, each of 1 gram, are valued locally at between £30 and £120.

25. The second indictment (containing the Counts of dangerous driving and driving under excess alcohol) concerned events which took place while the Third Appellant was on police bail. In the early hours of 5 December 2020, he was seen driving his Ford Fiesta on the wrong side of the road travelling towards Val des Terres. He declined to stop when signalled to do so by police officers and a chase followed. In the course of the pursuit, a collision was narrowly avoided when a taxi was forced to take evasive action. Eventually, the Third Appellant lost control of his vehicle, which mounted a grass bank and came to a halt. The Third Appellant made off from the scene but was arrested after a short chase. It transpired that he had over twice the legal limit of alcohol in his system. Following his arrest for the driving offences, he was released on conditional bail, one of the conditions

being not to consume alcohol. That condition was breached on 14 December 2020 and he was remanded in custody where he remained until the sentencing hearing on 4 May 2021.

Personal circumstances: The Third Appellant

26. The Third Appellant is a local man, who, at the time he came to be sentenced, was aged 29. He was of good character and had previously worked as a well-respected medical professional (a paediatric nurse, paramedic and emergency call handler). He had in addition carried out voluntary work with the homeless in the United Kingdom and with refugees across Europe. Following voluntary work in refugee camps in Calais and Greece, and after witnessing the unexpected death of a child in his care, the Third Appellant had become alcohol dependent in 2019. Later that year he had been diagnosed with PTSD in addition to continuing diagnoses of anxiety and depression. It was in the midst of a relapse in his condition that the importation offences were committed. The Guernsey Probation Service report, dated 25 April 2021, confirmed that he had fully engaged with the therapeutic work offered to him whilst on remand, held no attitudes supportive of criminal offending and presented a low likelihood of reoffending. He provided 12 character references to the Royal Court that referred to his background and charitable work. As the Judge of the Royal Court noted at the sentencing hearing, the personal mitigation was *"impressive"*. In mitigation it was accepted that Mr Orchard had made a serious error in sourcing drugs as an appropriate strategy to cope with his PTSD.

The sentence: The Third Appellant

27. Having set out at the facts of the offences, the Royal Court explained the basis for the sentence in the course of its helpful sentencing remarks:

> *"The sentencing guidelines for offences involving drugs of Class A and B are contained in the case of Richards and this Court is obliged to follow those guidelines. The sentencing band for Class A drugs in powdered form is 7 to 9 years for quantities between 1 and 20 grams. The maximum sentence in respect of Class C drugs is 10 years. As set out in Richards, we are obliged to identify a starting point for each of the importations and then determine a total starting point for all 3 to which mitigation is applied.*

It is a well-established principle that postal importations are treated as an aggravating factor when it comes to sentencing. There were three separate importations in quick succession and the court is also entitled to treat that as an aggravating factor. Nonetheless, we are minded to treat them as part of the same overall course of conduct and so sentence you taking the most serious Count, the Class A importation, as the lead offence and we will regard the second and third Counts as aggravating the first Count. In view of the quantity of controlled drugs, the Court is satisfied that the custody threshold in respect of your offending has been passed.

The dangerous driving and driving with excess alcohol arise out of the same facts. We are minded to treat the driving with excess alcohol offence as aggravating the dangerous driving. It is no excuse to say that you would not have driven with excess alcohol in other circumstances. The Court views this prolonged episode of dangerous driving as serious and, again, considers that the custody threshold had been passed."

28. The Royal Court detailed the mitigation and then went on to explain the basis upon which it had reached the overall sentence:

"The Richards guidelines are binding on the Court. Having considered Richards, we take a starting point of 7 years for the Class A offence and 6 months for each of the Class C offences and have determined a combined starting point of 7 ½ years for the 3 importations. We sentence you in respect of Counts 2 and 3 concurrently with Count 1.

Even taking the lowest starting point for the first Count, without any significant increase for the Class C importations and aggravating factors and giving you the fullest discount for your guilty plea and a generous further discount for your good character and personal mitigation, so as to reach a total discount of over one-half, a sentence of immediate custody in unavoidable.

The driving offences are separate and should attract a separate and consecutive penalty which we conclude should be 8 months for the dangerous driving with a concurrent sentence for the driving with excess alcohol, but the Court will take into account totality and time on remand, to minimise any additional custodial sentence.

Taking into account all the above, and applying generous discount for pleas and mitigation, the sentence will be as follows:

First Indictment

Count 1 – 2 ½ years' imprisonment with effect from 14 December 2020

Count 2 – 3 months concurrent

Count 3 – 3 months concurrent

Second Indictment

Count 1 – 6 months' [imprisonment] *consecutive to Count 1 of the First Indictment*

Count 2 – 6 months' concurrent."

29. Mr Orchard was also disqualified from driving for a period of 6 years from the date of sentence (4 May 2021).

30. There is no application for leave to appeal against the sentences imposed for the driving offences but we have explained the circumstances of the offending because this formed a part of the total sentence and is a relevant part of the overall background.

