

1. On 26 June 2024, following acceptable guilty pleas entered by the Respondent, Wesley Guilbert, on 29 February 2024 and on 14 June 2024, the Court imposed sentences of two years' imprisonment, suspended for three years (with certain shorter terms to run concurrently), along with a probation order for three years, with conditions. By an application dated 22 July 2024, signed on behalf of the Law Officers of the Crown by Advocate Roffey, leave to refer these sentences as being unduly lenient pursuant to section 43B of the Court of Appeal (Guernsey) Law, 1961, as amended, is now sought.
2. To put this application into context, the original Indictment in this matter contained nine Counts. On 29 February 2024, the Respondent entered guilty pleas to five of those Counts, following which no evidence was offered on the other four Counts, resulting in not guilty verdicts being entered. Subsequently, a Sixth Count was permitted and the Respondent pleaded guilty to that Count on 14 June 2024.
3. The First Count related to possessing cannabis resin, contrary to section 4(2) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended. The Second Count related to being concerned in the supplying of a controlled drug, this time being methylenedioxymethylamphetamine ("MDMA") to another on or around 30 June 2023, contrary to section 3(3)(b) of the 1974 Law. MDMA is a Class A controlled drug. Similarly, the Third Count related to another offence of being concerned in the supplying of a controlled drug to another, also MDMA, contrary to the same provision. The Fourth Count was for possessing a controlled drug, this time being morphine, which is Class A, contrary to section 4(2) of the 1974 Law. The Fifth Count involved offering to supply a controlled drug to another, being cannabis, contrary to section 3(3)(a) of the 1974 Law. The Sixth Count was for possessing MDMA on 30 June 2023, also contrary to section 4(2) of the 1974 Law.
4. The sentences imposed in respect of the Second and Third Counts were the three-year probation orders, with the standard requirements attaching thereto, as well as an additional condition "*to attend the Criminal Justice Substance Service as directed and comply with drug testing and treatment as required*". The longest suspended sentence of two years was imposed in respect of the Fifth Count, with concurrent sentences being imposed in respect of the three other Counts relating to simple possession, being two months in relation to the Fourth Count and one month each time in respect of the First and Sixth Counts. Accordingly, the overall sentence was a total of two years' imprisonment, suspended for three years, plus a three-year probation order.
5. As the Royal Court explained in the sentencing remarks, all of these offences arose on or around 30 June 2023, when a search warrant was executed at the Respondent's home. The Respondent was co-operative and indicated where the various drugs were. He claimed that the cannabis and broken MDMA tablets were for his personal use. The Sixth Count related to a white pot containing broken MDMA tablets, which the States Analyst quantified as 21.11g of MDMA powder. The First Count relates to 8.5g of cannabis resin. The Respondent had a prescription for medicinal herbal cannabis, a quantity of which was also located, but has no bearing on any of these Counts. A bottle marked Morphine Oral Solution was found, containing 1.44g, along with three metal spoons with liquid residue, all of which relates to the Fourth Count and was accepted as being of minimal value. Just over £850 and digital scales were discovered. Analysis of the Respondent's phone revealed messages from which it was accepted that three MDMA tablets were arranged to be supplied for £60 and separately four tablets were to be supplied for £80, which form the basis of the Second and Third Counts. Finally, there was also an offer to supply an unquantified amount of cannabis, which is the basis of the Fifth Count. None of the values of these quantities of controlled drugs was very high. The largest value related to the MDMA found in the white pot, which was put at between approximately £1,680 and just over £2,200, whether calculated by reference to tablets or powder.

