IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

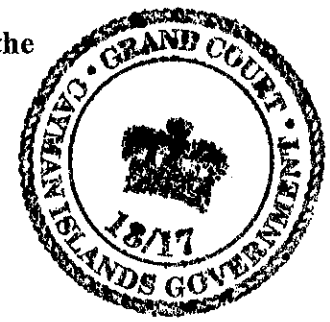
CAUSE NOs: G 209 of 2016 &
G 216 of 2018

BETWEEN: **IAN FERNANDO ELLINGTON**
Applicant/Plaintiff/Appellant

AND **THE CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS**
Defendant/Respondent

Appearances: **Mr. Alastair David of HSM Chambers for the Applicant/Plaintiff/Appellant**

Mr. Michael Smith, Crown Counsel (Civil) for the Defendant/Respondent



Before: **Hon. Mr. Justice Richard Williams**

Heard: **20-21 February 2020**

Draft Ruling circulated: **23 April 2020**

Judgment provided: **29 April 2020**

HEADNOTE

Judicial Review of automatic designation of Prohibited immigrant - Declaration of incompatibility of s.82 Immigration Law (2015 Revision) and s.109 Customs and Border Control Law, 2018 - Appeal against rejection by Immigration Appeals Tribunal ("IAT") of Residency and Employment Rights Certificate - Factors be taken into account by IAT at de novo hearing of application - Requirement to consider the Bill of Rights

JUDGMENT

The Application

1. I have before me two actions brought by the Applicant/Plaintiff/Appellant, Ian Ellington ("the Plaintiff"), against the Respondent, the Chief Immigration Officer

of the Cayman Islands ("the Respondent") which were consolidated by a Consent Order dated 9 September 2019.

2. In the first action, brought under Cause No. G 209 of 2016, the Plaintiff seeks to judicially review the decision made by an unknown immigration officer to designate him as a Prohibited Immigrant ("PI"). If the Court finds that the designation of PI upon the Plaintiff is automatic, then the Plaintiff seeks to udicially review the automatic designation.

3. In the second action, brought under G 216 of 2018, the Plaintiff appeals against the rejection of a Residency and Employment Rights Certificate ("RERC") application made by him on 13 October 2016. The Plaintiff was informed that his application was rejected in a letter from the Caymanian Status & Permanent Residence Board ("the Board") dated 12 May 2017. He appealed that decision to the Immigration Appeals Tribunal ("IAT") by an initial notice dated 1 June 2017. The appeal was argued upon written Grounds for Appeal, which were submitted on 17 November 2017. Additional grounds were submitted on 10 May 2018 and 1 June 2018 and an affidavit from the Plaintiff's spouse was filed.

4. The IAT rejected his appeal and notified the Respondent of its decision in a letter dated 10 October 2018. The Plaintiff now appeals against that rejection by a Notice dated 8 November 2018. He submits that the decision of the IAT is (i) wrong in law; (ii) a breach of natural justice; (iii) not reasonable, proportionate nor rational. An order is sought that his RERC application should be remitted to

the IAT for further consideration and the Court is invited to set out to the IAT how such matters should be considered in the future.

5. The Respondent opposes the Plaintiff's claim for judicial review of his PI designation and claims that the relevant sections of the relevant Laws[1] are not incompatible. The Respondent also opposes his appeal against the decision of IAT to refuse the appeal against the decision of the Board to refuse an application for an RERC as the spouse of a Caymanian. The Respondent denies that the IAT's decision was wrong in law, was in breach of natural justice, or was unreasonable or disproportionate.

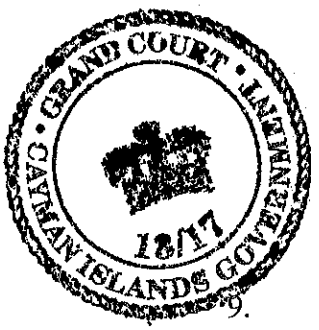
6. The Plaintiff relies upon the content of affidavits sworn by him on 10 November 2016, 13 September 2017, 28 November 2017, 17 November 2017 and 8 November 2018, as well as in an affidavit sworn by his wife, Rhonda Livingston-Ellington, on 12 June 2018 ("wife"). The Respondent has filed no evidence in this matter.

The Background

7. The Plaintiff is a 35-year-old male Jamaican national who has been resident in the Cayman Islands since 2007. On 31 August 2013, he married his former wife, Saneta Johnson ("SJ"). They had a son who was born on 11 December 2013. Their son and his former wife have had Caymanian status at all material times.

[1] See paragraph 38 below - s.82 of the Immigration Law (2105 Revision) and s.109 of the Customs and Border Control Law, 2018.

8. On 23 September 2013, only a month after his marriage, the Plaintiff was arrested on suspicion of a robbery which had recently taken place at a supermarket. In March 2014 the Respondent was sentenced to 2 years custody, having pled guilty to the offence of being an accessory after the fact to a robbery. Quin J, the sentencing Judge, did not make a recommendation for a deportation order and there is no evidence before me as to whether he put his mind to such a recommendation or whether any submissions were made before him in that regard. The Plaintiff left custody on 4 February 2015 and he was granted permission by the Department of Immigration to reside in the Cayman Islands on a tourist visa.

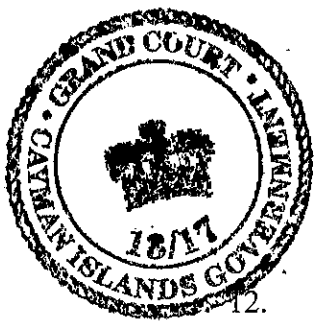


9. When he was at Her Majesty's Prison the Plaintiff made an application for a RERC as the spouse of a Caymanian, namely of SJ. That was first considered by the Board on 23 April 2015, but it was deferred because the Plaintiff was facing charges of burglary. On 14 April 2016 the application was again deferred, this time until 25 May 2016, as the outcome of the burglary charges was still pending.

10. Meanwhile, in October 2015 he began dating his present wife, whom he had met online. The Plaintiff's marriage to SJ had clearly broken down. SJ appropriately notified the Board, by letter dated 13 January 2016, that their marriage was no longer intact. She informed the Board that one of the reasons was because the Plaintiff was residing with his present wife at her residence. On 30 April 2016, understandably when considering the history and the unstable status of SJ and the

Plaintiff's marriage, the Board issued its letter setting out its decision not to approve the RERC application.