The Application for Leave to Appeal: The Third Appellant

31. On 13 May 2021, Mr Orchard gave notice of his application for leave to appeal against the drug importation sentence on three grounds. First, the Royal Court failed to give adequate weight to the mitigating circumstances applicable to the offences (principally the small quantities of drugs involved and the fact that they were intended for personal use). Second, the Royal Court failed to give adequate credit for the personal mitigation (principally his good character and the low risk of re-offending). Third, the Royal Court failed to have sufficient regard to the fact that Mr Orchard had spent five months on remand pending sentence.

32. By a decision dated 1 July 2021, leave to appeal was refused by the single judge (Clare Montgomery Q.C., JA) who concluded that the total sentence of 3 years' imprisonment was *"entirely reasonable"*. She noted that the Royal Court had given *"considerable credit for the Applicant's extensive personal mitigation."*

The *Richards* Guidelines

33. The decision in *Richards* is the leading authority within the Bailiwick Islands in relation to the appropriate starting points for sentences in cases involving the principal drug trafficking offences: importation, supply and possession with intent to supply. Speaking for an enlarged Court of five judges, the then President (Carey P.) prefaced his explanation for the guidelines by stressing their general purpose (at paragraph 5):

> *"It cannot be stressed too strongly that this Court is not attempting to establish for the Royal Court some sort of inflexible code, which covers all of the issues involved in sentencing for such offences, some of which must as yet be unknown and incapable of anticipation. These are general guidelines only. Sentencing is always a matter for the court's discretion. It is an art and not a science. It should from now on be unnecessary for counsel to refer the court to earlier cases in the Guernsey Courts."*

34. The guidance itself makes clear that in conducting the sentencing exercise the court should initially determine the starting point appropriate for the particular case. By this is meant the appropriate sentence for the offence after a full trial and before taking into account any mitigation. The starting points identified by the Court of Appeal were as follows (at paragraph 10):

> *"Bands of Class B – Cannabis Resin*
>
> | | |
> |---|---|
> | *Up to 2 kgs* | *3 - 6 years* |
> | *2 - 5 kgs* | *5 - 8 years* |
> | *5 - 10 kgs* | *7 - 10 years* |
> | *10 - 30 kgs* | *9 - 12 years* |
> | *Over 30 kgs* | *11 years upwards* |
>
> *Bands of Class A drugs powder form*
>
> | | |
> |---|---|
> | *1 - 20 grams* | *7 - 9 years* |
> | *20 - 50 grams* | *8 - 10 years* |
> | *50 - 100 grams* | *9 - 12 years* |
> | *100 - 250 grams* | *10 - 13 years* |
> | *250 - 400 grams* | *11 - 14 years* |
> | *Over 400 grams* | *14 years upwards* |
>
> *Bands of Class A drugs in tablet form*
>
> | | |
> |---|---|
> | *1 - 500* | *7 - 9 years* |
> | *500 - 1000* | *8 - 11 years* |

1000 - 2500	*9 - 12 years*
2500 - 4000	*10 - 13 years*
4000 - 5500	*11 - 14 years*
5500 and over	*14 years upward"*

35. The Court explained that the overlapping starting points within the bands were intended to serve the interests of flexibility and that the appropriate starting point should primarily be based on weight, and only to a lesser extent on street price.

36. In the case of two different drugs imported at the same time the President said this (at paragraph 12):

> *"It is a feature of some cases that two different drugs are imported at the same time both in significant quantities. It may be two different Class A drugs, or a Class A drug and a Class B drug. In such cases the combined gravity is a relevant factor in determining the extent of the criminal conduct, which must be greater than if only one drug was imported. In such cases the court should assess the appropriate starting point in respect of each of the drugs, and then determine a 'total' starting point, taking into account overall quantity. Thereafter the mitigation will be applied to arrive at the actual sentences to be imposed. The court then provides for the total length of sentence by imposing a greater term of imprisonment than otherwise would have been imposed for the more serious of the two offences (if such can be identified), to run concurrently with the other sentence imposed. Consecutive sentences should not normally be imposed in such cases, since that may create a misleading impression that each offence is being sentenced more leniently than it is. The court must clearly state in any such case both what the court considers to be the appropriate 'total starting point' and how it is arrived at."*

37. In addressing the position where drugs are imported for personal use, the President said this (at paragraph 14):

> *"As we have identified importation is a drug trafficking offence, whatever the intention of the offender as to the use to which the importation is to be put. There is however a clear division between importations of very small quantities for personal use which are punished in the same way as offences of simple possession, and importations of more than relatively small amounts which still fall within the lower of the bands we have set out. In the case of such importations, the fact that a claim is made that a drug was for*

personal use will not generally result in a lighter sentence being imposed than where no such claim is possible, because any importation adds to the stock of drugs available in the Island. Although these cases must be looked at with care, it cannot generally be right that an addict importer of the drug to which he is addicted can be heard to claim some credit for the likelihood that he will be consuming all or part of it."

38. The President also addressed the significance of a guilty plea (paragraph 15), the significance of any erroneous belief as to the nature of the drugs the subject of the offence (paragraph 16) and credit for useful assistance in helping the authorities to prosecute others (paragraph 17).