6. The way these sentences were explained is also set out in the sentencing remarks. There was an acknowledgment that the two most serious Counts were the supplying of seven MDMA tablets, ie, the Second and Third Counts. These are drug trafficking offences to which the guidelines established by this Court in *Richards v Law Officers* 2000-02 GLR 247 applies. Those principles had been re-affirmed in *Barras, Watt and Orchard v Law Officers* [2021] GCA 045. Having regard to para. 10 in *Richards*, the starting point taken was 7 years' imprisonment. This was at the lowest end of the range for Class A drugs in tablet form (1-500) and below what might have been the range for Class A drugs in powder form (20-50g) had the contents of the white pot been taken into account, rather than becoming the Sixth Count. The Court accepted what Advocate Steel on behalf of the Respondent had suggested was the appropriate course and treated these two Counts as supplying tablets. This was consistent with a judgment given by the Judge of the Royal Court, who presided at the sentencing hearing, on 13 June 2024.
7. The only other drug trafficking offence for which the Respondent fell to be sentenced was the Fifth Count, offering to supply cannabis, in respect of which the Court chose to take a standalone starting point of 3 years' imprisonment. The cannabis is a Class B controlled drug and the lowest range of 3 to 6 years' imprisonment applies to up to 2 kilogrammes.
8. In relation to the possession Counts, the Royal Court adopted a notional starting point of 2 years' imprisonment for the possession of MDMA, being for the Respondent's personal use. As regards the First Count, it is suggested that that would only justify a small increase to that two year period and the possession of morphine was said not to justify any increase in the starting point. It seems that the possession Counts were then used to aggravate the lead offences.
9. Having taken a starting point for what were described as the lead offences, the Court increased that starting point to 8 years' imprisonment as a result of the previous offending of the Respondent, particularly noting that he had been sentenced to 9 years' imprisonment in 2014 for drugs offences, and because there was more than one drug involved, being a reference to para. 12 of the judgment in *Richards*.
10. From that increased starting point, the Court was prepared to afford a full one-third discount in respect of the guilty pleas. Reference was also made to the Respondent's good work ethic and the fact that he was assessed as having a very high likelihood of reoffending. Although the Social Enquiry Report explained that the Respondent was anticipating an immediate custodial sentence, the Court also had three letters by way of character references, including from the Respondent's mother and daughter, and explained that the Court had looked beyond the Respondent's offending and his record. However, the Court expressly referred to the possible interference with family life (citing *Bourgaize v Law Officers* (unreported, 10 December 2014)) before concluding that any impact of a custodial sentence on the Respondent's daughter and grandchildren fell outside the range of dependency and impact envisaged in such cases.
11. It is helpful to set out the opening paragraphs delivered in the sentencing remarks relating to the sentences to be imposed. They read:

“Even applying the most generous discount for your personal mitigation to add to the full one third discount for your plea you could have no complaint were you to leave today to start a prison sentence of 4 years or longer, which would ordinarily rule out any consideration of alternatives to immediate custody.

Nevertheless, the Court was struck by the letters from your family and referee and the evidence from the writer of the Social Enquiry Report that you have turned your life around. You have accommodation, you are playing a full role in family life, you have family support and you are willing to be free from illegal drugs. The Court considers

that there is a prospect of rehabilitating you and that doing so in the community represents a better chance of long-term rehabilitation than sending you to prison, Wholly exceptionally (and I cannot emphasise that enough), the Court is going to impose an alternative to immediate custody.

The Court is concerned to pass sentences which will enable the Court to sentence you for these offences if you do not adhere to the terms of the Orders or if you re-offend, so there will be a Probation Order for the supplying of Class A offences and suspended sentences which will give any future court the ability to re-sentence you to an appropriate term of immediate imprisonment, plus there will be suspended sentences which can be activated.”

12. The other paragraph that is also worth setting out is the one immediately before the sentences were imposed, which makes it clear that this was acknowledged to be an exceptional course to take:

“You have said that you would agree to any conditions or terms of any order were the Court willing to give you a chance. Your Advocate said that you would grasp the chance with both hands. That is easy to say but harder to do. Here is your chance. It will be the one and only chance. You can choose to turn your back on a 30 year past blighted by illegal drugs and continue to enjoy your freedom and your fishing trips, your own accommodation and the company of your family and dog but be in no doubt that if you do not make that choice and you come back before this Court or the Magistrate’s Court, you can expect to spend a long time in prison. The Court urges you to take this exceptional chance for yourself and for the sake of your family and for the sake of your community, which needs to see an end to your offending. Do not let them down or yourself down.”