11. On 19 August 2016 the Plaintiff presented a Petition for Dissolution of Marriage. The Decree of Dissolution of Marriage was granted by McMillan J on 21 September 2016, after he had approved their consent ancillary relief order. The ancillary relief order reflected their agreement that there would be a residence order in relation to their son in favour of SJ and an order for liberal contact between the child and the Plaintiff. Provision was made for the Plaintiff to pay $200 per month child maintenance, as well as to share educational and medical costs for the child. The order illustrates an agreement and an intention that the Plaintiff will play a role in that child's life.



12. In September 2016 an unknown officer at the Immigration Department informed the Plaintiff that he was a PI and that he would only be granted leave in his passport to remain until 11 November 2016, by which date he should have left the jurisdiction. The observation that the Plaintiff was a PI was one that the immigration officer was entitled to make. The Plaintiff states that this was the first time that he had been made or became aware that he was a PI. He indicated that he had not received any letter stating that he was prohibited. He stated that no deportation order has been made against him by the Court and that he has had no hearing in relation to the designation as a PI at which he could put his case forward. There is no formal procedure to inform a person that they have, as

consequence of the provisions of s.82 Immigration Law (2015 Revision) ("the Law"), become a PI.[2]

13. On 10 November 2016, the Plaintiff, who was then represented by Steve McField & Associates, filed his application for leave to apply to judicially review the declaration of him as being a prohibited person, and he sought an injunction to prevent his removal from the jurisdiction pending the conclusion of the proceedings. The ex parte leave application[3] came on before Carter J on 14 September 2017 and she granted leave to apply for judicial review and made an injunction restraining the Respondent from requiring the Plaintiff to leave the jurisdiction prior to the conclusion of the proceedings. The Learned Judge also ordered that *"For the avoidance of doubt, the Applicant has permission to argue that section 82 (h) Immigration Law (2015 Revision) is incompatible with the Constitution of the Cayman Islands."*

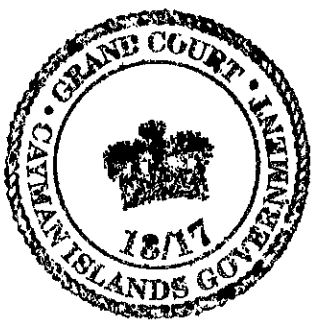
14. On 29 September 2017 the written grounds upon which judicial review is being sought were filed by the Plaintiff.

15. On 1 October 2016, after courting for only twelve month[4] and less than a month after he had been notified by Immigration of his PI status, the Plaintiff married his present wife, who has Caymanian status. Therefore, at the time of the marriage,

[2] No evidence was filed by the Respondent in the proceedings to outline any procedure.
[3] The application was made at the hearing by HSM Chambers, who had come on the record for the Plaintiff on 13 September 2017.
[4] See paragraph 10 above.

one would expect both he and his wife to be aware of his PI status and they both should have been aware that the designation would be an obstacle they would have to surmount if he were to apply for an RERC or to be able live together as husband and wife in the Cayman Islands. On 14 October 2016 a letter of application for RERC signed by the Plaintiff and his present wife was submitted to the Board.

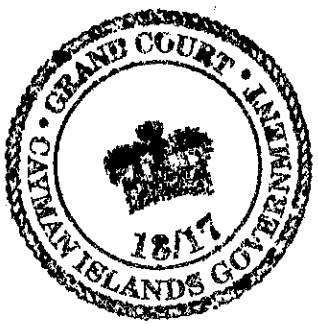
16. In his affidavit sworn on 28 September 2017, the Plaintiff states that initially his RERC application was approved on 12 January 2017. During the hearing, the Plaintiff produced a letter dated 30 June 2017 from the Deputy Chief Immigration Officer concerning the rescission of a grant of RERC to him. The letter made reference to him being told on the telephone on 13 January 2017 that his application had been approved, but then went on to say that it been communicated to him by email on 16 January 2017 that the approval had been made erroneously by the Board and that it would be reconsidered on19 January 2017. In the letter, the Plaintiff was informed that, when the grant had been made, a number of matters were not put before the Board, *"including Mr. Ellington's criminal history, the fact that he is a prohibited immigrant and his current deportation issues."* The letter stated that for this reason the formal approval letter was not generated or mailed to him and that the application was understandably rescinded by the Board.



17. On 19 January 2017 the Board deferred consideration of the RERC, the application for a marriage check and random home visit in respect of his present marriage. The marriage check was completed on my March 2017.

18. In March 2017 the Plaintiff appeared before the Summary Court and he was fined for the offences of using a vehicle without a certificate and using a vehicle with expired registration.

19. The Board considered the RERC application on 27 April 2017 and noted that the findings of the marriage check indicated that the marriage did not appear to be one of convenience. By a letter dated 12 May 2017, and served on him on 31 May 2017, the Board notified the Plaintiff that his application for the grant of RERC had not been approved. The reasons for the refusal set out in the letter were:



> *"... The Board considered in depth the history of Mr. Ellington in the Islands and noted his current immigration designation as a Prohibited Immigrant in light of his criminal history. Whilst the Board noted that Mr. Ellington is the parent of a Caymanian child, it is troubling to see that he continues to run a-foul of the Laws of the Islands, having recently been arrested again. The Board has serious concerns with the character of the applicant and is of the opinion that his continued presence in the Islands is not in the best interests of the community as a whole."*

20. On 2 June 2017 the Plaintiff filed his Letter of Appeal dated 1 June 2017. On 22 October 2017 the Board provided a copy of its Appeal Statement outlining the reasons for refusing the RERC application.

21. In its Appeal Statement, the Board repeated the above extract from the 12 May 2017 letter and noted under the heading Reasons for the Board's Decision:

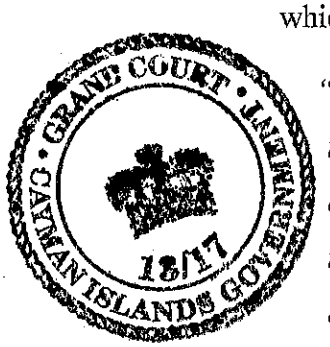
> *"With regard to the aspect of family life, it was observed that Mr. Ellington's recidivism demonstrates his inability or lack of interest to provide a positive example for his Caymanian child and family. It would appear that he has not considered the impact of his criminal actions might possible (sic.) have on his standing in the Islands or the welfare of his family.*
>
> *The refusal of Mr Ellington's application has its basis in the Immigration Law, and such immigration controls serve legitimate aims of "public safety, public order and public morality."*
>
> *Mr. Ellington's conduct since coming to the Islands has not been one of good morals, good citizenship or a positive example for his family. The Board assessed the circumstances to strike a fair balance between Mr. Ellington's right to family life and the interests of public safety and the prevention of disorder and crime.*
>
> *As a result of his wanton disregard of the Laws of these Islands, the Board has serious concerns with the character of the applicant and is of the opinion that his continued presence in the Islands is not in the best interests of the community as a whole. As such, the application was therefore refused."* [My emphasis]

In the statement, the Board also stated that, when the Court imposed the custodial sentence, the Plaintiff:

> *"Pursuant to Section 82(h) Immigration Law, having been sentenced to more than 12 months imprisonment, became a Prohibited Immigrant. As a prohibited Immigration (sic.), the Appellant was no longer legally allowed to reside on island and as such was subject to Deportation Order."*

From the Appeal Statement it is evident that the Board felt and understood that, when determining the RERC application, there was a requirement for it to consider the right to family life and balance that against the interests of public safety.