39. The Court of Appeal revisited the issue of personal consumption four years later in *Law Officers of the Crown v Edwards* (45/2006). The Court confirmed (at paragraph 13) that where an illegally imported drug was required for personal use this was not to be taken as an extenuating circumstance save in the case of very small quantities:

"The starting point of the discussion is the recognition that importation is a drug trafficking offence "whatever the intention of the offender as to the use to which the importation is to be put." We have no doubt that, read in its context, the "clear division" identified by the Court of Appeal [in *Richards*, at paragraph 14] *is between "very small quantities for personal use" on the one hand and, on the other, any larger quantity which still falls within the lower of the bands set out in paragraph 10 of the Richards judgment. We are, consequently, of the view that there is no lacuna in that part of the Richards analysis. In applying the guidelines, it is for the sentencing Court to determine whether the quantity of drugs under consideration can properly be described as "very small", having regard to the facts and circumstances of the particular case. If it cannot be so described, a "personal use" claim will not generally result in a lighter sentence, because any importation adds to the stock of drugs available in the island. The risk of such addition to the stock is that the drugs may find their way into other hands."*

40. We would also observe that the vice of adding to the stock of drugs on the Islands is not limited to the risk that the drugs may find their way into the hands of third parties. There is the additional point that any increase to the stock will have an impact on the supply and demand for drugs within Guernsey, in the sense that importation by one person for personal use enables a drugs supplier to traffic his drugs elsewhere, thus adding to the overall problem of dangerous drugs in a small Island community.

The Appellants' Submissions on *Richards*

41. In support of his argument that the *Richards* guidelines are out of date and in need of revision, particularly in relation to the importation of small amounts of drugs for personal consumption, the First Appellant relied on helpful and detailed written submissions, dated 3 September 2021, and a number of supporting documents:

    (i) Combined Substance Use Strategy for Guernsey and Alderney 2021-2026 (a report commissioned by the States of Guernsey Public Health Services);

    (ii) Review of the interaction of health and justice system in relation to the possession of drugs for personal use (a report prepared in 2020 for the States of Guernsey by the Public Health Institute, Liverpool John Moores University);

    (iii) The Incarceration of Drug Offenders: An Overview (a 2009 report prepared by the Beckley Foundation Drug Policy Programme);

    (iv) Sentencing Burglary, Drug Importation and Murder, Evidence From Ten Countries (a 2021 report prepared by the Institute for Crime and Justice Policy Research, Birkbeck, University of London);

    (v) The Effects of Imprisonment Specific Deterrence and Collateral Effect (a 2014 report prepared by the University of Toronto).

42. These materials were relied on by Advocate Tee in support of the following two broad submissions:

    (i) Imprisonment is not an effective deterrent in cases of drug trafficking (or at least not in cases where the importation involves small quantities and is carried out for personal consumption);

    (ii) The use of alternatives to imprisonment for offences involving smaller amounts of drugs may lead to a reduction in drug use and related harms.

43. The First Appellant also sought to rely on drug sentencing policy and practice in Bermuda and the Cayman Islands as jurisdictions comparable to the Bailiwick. It was, however, acknowledged by Advocate Tee that her research into these jurisdictions was limited to a consideration of the local misuse of drugs laws and open source press materials, and that drawing any useful conclusion from these materials was difficult, not least because the sentencing policy in each jurisdiction is markedly different.

44. In support of their argument in relation to the *Richards* guidelines, the Second and Third Appellants provided detailed written submissions, dated 16 August 2021, with supporting materials:

    (i) A Quiet Revolution: Drug Decriminalisation Across The Globe (a 2016 report published by Release the United Kingdom national centre of expertise on drugs and drugs law);

    (ii) Taking A New Line On Drugs (a 2016 report published by the United Kingdom Royal society for Public Health);

    (iii) Enforcement of Drug Laws, Refocusing On Organised Crime Elites (a 2020 report prepared by the Global Commission on Drug Policy);

    (iv) The European Union Action Plan on Drugs 2017-2020 (2017/C215/02);

    (v) Drugs and the Law: Report of the Independent Inquiry Into the Misuse of Drugs Act 1971 (2000);

    (vi) The English Sentencing Council, Drug Offences, Definitive Guideline (the version issued in 2012 and most recently revised in 2021).

45. The essential argument encapsulated in Advocate Steel's helpful written submissions on behalf of the Second and Third Appellants is as follows:

> *"Richards was of course decided 21 years ago at a time when there was relative consistency throughout Western jurisdictions to the approach to sentence for drugs offences, with lengthy sentences for commercial supply or importation of large quantities of drugs and possession offences (whether as part of an importation or otherwise) being met with criminal sanction and sometimes involving short periods of imprisonment.*

However, over the last 20 years, although there has been little change in the approach to sentences for the supply/importation of large quantities of drugs, the position has changed considerably in respect of possession of small quantities of drugs as many countries have moved away from the use of criminal sanctions and custody in particular, and towards a more tolerant and progressive approach to offences for possession of drugs only."

46. Relying on the English Sentencing Council guidelines, and applying certain assumptions as to how equivalent cases in England might be viewed in terms of harm and culpability, it was submitted that a person similarly situated to the First Appellant would fall to be sentenced to no more than 18 months' custody; the Second Appellant's case if transposed to England would not have involved a custodial element at all; and the Third Appellant's case if similarly transposed would attract a starting point of a low-level community order with penalties ranging from a fine and up to 18 months' imprisonment.