Submissions

13. On behalf of the Respondent, Advocate Steel has chosen to make no representations.
14. On behalf of HM Procureur, Advocate Roffey relies on what is set out on the face of the application for leave to refer. He suggests first that the starting point, even after the aggravating factors were taken into account, was too low. In doing so, he refers to the 2014 conviction and the Respondent’s otherwise extensive criminal record. He also suggests that the full one-third discount was too generous given the strength of the prosecution’s case. In relation to these matters, the application states that, *“having adopted a starting point of 8 years, [the Court] erred in reducing the sentence to community-based penalties”*.
15. In the application signed by Advocate Roffey, he suggests that even with a full one-third discount for guilty pleas and any personal mitigation, the resulting sentence should have been 5 years and 4 months and that there was no justification for adopting the *“wholly exceptional”* course taken. He also suggests that there were insufficient reasons to depart from the guidelines found in *Richards*, further suggesting that the Royal Court fell into *“gross error”*, concluding that: *“If the sentence is not altered, public confidence in the sentencing process, and particularly in the crucial area of drug trafficking offences, will be damaged.”*

Legal principles

16. The provisions found in Part IIIA of the 1961 Law were inserted by the Court of Appeal (Guernsey) (Amendment) Law, 2021, with effect from 7 February 2022. Because I have been informed that neither Advocate wishes to elaborate on the documents with which I have been provided, I have decided that I can dispense with the hearing that the Registrar has to fix under

section 43J and proceed to determine this application for leave to refer on the papers, sitting as a single judge, as is permitted by section 43K.

17. Unlike when I have dealt with previous applications for leave to refer, the plenary Court has now determined those previous applications and set out the principles that fall to be applied. Indeed, on the face of the application with which I am dealing, Advocate Roffey has referred to para. 20 in *Law Officers v Trenchard* [2024] GCA 025, where the Court's judgment was given by Crow JA:

“The next step is to identify an appropriate test for determining whether a sentence is ‘unduly lenient’. Any such endeavour must tread a careful path between (on the one hand) imposing an unwarranted gloss on the statutory language and (on the other) leaving the jurisdiction so open-textured that its application would risk being arbitrary and unpredictable. In our judgment, a number of guiding principles should be kept in mind.

- (i) The first is that, in order to remain faithful to the statutory language, it is plainly not sufficient for this court merely to reach the view that the sentence was lenient: the test is ‘unduly lenient’, and real value must be given to the word ‘unduly’.*
- (ii) The second point is to recognise that this is an appellate court, not a sentencing court. Accordingly, the question in any given case is not whether this court would have passed a different sentence if it had been conducting the sentencing exercise.*
- (iii) The third consideration is to recall the unique legal structure in this jurisdiction, particularly the participation of Jurats, as noted above. That again militates in favour of interpreting the scope of ss. 43B and 43C in such a way as to keep the exercise of this court’s powers within appropriately principled constraints.*
- (iv) The fourth consideration is that any test must be clear and practical, so that it can be applied readily and predictably in individual cases.*
- (v) Finally, we are acutely conscious that this is a relatively new legislative regime and the proper scope of its operation will need to be explored and tested in individual cases over time. It would be unwise to be unduly prescriptive at this early stage.”*

18. Although there is no express reference to the following paragraph, this is where the plenary Court set out the test to be applied:

“Taking all these considerations into account, in our judgment the appropriate test for deciding whether any given sentence is unduly lenient is to ask whether it was outside the range which the trial court, applying its mind to the relevant factors (and only to relevant factors), could reasonably consider appropriate. In applying that test, although this court will plainly have regard to the process by which the sentencing court arrived at its decision, ultimately the judgment under ss. 43B is made by reference to the overall sentence that is passed.”