22. On 10 October 2018, the Plaintiff submitted his written Grounds of Appeal in which he requested that:



"The Board's decision should be set aside so that a hearing de novo could take place, which is procedurally fair, is based on admissible and relevant evidence only and which leads to a reasonable decision made with due regard to the correct statutory and human rights considerations properly and correctly applied."

It was further requested that, if a de novo hearing was to take place, the IAT also consider the Plaintiff's affidavit which had been provided in support of the Grounds of Appeal.

23. The IAT's 'minutes' record that on 19 April 2018 the IAT had *"carefully considered"* the Notice of Appeal, the Board's Appeal Statement and detailed grounds dated 17 November 2017. It recorded that the IAT was satisfied that the grounds of appeal were established under breach of natural justice, as the Board had not given the Plaintiff the opportunity to address a complaint that was submitted by SJ. The 'minutes' record that the hearing of the appeal was then deferred for 28 days to enable the Plaintiff to provide further information for

consideration, namely details of his current relationship with his Caymanian family, to include a sworn affidavit from his present wife.

24. On 10 October 2018, the IAT drafted its letter in which it communicated to the Plaintiff its decision to dismiss the appeal as it had determined *"that the grounds of appeal had not been established"*. The IAT stated in the letter that:

> *"By unanimous vote the Tribunal refused to grant RERC as a result of consideration of the appellant's character under section 31(3) (c) of the Immigration Law (2015 Revision), namely his conviction and sentence to 2 years imprisonment. His wife stated that her husband, Mr. Ellington served 14 months in prison. The Tribunal accepted that the marriage was stable and accepted that the CS/PR Board acted improperly in referencing/relying on the ex-wife (Saneta Johnson) letter without giving the appellant an opportunity to address the allegations, but the one allegation that remains is the conviction."*

25. The undated and unsigned 2 page 'Minutes' of the relevant IAT hearing added little to the reasons for decision given in the letter. The 'Minutes' contained only two brief paragraphs in relation to the actual decision made by the IAT. It recorded that, when the appeal was heard on 23 August 2018, it was dismissed unanimously by the seven members of the IAT. Under the heading *"Conclusion"* the Minutes recorded that:

> *"The Tribunal considered the notice of appeal dated 1st June 2017, appeal statement dated 9th September 2017, 10th May 2018 and 12th June 2018. It was determined that grounds of appeal had not been established."*

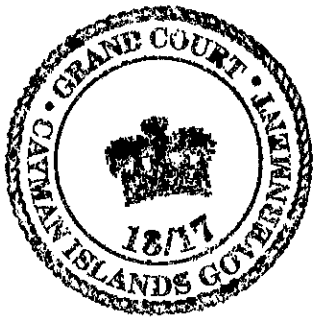
The 'Minutes', then recorded precisely the same wording that was set out in its above-mentioned letter dated 10 October 2018.[5]

26. From the evidence before me it is evident that the IAT, unlike the Board, did not feel there to be a requirement for it to consider the right to family life and attempt to balance that against the interests of public safety. There is no mention in either the 'Minutes' or the letter of 10 October 2018 about any consideration being given to the potential effect of the decision on the Plaintiff's son. There is also no mention of any consideration being given to (i) the potential effect on his present wife and on his step daughter (DOB 1 March 2014) if the Plaintiff was not permitted to reside in the Cayman Islands leaving them behind here or, (ii) to the effect upon that child's relationship with her Caymanian biological father if the mother felt compelled to leave the Cayman Islands with the Plaintiff. It emerges from the Plaintiff's evidence, his wife's affidavit and the exhibited letter from the child's biological father to the IAT dated 17 October 2017, that the step child is treated as a child of the marriage[6] by the Plaintiff and his present wife. There is no evidence from the Respondent to suggest otherwise and, in fact, the written conclusion by the IAT that the marriage is a stable one tends to support a finding that the child is treated as a child of the marriage.

27. Whether or not 'family life' is present in a case is a question of fact. I am satisfied for the purposes of the current proceedings, based on the unchallenged evidence

[5] See paragraph 24 above.
[6] See definition of child of a marriage at s.2(1) Matrimonial Causes Law (2005 Revision).

before me, that the core test of the real existence in practice of personal ties exist between the Plaintiff and his wife. The European Court of Human Rights ("ECtHR") regards *"lawful and genuine"* marriage as amounting to family life, this can be so even if the couple had not yet been able to establish a home together.[7] Minor children are regarded as having a relationship of family life with biological parents, even if they do not live together[8], and the ECtHR has consistently held that in the absence of exceptional circumstances the parent-child relationship automatically gives rise to family life. I am therefore also satisfied that the test is met in relation to his biological son[9] and that there is potential for all of these ties to develop further.



28. The chronology of events is not contentious and is on the whole accepted by the Respondent in paragraph 3 of his Skeleton Argument.

Judicial Review – Designation as Prohibited Immigrant

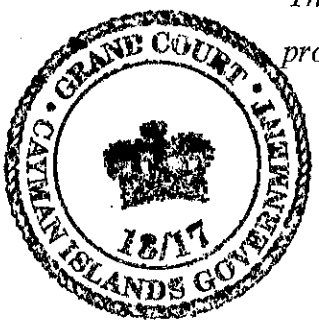
29. The Plaintiff initially submitted that the first issue for the Court to resolve is whether or not the designation of PI is automatic, or whether there is a consideration and a subsequent determination. In the Skeleton Argument it was argued by the Plaintiff that a decision must be made to conclude that a person is a PI. On the other hand, the Respondent rightly contends that a person who fits the criterion set out in s.82 (h) of the Law is automatically, without a further

[7] ***Abdulaziz, Cabales & Balkandali v United Kingdom*** (1985) 7 EHRR 471.
[8] ***Berrehab v Netherlands*** Application no. 10730/84 - where the unmarried parents did not live together and the father had regular contact with the child.
[9] See paragraph 11 above.

consideration, designated as PI. He correctly asserts that the grammatical meaning of the section is clear.