47. The Second and Third Appellants have also drawn our attention to sentencing authorities in Jersey, the Isle of Man and Hong Kong, as well as the practice in certain jurisdictions in the Caribbean which are subject to the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules.

The Respondents' submissions

48. On behalf of the Law Officers, Crown Advocate Dunford provided detailed written submissions, dated 10 September 2021, which he amplified in his helpful oral submissions. He argued as follows:

    (i) The *Richards* guidelines already provide a sufficiently flexible framework for sentencing in drug importation cases capable of reflecting individual circumstances and achieving fair and just sentences. The guidelines work well in practice and ensure consistency in sentencing.

    (ii) The Appellants have based their arguments on possession offences (to which the *Richards* guidelines do not apply) whereas the offences to which they pleaded guilty were importation offences (and thus subject to the *Richards* guidelines), and

the real issue in the case is not whether the guidelines should be revised but whether the Appellants' cases merited exceptional leniency.

(iii) The Guernsey Law Enforcement authorities operate a cannabis possession charging policy with the result that minor cases of possession, with no aggravating features, may result in a caution, juveniles are routed away from prosecution to be dealt with by the Guernsey Children's Convenor, and pleas are sometimes accepted for simple possession with the result that appropriate cases are dealt with by way of sentence in the Magistrates' Court.

(iv) Insofar as the arguments stray into issues of decriminalisation and penal policy, the Appellants are inviting the Court of Appeal to go beyond its proper remit and address matters that are properly within the province of the States of Deliberation.

(v) Most controlled drugs are classified in the same way as they were at the time of the decision in *Richards* and the offences in relation to importation carry the same penalties. (The one prominent exception being that the Chief Pharmacist can now issue licences to import (and possess) cannabis-based medical products based on prescription issued by the United Kingdom or Jersey-based specialist practitioners.)

49. The Law Officers also submitted a report, prepared by Richard Halliday, a Customs Officer with the Guernsey Border Agency and Member of the Bailiwick Law Enforcement Drug Expert Witness Team, dated 10 September 2021, which provides details of the drug trafficking marketplace in Guernsey. The points to be noted from his report are as follows:

(i) Drug trafficking in Guernsey follows its own path and at times the Bailiwick has been used as a testing ground for new types of drugs and has its own trends.

(ii) The price of controlled drugs in the United Kingdom is considerably lower than Guernsey with the result that from a business point of view it makes financial sense to import drugs into the Bailiwick and the local market is attractive and lucrative to organised crime groups.

(iii) Cocaine and crack powder continue to be seen on the Island with the last large importation seizure in 2019 and the last powdered cocaine seizure in February 2021.

(iv) Cannabis cultivation and consumption has taken place for many years and there is continuing debate about its criminalisation and use. Cannabis remains popular among drug users in Guernsey.

(v) In the period 2016 to 2017 there was a rise in the postal importation of controlled drugs ordered from the *'dark web'*. There was a further increase in postal importations during the COVID-19 lockdown and associated travel restrictions.

50. Mr Halliday's overall conclusion is that *"the drug marketplace in Guernsey is complex, is continually changing and evolving, and it is a difficult task for Law Enforcement to keep pace with it."*

51. We have also been provided with a table of the sentences imposed by the Royal Court and the Magistrates' Court in cases of drug importation from 2010 until the hearing of these applications. As might be expected, his table showed that a range of sentencing options have been used by the courts at first instance and the sentences imposed, far from being the mechanical application of the *Richards* starting-points, were tailored to the circumstances of the individual case (as the Court of Appeal in *Richards* had stressed the position should be). There are a number of cases in which the Royal Court followed the guidelines and nevertheless exercised exceptional leniency, and there are also cases in which the Royal Court gave generous discounts for personal mitigating circumstances.

The Right of Appeal

52. The right of appeal against sentence, with leave of the Court of Appeal, is contained in section 24(1)(c)(i) of The Court of Appeal (Guernsey) Law 1961. The powers of the Court on an appeal against sentence are set out in section 25(3) of the 1961 Law which provides: *"The Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal."*

53. It is well-recognized (and accepted by all the parties) that the Court of Appeal will not interfere with the sentencing discretion of the Royal Court merely on the ground that it

might have passed a somewhat different sentence: the Court of Appeal will only quash a sentence passed at the trial where it is manifestly excessive or wrong in principle.

Discussion

54. While the parties have produced a large quantity of documentary material in the form of submissions, reports by distinguished bodies, sentencing guidelines and case reports (for which we are grateful), in our view the position in relation to the point of principle is relatively straightforward. While the decision of the Court of Appeal in *Richards* was handed down almost 20 years ago, we are not aware that it has caused difficulties in practice, nor are we aware that it has created injustice in particular cases. Given the emphasis placed by the Court on the discretion vested in the Royal Court, it is not surprising that the decision has stood the test of time. In our view, the decision in *Richards* is not out of date; it does not need to be revised, and it does not lead to sentences that are generally manifestly excessive. We have reached our conclusion on the point of principle for the following reasons.