This reference resulted in the conclusion that the sentence imposed “was not unduly lenient, because it was not unreasonable” (para. 39).

19. This reference was heard at the same time and by the same plenary Court as *Law Officers v D1 and D2* [2024] GCA 029. The Court’s judgment was given by Fulford JA who, at para. 31, referred to the discussion in *Trenchard* to which I have just referred and repeated that “*the test on these applications ... is to ask whether the sentence was outside the range which the trial court, applying its mind to all relevant factors (and only to relevant factors), could reasonably consider appropriate*”.
20. The other passage from *D1 and D2* that can helpfully be cited is what had been referred to in *Barras, Watt and Orchard*, in turn quoting from *Wicks v Law Officers* 2011-12 GLR 482 (as set out in para. 33):

“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 [...]. 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.”

In *Barras, Watt and Orchard*, the plenary Court continued (at para. 61) by emphasising that “*the guidelines provide ample scope for the first instance court to exercise its judgment when deciding on the appropriate sentence.*” Further, the starting points are treated “*as merely the beginning of the sentencing exercise.*” Moreover, regard must be had to the constitutional role played by the Jurats, who play a full part in sentencing decisions and so “*are able to reflect and give expression to the values of the wider Guernsey community.*” All of these matters need properly to be borne in mind.

21. As a result of confirmation from the plenary Court that the approach I had taken on the applications for leave to refer in both of those cases, which I had derived in part through referring to the decision in *Attorney-General’s Reference No. 4 of 1989* [1990] 1 WLR 41, is the proper one to take, I also need to remind myself that I am principally considering whether there are arguments that can properly be deployed on behalf of HM Procureur that the combination of sentences imposed on the Respondent fall outside the range that the Royal Court could have imposed. Put another way, I need to consider whether those arguments have a realistic, as opposed to a fanciful, prospect of succeeding, bearing in mind the guidance given in *Trenchard* and *D1 and D2*.

Discussion

22. Because the Royal Court had to sentence for a mixture of drug trafficking offences and simple possession, the principles derived from *Richards* were acknowledged to be relevant in relation to the former. As the sentencing remarks set out, it involved taking starting points for the drug trafficking offences to which the Respondent had pleaded guilty. The fact that there were six Counts on the Indictment meant that the Royal Court was engaged in a sentencing exercise where all the offending related to a similar timeframe. In those circumstances, starting from the premise that the lead offences would be identified, with the other Counts being treated as aggravating those offences, there is nothing unusual about that approach. Indeed, given that three of the Counts were confined to simple possession, I suspect that they were regarded as adding little to the overall offending, despite referring to a notional 2-year starting point for possession of the MDMA, especially in the light of the totality principle applicable to this spate of offending at around the same time. However, on behalf of the Law Officers there may be scope to argue that the increased starting point should have been higher than it was.

23. It is important first to remember what this Court stated at para. 5 of *Richards*, noting that this was repeated in *Barras, Watt and Orchard*:

“... It cannot be stressed too strongly that this court is not attempting to establish for the Royal Court some sort of inflexible code that 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 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.”