30. The relevant part of s.82 of the Law to this case provides:

"The following persons, not being Caymanian or permanent residents, are prohibited immigrants-



(h) a person who, not having received a free pardon, has been convicted in any country of an offence for which a sentence of imprisonment of or exceeding twelve months has been passed otherwise than for non-payment of a fine." [My emphasis]

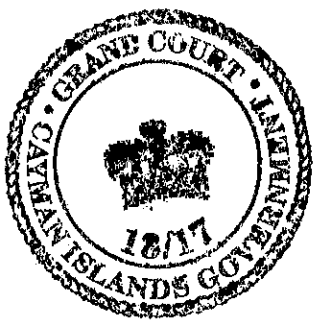
31. In his oral reply to the Respondent's submissions, Counsel for the Plaintiff sensibly indicated that he recognised the force in the submissions made on behalf of the Respondent. Although he did not go so far as to concede the point, he now took a neutral position.

32. I am satisfied that the meaning in s.82 of the Law is clear and uncontentious. A person who is not Caymanian or is not a permanent resident automatically becomes a PI if he falls within any of the criterion set out in subparagraphs (a)-(h). In light of the appropriate position now taken by Mr. David, I do not deem it necessary to address the arguments on this point raised in his Skeleton Argument.

33. Accordingly, as the Plaintiff is not Caymanian or a permanent resident, and as he received a custodial sentence of two years I find that he is automatically designated as a PI pursuant to s.82(h) of the Law. There is no requirement for

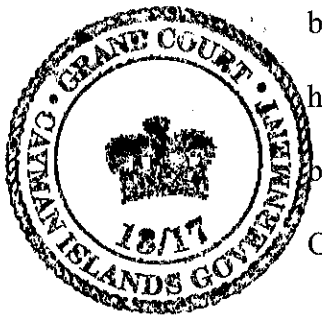
there to be a decision made by a body or individual to determine the issue or to formally make the designation.

34. The Plaintiff contends that, if it is an automatic designation, it is a breach of ss.7 and 9 of the Bill of Rights ("BOR"). It is argued that the designation as a PI is in effect, a *"removal order by operation of law"*, as it does not come with any of the protections provided for a deportee by the procedures set out at ss.88 and 89 in the Law.



35. Section 88 of the Law provides that there should be no deportation order made under the Law otherwise than in the case of (a) a convicted and deportable person; (b) a person has been convicted of an offence contrary to ss. 56[10] and 78(1)(c)[11] of the Law; or (c) a person has been sentenced in the Islands to prison for not less than six months unless a Magistrate has reported on the case and then Cabinet having had regard to the findings of fact and conclusions of law and any recommendations in the report is satisfied that the deportation order may be properly made. In such circumstances, before a report is obtained, s.88(2) of the Law provides that a notice must be served on the person. That notice should provide a person with reasonable information about the nature of the facts alleged against him and details about the grounds upon which it is alleged that a deportation order should be made. The notice requires the person to show cause why such an order should not be made in sets out the date for his appearance

[10] Offence of engaging in gainful occupation and offence of failing to comply with a condition in a work permit.
[11] Offences relating to illegal landing (including over staying) and powers of arrest.



before the Summary Court. Section 88(3) of the Law set out requirements of the hearing, which includes evidence being taken by parties who may be represented by an attorney and from their witnesses before the Magistrate reports to the Cabinet.

36. Section 89 of the Law makes provision for the Governor to make a deportation order is respect to certain specified persons including a *"convicted and deportable person"*. It is submitted by the Plaintiff that the Governor should exercise his powers in a manner consistent with the approach in s.88 of the Law.

37. The Plaintiff highlights that, unlike in the deportation situations, a person when being designated as a PI is not afforded the right to make submissions, call evidence and have a hearing at which he can be heard.

38. In such circumstances it is contended that s.82 of the Law is incompatible with the BOR and a declaration to that effect should be made. It is also contended that s.109 of the Customs and Border Control Law, 2018, (the "Customs Law") which mirrors s.82 in the Law is also incompatible with the BOR.

39. Initially, the Plaintiff submitted that the Law and the Customs Law should be regarded as 'existing laws' pursuant to s.5 of the Constitution and therefore the Court should rewrite the sections to make them compatible with the Constitution. Mr. Smith rightly highlighted that they were not existing laws as they were both

wholly new laws, which came into effect after the appointed day. When it came to his oral submissions, Mr. David again sensibly recognised the force of the submissions being made and again took a neutral position. Accordingly, it would not be appropriate for this Court, even if the sections are found be incompatible, to consider rewriting the sections.

40. A core argument relied upon by the Plaintiff in support of his incompatibility contention arises from the effect of s.66 and s.67 of the Law. s.66 of the Law provides:

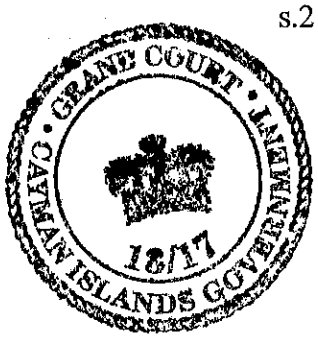
> *"Without prejudice to any of the succeeding provisions of this Law, it is an offence for any person other than a person -*
>
> *(a) who is Caymanian; or*
> *(b) who is not a prohibited immigrant and satisfies an immigration officer that he is-*
>
> *(i) authorised to carry on a gainful occupation under section 48, 53 ,54 or 54A;*
> *(ii) a person named in a work permit as a dependant of the licensee;*
> *(iii) a person who is exempted under section 40 or a dependant of such a person; or*
> *(iv) a person who has permission to reside or to remain permanently in the Islands under Part IV,*
>
> *to land in the Islands, without, in each case, specific permission, with or without the imposition of conditions or limitations, being given by an immigration officer."* [My emphasis]

41. Section 67(1) of the law provides:

> *"Persons other than those referred to in section 66, and who are not prohibited immigrants, may be granted permission to land in the Islands as visitors for a period of up to six months, subject to extension, from time*

to time, for further periods not exceeding six months on each occasion upon application." [My emphasis]