55. The starting point in our analysis is to consider whether there is good reason to justify a relaxation of the policy which in 2002 motivated the Court of Appeal to formulate sentencing guidelines for the principal drug trafficking offences. At the forefront of the President's reasoning was his *'preliminary conclusion'* (at paragraph 4):

> *"The information provided on behalf of H.M. Procureur persuades us that the level of drug trafficking in Guernsey has not abated despite the commendable efforts being made by the law enforcement authorities to detect it and other bodies to contain abuse. Indeed as we have identified there are disturbing signs of recent growth in activity. There appears to us no justification for relaxing the general policy of the courts of this Bailiwick in visiting drug trafficking offenders with condign punishment."*

56. The Appellants do not dispute that drug trafficking remains a serious problem in Guernsey. To the contrary, they seek to rely on the increased level of importation activity since 2002. As Advocate Steel submitted on behalf of the Second and Third Appellants:

> *"The value of drugs seized by Guernsey police doubled between 2012 and 2019 (£682,968 to £1,359,719) and so drug use remains an issue."*

57. In light of this continuing problem, we do not accept the Appellants' arguments that the current levels of sentence are ineffective as a deterrent or that lowering sentencing levels would not necessarily lead to an increase in offending. While the effectiveness of prison sentences as a deterrent is not an altogether straightforward issue and one on which in the present context views may differ, we have the benefit of the report prepared by Mr Halliday. He noted that the drug market place in Guernsey is complex. The financial rewards associated with drug trafficking are particularly attractive to criminal gangs and the problems associated with this criminality is an ongoing challenge for the law enforcement authorities, to say nothing of the burden it imposes generally on the Bailiwick. We have little doubt that if we were to relax the guidelines to identify a lower starting point for small amounts of drugs there would be an increase in drug trafficking activity with criminal gangs packing drugs in smaller amounts to take advantage of the higher rewards available through selling drugs in Guernsey. Equally, a relaxation of the guidelines in relation to small amounts might work injustice in genuine cases of personal use, for example where the amount imported exceeds a very small quantity. A similar problem is likely to arise if an exception is created to address importation of drugs for personal consumption. As was pointed out in the course of argument, this would provide an incentive for the importation of significant quantities of drugs by those claiming to be addicts or significant users of drugs, and the problems associated with such claims are much too obvious to require elaboration. The short point is that it is difficult in the abstract to set a starting point for very small quantities of drugs or to have an exception applicable to drugs imported solely for personal use. It is our clear view that the *Richards* guidelines contain sufficient flexibility to accommodate the mitigating circumstances that might arise in any particular case and experience shows this to be the case.

58. Moreover, while we have considered with interest the materials and arguments in relation to the sentencing regimes in other jurisdictions, including Bermuda and the Cayman Islands as island jurisdictions, and England and Wales as a near neighbour, we have not found them to be of assistance on the point of principle. As this Court noted in *Wicks, Sharp and Towers v Law Officers of the Crown* 2011-12 GLR 482 (at paragraphs 18 and 20):

> *"Guernsey is a separate jurisdiction and has its own legal system. It is, therefore, free to set its own sentencing levels as the Island's courts think appropriate for Guernsey. Guernsey no more has to follow sentencing practice in England than it has to follow sentencing practice in Scotland, Northern Ireland, Jersey or, for that matter France; it can, of course, in exercise of its autonomy choose, but for the same reason of autonomy cannot be compelled, to do so.*

…

It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is that the Guernsey courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England and Wales or in any other jurisdiction."

59. Similarly, in *Forno v Attorney General* [2011] JCA 22, a case decided by the Court of Appeal in Jersey, it was said (at paragraph 38):

"We would only add a brief observation about the relationship between sentencing guidelines in Jersey and those applied in England. Where the relevant social conditions and the policy considerations appear to be the same in both jurisdictions, it will usually be right for the sentencing court in Jersey to have regard to English sentencing practice even though not bound by it. The volume of case law generated by English criminal appeals is large and varied, and in practice it has been found of value by sentencers in this jurisdiction. There are, however, some offences where the conditions in this Bailiwick call for a different approach. A well-established example is drug importation, which has for many years been visited with much heavier sentences in this jurisdiction than in England."

60. We respectfully agree with these observations.

61. Quite apart from the ability of Guernsey to adopt its own sentencing practice, we consider that the Appellants' criticisms of the *Richards* guidelines are in any event overstated for the following reasons. First, in *Richards* the Court of Appeal emphasized that it was not attempting to establish an inflexible sentencing code. The President said in terms: *"These are general guidelines only. Sentencing is always a matter for the court's discretion. It is an art and not a science."* The Appellants have accepted in their submissions that the decision in *Richards* ensured that the sentencing courts retain a discretion and the guidelines provide ample scope for the first instance court to exercise its judgment when deciding on the appropriate sentence. This individualised approach is confirmed by the information provided to us on sentences passed since 2010. The table of sentences demonstrates that the Royal Court treats the *Richards* starting points as merely the beginning of the sentencing exercise. As Crown Advocate Dunford submitted, they are starting points and not end points. Second, in *Richards* itself the Court of Appeal recognized

that cases involving claims that a drug is for personal use must be considered with care. The guidelines provide a flexible framework capable of reflecting individual circumstances in any given case. Third, the Appellants base their arguments on the differing approaches in various legal systems to offences of simple possession. This is to overlook the fact that the Appellants were convicted of serious drug trafficking offences, not offences of simple possession. Finally, on this aspect of the case, it is not irrelevant to note the constitutional role played by the Jurats in the sentencing process. They perform a full part in sentencing decisions. They are able to reflect and give expression to the values of the wider Guernsey community. It is apparent from the sentencing remarks that the Royal Court considered the Appellants' cases with great care. We would also note that unlike in jurisdictions such as England and Wales where sentencing in cases of serious offences is dealt with in the Crown Court sitting in many different locations, the position in Guernsey is that the Royal Court is the sole court dealing with sentencing for serious offences. This fact in itself is conducive to consistency of approach and fairness.