24. Against that background of setting out guidelines, para. 8 deals with an appropriate starting point, being the sentence after a full trial, which is generally determined by considering two factors: *“the quantity of the drugs and the involvement or role of the defendant in the commission of the offence.”* Paragraph 12 deals with where two different drugs are involved. Although it refers to importing, this has been taken to mean involvement in any two or more drug trafficking offences where the drugs differ. Paragraph 14 refers to claims that drugs are for personal use, but that does not extend in the Respondent’s case to any of the drug trafficking offences, but rather relates to the possession offences. Paragraph 15 then deals with the effect of a guilty plea, which ends with: *“When there is no sensible alternative to a guilty plea, the discount will be more limited”*, being a qualification to the usual discount of one-third.
25. On a strict application of these guidelines, it is difficult to see how the Royal Court could have achieved any sentence other than immediate custody. Equally, it is important to remember, as this Court has set out clearly in para. 20(ii) in *Trenchard*, that this is not a sentencing court but a reviewing court and the test will not be satisfied just because I, or anyone else, might have imposed a different sentence.
26. One of the difficulties is that the Royal Court expressly took a starting point consistent with the *Richards* guidelines and then increased it because of aggravating factors. The approach taken, for example, in *Law Officers v Stewart* [2019] GRC 018 of departing from the starting point that would otherwise apply and choosing a lower starting point than the range indicated in *Richards* was not adopted. *Stewart* was a case of importing small quantities of cocaine, also a Class A controlled drug, where it was accepted that it was for the defendant’s personal use. In that case, the Court imposed sentences of 2 years’ imprisonment, suspended in each case for three years, along with a community service order of 240 hours, as a direct alternative to 18 months’ imprisonment, but each time from a significantly lower starting point.
27. Although Advocate Roffey suggests that the increased starting point before mitigation at 8 years was too low, having regard to the totality of the offending, especially where the two Counts of being concerned in the supplying of MDMA involved just seven tablets, each costing £20, whilst another Court might have ended up with a higher increased starting point, I am not persuaded that using 8 years’ imprisonment as the appropriate figure can be said to be outside the permissible range. Ultimately, from selecting the lowest point in the range, adopting the approach indicated of referring to tablets rather than powder, even with there being three drug trafficking Counts, plus the simple possessions, along with the Respondent’s prior offending, it does not necessarily mean that a higher increased starting point was inevitable. By reference to the bands in *Richards* for Class A tablets, the range for 500 to 1,000 tablets is 8 to 11 years, showing that there is an overlap with the lower range of 7 to 9 years for 1 to 500 tablets. Therefore, although there were three Counts, involving seven tablets and an unknown quantity of cannabis, all of this can be regarded as falling at the lower end of this range anyway.
28. Similarly, I am not hugely attracted to the suggestion from Advocate Roffey that the discount for plea could have lower than the one-third given. Such a discount is very much *“a very general rule”* (*Richards*, para. 15), but where a trial has been avoided there is nothing wrong in

principle in giving the full credit for the pleas. All it means is that the other mitigating factors need to fit the overall offending before sentence is announced.