42. Importantly the definition of the word "*land*" found in s.66 is wider than simply gaining entry or being admitted to the Cayman Islands. The definition is found at s.2 of the Law which provides:



""land" means to go to, to be, to remain or to reside in any place in the Islands other than -

(a) on board a vessel; or
(b) in a place under the control of an immigration officer in his official capacity;" [My emphasis]

43. Having regard to ss.66 and 67, the Plaintiff rightly submits that the designation as a PI pursuant to s.82(h) of the Law removes from that person any right to reside in the jurisdiction and technically places him in breach of the law on each and every day he remains in the jurisdiction after his release from custody. This proposition was accepted by Counsel for the Respondent during his submissions at the hearing and he conceded that, as the RERC had not been granted, pursuant to s.31(6) of the Law, the Plaintiff had no right to work or permission to reside in the Cayman Islands. This means that a person in the Plaintiff's position, namely a non-Caymanian or non-permanent resident who is in the jurisdiction and who has been convicted of an offence and been sentenced to over 12 months in custody is in effect required to leave the jurisdiction immediately upon release from Her Majesty's Prison as he cannot lawfully remain. In the absence of an appropriately worded injunction order, if he decides to remain to try to challenge his removal or to make an application to regularise his immigration status, he can only do so by

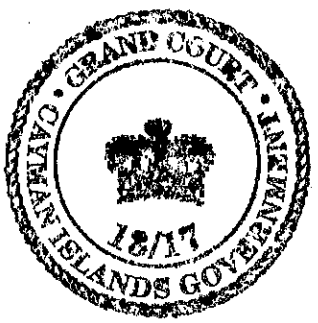
being here illegally as permission to remain until the determination of that challenge or application cannot be given to him by an Immigration Officer under the Law.

44. Although the Plaintiff upon his release had initially been given permission by the Immigration Department to remain in the jurisdiction (notably initially at a time when the Department did not seem to be aware of the fact that he was a PI), it appears that that permission was not lawful, as pursuant to s. 67(1) of the Law it could not be given by an immigration officer to a PI. The reason why the Plaintiff has been able to lawfully remain, especially having regard to the fact that he was told by an Immigration Officer that he had to leave by 11 November 2016, is due to the Injunction Order of Carter J made on 14 September 2017, such authority coming to an end upon the determination/conclusion of these proceedings. If he had not applied for judicial review and obtained that order from Carter J, he would have had to leave the Cayman Islands or unlawfully remain as an over stayer pending the determination of his RERC application and any other application that he may be able to make.

45. The designation of PI in effect means that a person is compelled to leave without having being able to go through the procedures in s.88 and s.89 of the Law, unless he chooses to remain unlawfully. It is contended that, as none of the statutory constitutional protections in deportation matters are available when there is a PI designation, and because if an individual remains in the Islands to make any

challenge or application he thereby commits an immigration offence, the situation is *"wholly inconsistent"* with the right to a fair trial at s.7 BOR, the right to private and family life at s.9 BOR and the right of movement at s.13 BOR. It is also contended that the procedure *"falls foul"* of s.19 BOR, which requires all decisions of public officials to be lawful, rational, proportionate and procedurally fair and that every person whose interests have been adversely affected by such a decision have the right to request to the given written reasons for that decision.

46. I note with interest that, as raised by the Plaintiff, in the United Kingdom pursuant to s.32 UK Borders Act 2007 ("the Act") a foreign national may be subject to 'automatic deportation' if he or she has been convicted of an offence in the UK, and sentenced to a period of imprisonment of 12 months or more. This is because such an individual's deportation is automatically considered to be beneficial to the public good. This is presumably the same understandable reason why non-Caymanian, non-permanent residence individuals convicted of certain offences are designated as PI in the Cayman Islands. However, significantly in the UK, the Secretary of State may revoke such a deportation order in certain limited circumstances, one of them being when an exception under s.33 of the Act applies. One of the exceptions under s.33 of the Act, namely at s.33(2)(a) of the Act, is where it is found that the removal of the foreign national would breach that person's Convention rights.



47. The Immigration Directorate Instructions Deporting Non-EAA Foreign Nationals (Version 3.1, April 2015) notes that s.33 of the Act sets out exceptions to automatic deportation and that, whilst an exception applies, automatic deportation cannot continue. Importantly, at 2.4.2 under the heading *"Asylum and human rights"* it states that:

> *"If deportation would breach the person's rights under the European Convention on Human Rights (ECHR) or the UK's obligations under the Refugee Convention then the exception at section 33(2) applies.*
> *Where deportation is pursuant to section 32 of the UK Borders Act 2007, asylum and human rights claims must be considered in full before a deportation order can be signed.*
> *If there is found to be a breach of the UK's obligations under the Refugee Convention or of ECHR then deportation under either the UK Borders Act 2007 or the Immigration Act 1971 will not be possible."*

Regrettably, I note that there is no human rights provision similar to s.32 of the Act or at all in the Law or the Customs Law.

48. These provisions, although not relevant to the actual designation as a PI, therefore require consideration of a PI's Convention rights before the automatic deportation order can be carried out. It is submitted by the Plaintiff that the provisions in the Act illustrate, when a designation of a PI (which it is submitted results in in effect deportation or removal by operation of law) in the absence of any consideration of the BOR, why s.82 of the Law and s.109 of the Customs Law are incompatible with the BOR. The Plaintiff contends that the Laws should provide safeguards, for example a similar BOR exception consideration, when it comes to designating

person as a PI. Mr. David suggests that the PI should be notified prior to the end of their sentence that he is designated as a PI, but provide him with an opportunity to make submissions as to why his removal under a PI should not be made or to pursue an appropriate application to regularise his immigration status, both taking into consideration the provisions of the BOR. He suggests that s.88 of the Law could provide a procedure to deport a PI in which rights under the BOR could be considered if it was utilised while the person was still in custody, with a deportation order then taking effect upon the conclusion of the sentence.

49. The Respondent states that there is no decision to make a deportation order in this case; all that has happened is that there is a statutory designation of the Plaintiff as a PI as he has met the reasonable criteria which exists to protect the public. The Respondent highlights that there is no expressed legal power under the Law and the Customs Law to remove or deport a PI.

50. The Respondent contends that the Plaintiff's submission that PI amounts to an effective deportation is *"wholly misconstrued"*. In support of this contention his Skeleton Argument correctly stated that PI status may prevent the Plaintiff, pursuant to s.67 of the Law, re-entering the Cayman Islands, but then wrongly added that *"it has no effect in itself on his status if he does not leave"* and that s.66 and s.67 of the Law *"has nothing to say about the status of persons already in the islands who become PI's"*.