62. We also wish to make clear that we do not accept the Appellants' interpretation of the English Sentencing Council guidelines or how they might fall to be applied in circumstances similar to those arising in the three cases before the Court. It is sufficient for us to say that our reading of the guidelines (as well as our experience in practice) suggests that similarly situated offenders in England and Wales would be sentenced to significant periods of imprisonment, although for reasons we have explained attempting to apply guidelines from another jurisdiction, even one as familiar as England and Wales is, ultimately, a distraction from the issue of whether the sentences are manifestly excessive as a matter of Guernsey law.

63. This brings us to what in our view is the true nature of the arguments advanced by the Appellants, namely that the sentences imposed by the Royal Court were too long, even applying the *Richards* guidelines. It is to those arguments we now turn.

The First Appellant

64. In addition to his submission in relation to the *Richards* guidelines, the First Appellant argues that the sentence in respect of the cocaine importation was manifestly excessive because the approach taken was not to treat the amount imported (12.85 grams) as being split equally with the co-accused.

65. The Royal Court made clear when sentencing the First and Second Appellant that it was treating the importation of the cocaine as a joint enterprise and each was liable for the acts of the other carried out in pursuance of that joint enterprise. As the Royal Court explained in its sentencing remarks:

> *"The Count relating to the cocaine, to which you have both pleaded guilty, is in the nature of a joint enterprise. The law in Guernsey is clear. Where two or more people embark on a joint enterprise each is liable for the acts of the other that are done or might be done in furtherance of that enterprise.*
>
> *So whilst you, Mr Watt, may claim that your intended share of the cocaine was for personal use only it would seem clear that Mr Barras intended to share his with others for reward. It does not matter when the plan was agreed between you because whenever that was, you were both in agreement that once the cocaine had been acquired it would be taken back to Alderney. This Court and the Court of Appeal have said on many occasions that importation for personal use is really no mitigation at all. That is because anyone who brings drugs into the Bailiwick is adding to the stock within the islands and creates a realistic risk that once here it might be shared. To that extent therefore you largely stand or fall together in respect of that Count."*

66. In our view the reasoning is unimpeachable. The Royal Court might also have mentioned the additional impact that importation has on supply and demand generally, and its indirect effect of facilitating the supply of other drugs. We also note that in the case of the First Appellant he did intend to share the cocaine with others for reward and there were in his case other aggravating features (his previous convictions, his likely continued use of cannabis, and the importation of two different types of drug). The Royal Court was entitled to take an initial starting point of around 8 ½ years and reduce it, to reflect the First Appellant's mitigation, to a sentence of 5 years and 9 months' imprisonment. The Royal Court properly imposed a separate sentence (18 months' imprisonment) in relation to the cannabis importation and, to ensure that the total sentence was just and proportionate, properly ordered that sentence to be served concurrently.

67. There is no arguable basis for concluding that the sentence imposed by the Royal Court was manifestly excessive and for these reasons we refuse the First Applicant's application for leave to appeal.

The Second Appellant

68. The Second Appellant's first ground of appeal is that the sentence imposed on him did not adequately distinguish between his case and that of his co-accused. In particular, he relies on the fact that the First Appellant was sentenced to only three months more (5 years and 9 months as opposed to 5 years and 6 months) despite being dealt with for the additional importation of Class B drugs (for which he received a concurrent sentence) and despite having a recent (2015) relevant conviction for drug trafficking.

69. As we have noted, in the Royal Court's sentencing remarks, the cocaine importation was treated as a joint enterprise and both the First and Second Appellants were sentenced on the basis that each was liable for the acts of the other carried out in furtherance of the joint enterprise. This was correct in principle. The initial starting point of 8 years was increased to closer to 8 ½ years to reflect the aggravating factors and while the co-defendant had a previous conviction for importing cannabis in 2015, the Second Appellant had a 2007 conviction for cultivation of cannabis for which he had been sentenced to 12 months' imprisonment.

70. At the time he referred the case to the plenary Court, the Bailiff addressed the disparity argument and, as he rightly noted, the fact that the Second Appellant was the owner of the vessel used to carry out the importation and was physically in possession of the cocaine may, even on a joint enterprise, have been viewed as balancing out the respective culpability of the co-accused.