29. Accordingly, the real question on this application is whether ending up with a three-year probation order for the two lead offences can be argued to amount to an unjustified departure from the approach set out in *Richards*. On the basis that there has been no departure from those guidelines in the manner in which the sentences were constructed, affording the full one-third discount before turning to other aspects of personal mitigation, means that I agree with Advocate Roffey that the Court must have had in mind a sentence in the region of 5 years and 4 months' imprisonment.
30. In the sentencing remarks, it is said that the Second and Third Counts are "*the lead offence and the Court will pass concurrent sentences on the other offences*". However, the sentences imposed for those two lead offences were probation orders. It follows, therefore, that the approach of the Royal Court appears to have been to decide that the Respondent should not be sent to prison that day and so to tailor the sentences accordingly. There is arguably sufficient flexibility to enable that to be done. In those circumstances, a sentence of 2 years' imprisonment, suspended for three years, might now appear to be the lead offence. A notional sentence of 3 years' imprisonment as "*a standalone starting point*" was given for the Fifth Count. Even if that were to be increased to reflect the totality of the Respondent's offending, once the full one-third discount is allowed, and there can be no reason to depart from that approach, it results in the sentence being the 2-year term then imposed. So whatever increase there was to this notional starting point appears to have been equally matched by the personal mitigation then also applied.
31. I mention that point because there is little by way of explanation as to how this term of imprisonment has been reached. It may be that the Royal Court chose to impose the longest period possible, and similarly to suspend for the longest period permitted, albeit that the Second and Third Counts were said to be the lead offences. Equally, if those two Counts are the lead offences, and the increased starting point of 8 years is being used, then after the discount for the pleas, apart from the acknowledgement that the Court was prepared to give the Respondent a chance and the comments about wanting to leave open the possibility of him being re-sentenced if he did not comply with the terms of the probation order or re-offended during the operational period of the suspension, it is difficult to see how the personal mitigation that is mentioned in the sentencing remarks justifies anything other than a term of imprisonment. The reference to the Respondent appearing before a Court within three years, exposing himself to spending "*a long time in prison*", rather suggests that re-sentencing for the Second and Third Counts was what the Royal Court had in mind. In turn, this implies some recognition that these offences would normally warrant long sentences of immediate custody rather than be disposed of by probation orders. Indeed, the comment made that the Respondent could not have complained if an immediate custodial sentence of "*4 years or longer*" had been imposed, rather points to the fact that the personal mitigation, including credit for pleas, would at best have warranted a sentence of half of the increased starting point.
32. In the Social Enquiry Report, there was no recommendation for any period of Probation supervision. From the sentencing remarks, it is apparent that the author of that report explained to the Court that, because the Respondent said he "*would engage with the SMART programme, she was willing to make a recommendation for a Probation Order*". The Respondent was advised about the importance of attending appointments or, if unable to do so through illness, to get an appropriate note from a doctor to explain his absence. As such, imposing the probation orders was permitted under the Probation (Bailiwick of Guernsey) Law, 2018, but it seems to me to be a significant departure from what might have been expected following pleas to two drug trafficking offences involving a Class A controlled drug.

33. I am conscious that, were I to refuse leave to refer these sentences as being unduly lenient, the application could be renewed before the plenary Court under section 43K(2) of the 1961 Law. Whilst I appreciate that the Royal Court could deal with the Respondent for all these offences without sending him to prison, and I have considered whether a different starting point would have resulted in these sentences potentially not being outside the range that could properly be imposed, because of the use of a starting point of 8 years, I take the view that there is an arguable case that the totality of the sentences for the purposes of determining this application for leave to refer fall outside the range that could be imposed. I have further borne in mind the comment in para. 20(v) of *Trenchard* that “*the proper scope of its operation will need to be explored and tested in individual cases over time*” and so consider that there is a proper basis for granting the leave to refer sought. It will enable the body of decisions under this new statutory regime to be expanded.

Conclusion

34. Whilst the sentences imposed on the Respondent were described as being wholly exceptional, even on a generous application of the guidelines found in *Richards*, it remains difficult to see how the starting point of 8 years’ imprisonment for the lead Counts results in probation orders rather than any term of immediate custody of some years. This relates as much as anything to the mitigation that is set out in the sentencing remarks. I am well aware of the comment made in the final paragraph of *D1 and D2* referring to the difference between the sentences imposed and what might have been imposed of around a year longer. Whilst I disagree that the appropriate sentence would approach 5 years and 4 months’ imprisonment, I am persuaded by the comment in the sentencing remarks that there could be no complaint if the sentence had been 4 years’ imprisonment or longer to think that the probation orders and 2-year suspended sentence can be argued to be unduly lenient. However, whether the sentences are found to be unduly lenient, rather than simply lenient, will be a matter for determination by the plenary Court, applying the test that has now been established. For the purposes of this application, I am satisfied that there is an argument to be put before the plenary Court that the sentences do indeed fall outside the permissible range available. I am also conscious of the double jeopardy to which the Respondent is exposed, but I take the view that it is preferable to grant the leave sought to enable full argument to be heard without also needing to address any question of leave.

35. In the circumstances, I am also prepared to grant legal aid to the Respondent’s Advocate so that he can properly prepare for that hearing. I am also minded to suggest to the parties that this reference should be heard as quickly as possible and ideally before the end of this year.