51. In his Skeleton Argument the Respondent wrongly submits that the Plaintiff has *"completely misconstrued"* the effects of ss.66 and 67 of the Law. He, due to an inaccurately restrictive interpretation of the word *"land"*, incorrectly then submitted that the sections do not mean that a person on the Island who becomes a PI is committing an offence if he remains. It is evident that at the time when the Skeleton Argument was drafted, the Respondent was wrongly of the belief that the word *"land"* meant entry or admittance into the Cayman Islands and did not also mean to remain or to reside. During his oral submissions Counsel for the Respondent, recognising the wider statutory definition of the word *"land"*, conceded that a PI designation would itself make someone unlawfully present.

52. Based on his flawed interpretation of ss.66 and 77 of the Law, the Respondent reiterates that the designation of PI does not ensure removal or deportation by operation of law, or at all. At the hearing Counsel for the Respondent accepted that, in the absence of a grant of RERC, the Plaintiff does not have a right to work or reside and would be unlawfully in the Cayman Islands pursuant to s.66 of the Law upon release from prison. Despite this, he contended that it did not change his contention that this does not make the sections incompatible as the actual decision to remove or deport still remains *"entirely discretionary"*.

53. The Respondent correctly noted that the refusal of the RERC, in the absence of any *"further leave to remain"* be granted, means that an unsuccessful applicant would then be subject to a direction for removal under s.101(1)(a) of the Customs

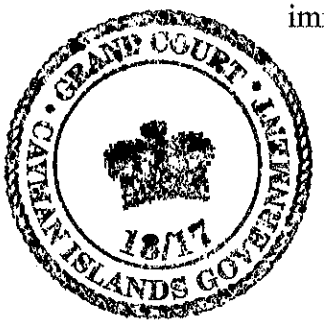
Law or deportation under s.120(1)(d) of the Customs Law. The Respondent highlights that if a decision is made by a public official to deport, then that decision must follow the statutory procedural requirements and be *"lawful, rational, proportionate and procedurally fair"* and *"the affected person has the right to request and be given written reasons for the decision".*[12] The Respondent adds that any such discretionary decision may be challengeable by way of judicial review and it will be at that stage when the BOR safeguards can be addressed. This would all have merit if one was not dealing with an unsuccessful RERC application made by an individual like the Plaintiff who is designated as a PI. It fails to recognise that the effect of s.66 and s. 67 of the Law for a PI is that *"leave to remain"* cannot be granted by the Immigration Department and that a criminal offence would, unless there is a court order preventing his removal, be immediately committed if he remained after his release from custody.

54. It is argued by the Respondent that the designation of PI does not ensure removal or deportation by operation of law, or at all. He highlights that there is no legal power under the Law and the Custom Law to remove or deport a PI. The Respondent points out that someone in the Plaintiff's situation, who remains when the RERC has not been granted, may be removed from the Islands, in accordance with directions given by an Immigration Officer not below the rank of Assistant Director[13] or the Cabinet may, if the Cabinet thinks fit, make a deportation order pursuant to s.120(1) of the Law. It is contended that the actual deportation of the

[12] Section 19 BOR.
[13] Section 101(1)(a) of the Customs Law.

Plaintiff is therefore not automatic, but will be at the discretion of an Assistant Director or the Cabinet.

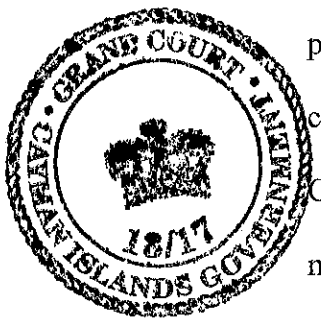
55. The Respondent submits that the PI does not amount to an effective deportation as the Plaintiff has the option of requesting an *"entry permit"* from the Cabinet pursuant to s.90 of the Customs Law or s.63 of the Law. It is contended that it was intentional that this decision be reserved to Cabinet rather than being left to an immigration officer. S.63 of the Law and s.90 of the Customs law provide:



"Notwithstanding anything contained in this Part, the Cabinet may issue a permit for the landing of any such person to the Islands, and such person shall be admitted accordingly upon such terms as may be specified in the said permit."

56. It appears that the Respondent is suggesting that the Plaintiff apply for an entry permit, although such a permit would clearly enable a person to be admitted into the Islands, it is unclear (and the parties made no submissions about) what the effect of such a permit would be for a person thereafter remaining in the Cayman Islands. Presumably the authority for and nature of their remaining may possibly be set out as a term in the permit. Despite relying upon this as a possible avenue for the Plaintiff which could result in a discretion being exercised or reviewed with BOR considerations having to be applied, the Respondent has not produced any evidence about the practicalities of such an application and how realistic such an approach would be for a PI. There is no evidence filed about how many such applications are actually made and or how long it may take to process the same.

57. The Cabinet may feel that less weight should be given to family life or relationships formed if an applicant is in the Cayman Islands unlawfully, especially if the relied upon relationship is a short one commenced after a person has been designated as being a PI. It may be more difficult to succeed with family life arguments based on time in the Cayman Islands when an applicant has no lawful leave to remain. If one is being realistic, it is likely that the Cabinet may well take a similar unsympathetic approach to such a person, especially if he is here unlawfully, when deliberating on an application for an entry permit or Cayman status. The PI designation in the absence of any the provision of any procedure to review the resulting removal consequences, prior to release from custody, places the person in an invidious situation because if he fails to leave the Cayman Islands upon release he is committing a serious offence and the Cabinet may well look dimly on that.

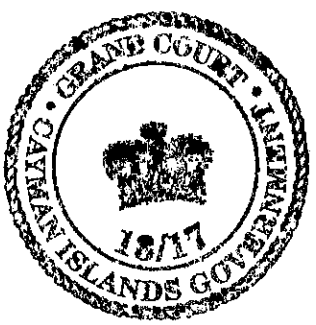


58. If it is suggested that the Plaintiff could apply for a grant of Cayman status from the Cabinet, then that is wholly unrealistic. The Cabinet may only make four grants of status per annum to highly deserving applicants and it is hard to imagine that such a grant would be considered for a person with the Plaintiff's background.