71. The test to be applied in relation to any disparity argument is an exacting one. It was identified by the English Court of Appeal in *R v Fawcett* [1983] 5 Cr App (S) 158. In that case it was held that where an offender had received a sentence which itself was not objectionable but, for no apparent reason, was more severe than that of his co-accused, the Court of Appeal could intervene if the disparity was serious. In the course of giving the judgment of the Court, Lawton LJ said that the question to be asked is:

> *"…would right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?"*

72. Applying this test, there is no reason to think that in the case of the Second Appellant the administration of justice has gone awry. The plain fact is that the Second Appellant did receive a more lenient sentence for the importation of the cocaine and the sentencing remarks make express reference to the co-accused's involvement in importing two different types of drugs. The essential point is that the sentence received by the Second Appellant was not on any view manifestly excessive and the difference in the sentence reflects the respective culpability of the First and Second Appellants. For these reasons we refuse leave to appeal on the first ground of appeal.

73. The second ground of appeal relates to the Second Appellant's personal mitigation and family life. The Second Appellant submits that insufficient credit was given for his personal mitigation and the impact of his imprisonment on his family life, including the impact on his 8-year old son. He contends that this is an additional factor which distinguishes his case from the First Appellant's and which makes the narrow difference in their sentences even more conspicuous.

74. The approach to be taken by the sentencing court when considering a defendant's right to family life was considered by this Court in *Pinto v Law Officers of the Crown* [2013] GLR 83. The principles are not in doubt. The sentencing of a defendant inevitably interferes with family life. The sentencing court should always be informed of the offender's family circumstances and the impact that imprisonment will have on any dependent children. These are matters to be taken into account and balanced against the seriousness of the offence. The graver the offence, the more inevitable it is that a custodial sentence will be imposed.

75. In the case of the Second Appellant, the Royal Court was provided with all the relevant information and the submission on his behalf by Advocate Steel was that a sentence of imprisonment would have a negative impact on his son. He also acknowledged that this was something that the Second Appellant should have considered at the time he decided to commit the importation offence. In our view, the Second Appellant pleaded guilty to a grave offence and a lengthy custodial sentence was inevitable. The Royal Court had regard to his personal mitigation in reaching the overall total sentence. There is no question of any disproportionate interference with family life and, for these reasons, we refuse leave to appeal on the second ground of appeal.

76. The third ground of appeal, relating to the RIPL Offence, is that the sentence of 8 months' imprisonment for failing to provide the passcode to his mobile telephone is manifestly

excessive. The Second Appellant notes that there are no guideline cases in respect of this offence and submits that guidance from this Court might be of assistance for future cases. We have been informed by Advocate Steel that the RIPL offence has been a regular recent feature in Magistrates' Court and Royal Court proceedings, most commonly in relation to investigations into drug trafficking offences. The Royal Court itself noted the increasing prevalence of the offence in its sentencing remarks.

77. On behalf of the Law Officers, Crown Advocate Dunford informed us that the approach of the Magistrates' Court to the offence is to send cases to the Royal Court for sentence. This is a reflection of the limited sentencing powers available in the lower court: the maximum sentence for the RIPL offence is 12 months' imprisonment at summary level, and 2 years' imprisonment in the Royal Court. Crown Advocate Dunford also told us that the Royal Court has been guided in its approach to the offence by reference to the decision of the English Court of Appeal in *R v Padellec* [2012] EWCA Crim 1956 (President of the Queen's Bench Division (Sir John Thomas), Collins and Singh J.J.), which concerned the equivalent English offence in the Regulation of Investigatory Powers Act 2000 (section 53).

78. In *Padellec*, the appellant's computer was examined by police officers who were searching for suspected indecent images. Although no images were recovered there were a number of deleted files and encrypted materials. The appellant refused to provide the encryption key on the basis that he was keeping the contents secret. This was (surprisingly) accepted as the basis for his plea. The Court of Appeal was critical of what had occurred and stated (at paragraph 11):

> *"What* [not handing over the encryption key] *does is to enable the defendant in question to identify, to his advantage, what was or was not on the computer and so get the benefit of a lesser sentence than otherwise might be appropriate. That is to enable him to dictate, wrongly, what the situation is. The whole point of requiring access is so that it can be seen what was in fact there. We express the hope that in a situation such as arose in this case, and in the content of an offence under the Regulation of Investigatory Powers Act (section 53), there will never again be a basis of plea accepted which is based upon keeping the contents secret and the defendant saying, to his advantage, what was or was not contained."*

79. While we decline the invitation to give guidelines as to the sentencing ranges for the RIPL offences, as cases are likely to turn on their own facts, we would make the following

observations. First, failing to make the disclosure required by a notice issued under section 46 of RIPL is a serious matter; it will almost invariably call for an immediate custodial sentence. Second, the sentencing court is entitled to proceed on the basis that the failure to provide access is motivated by a desire to hide something either to protect others involved in criminal activity or to conceal the accused's own more extensive criminality. We note that for those who are genuinely unable to provide their passcodes, statutory defences are available (see section 49 of RIPL). Third, deterrence is an important aspect of sentencing in this context. Fourth, the appropriate sentence will, of course, depend on the particular circumstances of the case. The circumstances are likely to vary across a very wide range and only limited assistance will be derived from considering the facts of other cases. One material factor is likely to be the seriousness of the alleged offence which is subject to the underlying investigation. When considering the length of any custodial sentence it will of course be necessary to consider with care the offender's background and personal mitigation.