59. The Plaintiff with some force counters the Respondent's submissions by arguing that the matter should be approached in a realistic manner and that there should be recognition about what the actual consequences of a PI designation are. He rightly

says that the legislation does not enable a member of the Immigration Department to provide a PI with permission to remain in or be a visitor[14] to the Cayman Islands upon release from custody. This means that someone in the Plaintiff's position has the option of leaving the Cayman Islands and likely thereby breaking up his family unit or remaining here unlawfully[15] and possibly being arrested. If he remains in the Island, unless a court orders otherwise by means of injunction, the only way in which he can challenge a removal decision by means of judicial review is if he first commits a criminal offence, resulting in deportation being considered. Also in this matter, as the RERC had not been granted, pursuant to s.31(6) of the Law, the Plaintiff had no right to work or permission to reside in the Cayman Islands.

60. The rule under s.25 of the BOR is that, so far as possible, legislation must be read and given effect in a way compatible with the rights set out in the BOR. The task for the Court is to look for the interpretation of the legislation that gives effect to the rights contained in the BOR. The Court should search for compatibility in the relevant legislation rather than the incompatibility. If it is not possible to read and give effect to primary or subordinate legislation in a way which is compatible with the BOR it may make a declaration of incompatibility.[16] Such a declaration does not change the law.[17]



[14] Section 67(1) of the Law.
[15] Section 66 of the Law.
[16] Section 23(1) BOR.
[17] Section 23(2) BOR.

61. There would be more force in the Respondent's submissions if the definition of *"land"* used in Law was as narrow as he first believed it to be, namely restricting a person entering the Islands. That would mean that under s.67(1) the Chief Immigration Officer could give permission to remain, which would at least enable a PI to be in the jurisdiction to seek review of the effects of a PI designation or to make any feasible application to remain to challenge the making of a deportation order without committing an offence under s.66 of the Law.

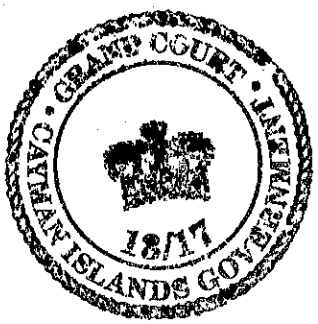
62. Although it is understandable why the Legislature might legislate, for the public good, that foreign nationals should be subject to automatic deportation if they have been convicted of any offence in the Cayman Islands and sentenced to a period of imprisonment of 12 months or more to, for example, protect the public, there still should be in the legislation provision for an appropriate avenue for consideration to be given as to whether the effect of a PI designation might be reviewable if it amounts to a contravention of rights under the BOR.

63. The automatic designation of PI, with a consequence of what is in effect an automatic deportation, in the absence of any provision[18] enabling a review to be conducted taking into account BOR considerations in particular the right to Family Life, makes s.82 of the Law and s.109 of the Customs Law incompatible with the BOR. This is even more so because, even if there existed a realistic avenue for review, if the PI remains in the Cayman Islands after his release from

[18] For example possibly along the lines of the avenue available in England and Wales (see paragraphs 46-48 above).

custody provisions in the Law mean that he would be committing a criminal offence.

64. The contentions put forward by Respondent, initially based on an inaccurate interpretation of the word *"land"* and of the consequences of s.66 and s.67 of the Law and based on the suggested unrealistic avenue for considerations by means of an application to Cabinet for an entry permit, do not have force or adequately address the lack of opportunity for consideration of a PI and his family's rights under the BOR.



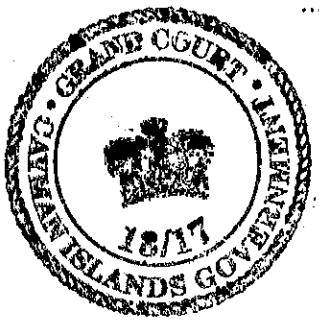
Appeal of IAT Decision

65. The decision of the IAT was reached after considering *de novo* the Plaintiff's application for an RERC. The IAT on one hand rightly granted the appeal against the Board's decision which it overturned, but on the other hand, upon rehearing the application, it refused the same.

IAT Wrong in Law

66. As already mentioned, the first ground of appeal is that the decision of the IAT was wrong in law. It is contended that the IAT failed to take into account factors including the Plaintiff's and his family's rights under the BOR.

67. Section 31(3) of the Law sets out the factors which the Board shall take into account when considering an application for an RERC. The section provides that

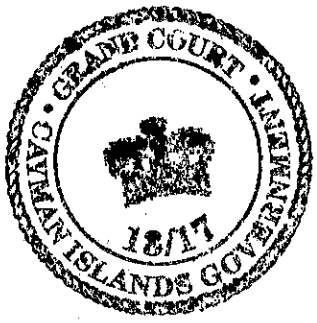


"...the Board shall take into account the following, namely that -

(a) the spouse of the applicant is Caymanian;
(b) the marriage is not a marriage of convenience;
(c) the applicant is of good character;
(d) the applicant is in good health as evidenced by a recent medical certificate;
(e) the marriage is stable; and
(f) the applicant and his spouse have sufficient financial means to support himself and his dependants listed on the application as accompanying him."

68. Both parties agree that the Law required the IAT to consider the factors set out in s.31(3) of the Law at the de novo RERC hearing. However, the Plaintiff contends that, in the absence of wording such as *"only"*, it was not intended that that the list of factors therein would be an exhaustive list. The Plaintiff suggests that additional factors could include (i) his ability to remain in the jurisdiction if he was not granted a RERC; (ii) his right to a family life; (iii) his present marital family and his biological child's right to a family life; (iv) the ability to maintain his family life outside of the jurisdiction; and (v) a review of the nature of his conviction, his culpability and his rehabilitation. The factors (ii) to (iv) are all BOR considerations.

69. The Respondent on the other hand contends that, due to the words used (and not used) in the subsection, the list of factors in s.31(3) of the Law is exhaustive. It is argued that the *expressio unius exclusio alterius* principle applies where a Law mentions one or more things, and by implication it excludes other things of the same kind. I note that the principle refers to things of the same kind. It is submitted that the use of the word *"namely"* in the subsection suggest that the



factors listed from (a)-(f) are intended to be exhaustive. The Respondent argues that it would have been unlawful for the Tribunal to consider the other factors highlighted by the Plaintiff.[19]

70. Some rights under the BOR are absolute and some are qualified. Section 9 BOR, right to respect for family life and privacy, is a qualified right, and it may be breached in circumstances provided for in the qualifying provisions of that right. There is also a third group, which includes s.7 BOR, right to a fair trial, which has effect in prescribed circumstances.