80. In the case of the Second Appellant the Royal Court explained its approach to the offence in the following way:

> *"… the court is entitled to assume that a refusal to* [provide an encryption key] *is designed to conceal evidence connected to the offences under investigation or some other form of serious criminality. In this case, the court is entitled to assume that you may have been lying to conceal evidence of actual or intended distribution of illegal drugs. Accordingly, the sentence that must be passed for this offence has to reflect, so far as possible within the statutory limits, the seriousness of a refusal to comply with a lawful request which may have the consequence of adversely affecting the proper administration of justice. It must also act as a deterrent to others for doing the same thing in future."*

81. In our view this reasoning is impeccable. The consecutive sentence of 8 months' imprisonment is not arguably manifestly excessive.

82. For the reasons set out above, none of the arguments advanced by the Second Appellant has sufficient merit to justify granting leave to appeal and his application for leave to appeal is dismissed.

The Third Appellant

83. In the case of the Third Appellant the Royal Court was bound to undertake the sentencing exercise by reference to the *Richards* guidelines. At the outset, it is important to recognize that the Royal Court did not consider it appropriate to treat the Third Appellant's case as being one of simple possession. We agree, and even if we did not, we consider that that was a conclusion reasonably open to the Royal Court. It is also the case that the Third Appellant was involved in three postal importations (treated by the Royal Court as the same overall course of conduct) involving a significant quantity, or at least not a very small quantity, of a Class A drug. Having taken a starting point of 7 years for the Class A offence and 6 months for each of the Class C offences to reach a combined starting point of 7 ½ years for the three importations, the Royal Court gave the fullest possible discount for the guilty plea and a generous further discount to reflect the Third Appellant's good character and personal mitigation. It was by this reasoning that the Royal Court arrived at a total sentence of 2 ½ years' imprisonment for the drugs offences.

84. The prolonged episode of dangerous driving with excess alcohol was serious, particularly since these offences were committed at a time when the Third Appellant was on bail. The custody threshold was comfortably passed in the case of both offences.

85. On behalf of the Third Appellant, Advocate Steele submits that the 2 ½ year sentence was manifestly excessive and that the Royal Court should have exercised its discretion and imposed community-based penalties. In support of this argument, reliance is placed on the mitigating factors applicable to the importation offences (including the small quantities of drugs involved which were purely for personal use), the Third Appellant's personal circumstances including his previous good character, the fact that the offences were committed at a time when he was in the midst of a mental health crisis and the fact that he had fully engaged with the therapeutic work offered to him during his five months in prison on remand.

86. The Third Appellant also relies on two decisions of the Royal Court where it has exercised its discretion to impose a non-custodial sentence in cases involving the importation of small quantities of cocaine: *Law Officers of the Crown v Liam Bucknall* [2017], and *Law Officers of the Crown v David Stewart* [2019]

87. In our view there is no arguable basis for concluding that 2 ½ years' imprisonment or the total sentence of 3 years' imprisonment was manifestly excessive. The Royal Court explained in clear terms the basis upon which it reached its sentencing decision. Contrary

to the Third Appellant's submissions this was not an importation involving a very small quantity of drugs, and while the Royal Court followed the *Richards* guidelines, he received a generous discount of over one half to reach a sentence of 2 ½ years' imprisonment. The driving offences were serious and although a custodial sentence was inevitable, the Royal Court tempered its effect by ordering concurrent sentences on the driving indictment and taking into account the time spent on remand. The decisions in *Bucknall* and *Stewart* are of no assistance to the Third Appellant; they are decisions confined to their particular facts, establish no point of principle and serve to emphasise the truism of the Court's observation in *Richards*: *"Sentencing is always a matter for the court's discretion. It is an art and not a science."* Moreover, in *McCarthy v Law Officers of the Crown* 2007-08 GLR 414, the Court stated (at paragraph 22):

> *"In our judgment, it is wholly inappropriate to attempt to determine whether the sentence in any particular case is manifestly excessive by reference to other unrelated cases (i.e. those where the comparator is not a co-defendant) except, perhaps in the most exceptional and clearest circumstances."*

88. We respectfully agree. This is not a clear and exceptional case for taking a contrary view. We also find ourselves in agreement with the single judge who noted that the sentence imposed was well within the range of rational reactions to the Appellant's offending and personal circumstances. The total sentence of 3 years' imprisonment was entirely reasonable and gave considerable credit for the Appellant's extensive personal mitigation.

89. For these reasons we refuse the Third Appellant's application for leave to appeal against sentence.

Conclusion

90. In our view the *Richards* guidelines remain good law. We reject the argument that they are outdated and in need of revision. We agree with the submissions advanced on behalf of the Law Officers of the Crown that the guidelines are not to be read as an inflexible code and that they have served the Bailiwick well for almost two decades, and continue to do so. A review of the sentences imposed in Guernsey since 2010 shows that the courts tailor their sentences to the facts of any particular case and have regard also to the serious threats posed to Guernsey by trafficking in dangerous drugs. The sentences imposed by the Royal Court

in the three cases before this Court are not arguably excessive and the applications for leave to appeal against sentence are dismissed.