71. The BOR does not give primacy of one right over others, but courts and public officials considering its application often have to navigate between competing rights and balance the same when reaching a decision. When conducting the balancing exercise consideration should not only be given to the rights of the individual but also to the right of the community, which includes the right to be protected from persons whose actions may impinge on public safety. This does not mean that the majority's views will automatically be given precedent, because the balancing of rights should ensure that minorities receive fair and proper treatment, especially if there may be an abuse of a body in a dominant position.

72. The Plaintiff's family life consists of his relationships with members of his family. Therefore his relationships with his wife or any relevant children under 18 are considered to be family life that he has a right to have, protected under s.9 of

[19] See paragraph 68 above.

the BOR. The wording of s.9(1) BOR implies a positive obligation on the part of the state to respect existing family life, not just a negative duty to avoid expulsion. If there is a failure to respect family life, the question moves on to whether the interference is necessary or reasonably justifiable in a democratic society for a reason permitted in s.9(3) of the BOR.

73. In addition, the right to marry and to found a family is a fundamental right protected by s.14 BOR. Baroness Hale stated at paragraph 67 in ***Regina (Aguilar Quila & another) v Secretary of State for the Home Department*** [2011] UKSC 45 that:

> *"Married couples also have the right to live together. This is inherent in the right to found a family, which is coupled with the right to marry in the universal declaration, the ICCPR and the Human Rights Convention".*

In a similar vein the European Court of Human Rights, at paragraph 62 of its judgment in ***Abdulaziz, Cabales & Balkandali*** **v** ***United Kingdom*** (1985) 7 EHRR 471[20], stated:

> *"The expression 'family life' in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of article 12[21], for it is scarcely conceivable that the right to found a family should not encompass the right to live together".*

74. With the above uncontroversial statements in mind it follows that, in an application by a person for residency rights under an RERC if their spouse is a

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[21] Section 14 BOR.

Caymanian settled in the Cayman Islands, consideration must be given to both spouses' rights under s.9 BOR. Arguably this is even more important when the IAT, as they did in this case, know that the appellant is a PI, due to the detrimental consequences to the family unit that will likely flow from the refusal. Accordingly, I do not accept the Respondent's submission that s.9 is not engaged because the RERC decision does not automatically lead to a removal or deportation.

75. That said, whilst the BOR recognises that people have the right to a family and private life, when applying the law there is a recognition that the state has the right to exercise immigration control. The s.9 BOR duties do not impose a general obligation on the state to uphold the choice by a married person of the country of their matrimonial residence and to accept non-national spouses for permanent settlement in that country. It does not appear whether any consideration has been given as to what obstacles, if any, there were to establishing family life in the husband's home country or whether there is a special reason why that relocation could not be expected of them. The fact that the Plaintiff's wife is Caymanian does not, of course, in itself mean that the RERC application should be granted, it is but one important factor. I accept that the Respondent's wife should have known that he would need to be granted an RERC to enable him to remain and that his criminal conviction, even if unaware at the time that he had been automatically designated as PI, may be a considerable negative factor in the RERC application process.

76. I am satisfied that s.9 BOR arguments in a RERC application or in cases where the remaining parent or child is a Caymanian will come into play and they involve the weighing up of these opposing rights.[22] The brief reasons given for the refusal of the RERC at the de novo hearing by the IAT should enable the reader to understand how the decision was reached and what significant factors were considered. If that is done, a Court may be able to deduce whether it was a decision reached taking into account the engaged parts of the BOR and whether it was in the circumstances, in which there had been no lack of respect for family life and hence no breach of s.9 BOR.

77. The rule under s.25 of the BOR is that, so far as possible, legislation must be read and given effect in a way compatible with the rights set out in the BOR. Even though not specifically mentioned in s.31 of the Law, and despite the PI designation, the relevant BOR rights must still form a part of the IAT's deliberations when reaching a decision about the application for an RERC. The IAT was required to consider whether refusing the Applicant a right to reside pursuant to an RERC would be in breach of the state's obligations under s.9 BOR. The IAT should have considered whether its decision to refuse the RERC was a proportionate one having regard to the nature and extent of the interference with the Plaintiff's family life and the purported grounds for the refusal.

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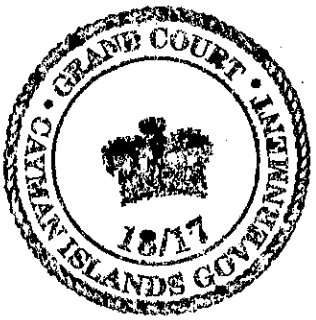
[22] See Blake J, Upper Tribunal (immigration and Asylum Chamber) in ***Sanade and Others (British Children- Zambrano- Dereci*** [2012] Imm AR 3).

78. Although the reason for the decision is stated, I am unable to deduce from the written reasons or from the decision and even from the wider material placed before me, whether BOR considerations formed any part of the IAT's deliberations when hearing the appeal and reaching determination. It appears that it did not, or at the very least there is a substantial doubt that it did, and that in itself is an error in law.



79. Even if the IAT had considered the BOR, it was obligated to illustrate that in its written decision. There is no reference to the BOR in the Minutes or letter which contain the decision of the IAT. A failure to provide adequate reasons for a decision is a question of law.

80. Accordingly I find that the IAT erred in law when failing to consider whether the refusal of the application would be a proportionate interference with the Plaintiff's and his family's rights under s.9 BOR.

81. It is extremely important to note that, when reaching this conclusion, I am not indicating whether or not the actual decision would necessarily be different if the BOR had been considered. It is not my role to substitute my own view of the merits, whatever that may actually be, for that of the IAT. A court is not entitled to rule on whether an individual should be granted one particular legal status rather than another, the choice being a matter reserved to the state. That will still

be a matter for the IAT to determine when it carries out the case specific weighing up of the respective rights.

82. I note that it is also argued by the Plaintiff that that the IAT misdirected itself in Law, as its decision appeared to place a mandatory requirement that a successful applicant must be a person of good character. This is suggested as *"it would appear that nothing else mattered to the (IAT)"* when it unanimously rejected the application. I do not accept this submission.

83. The Respondent correctly states that there is no evidence to support a contention that the IAT approached its decision on the basis that it was mandatory for an applicant to be a person of good character. The Respondent rightly indicates that it is a factor that the IAT must take into account as one of the factors that must be considered pursuant to s.31(3) of the Law. Again, the Respondent rightly submits that the weight to be given to the relevant factors is at the discretion of the IAT. There is nothing inappropriate with the IAT placing great emphasis on the criminal conviction if it is in the public interest, when arriving at a decision. However, this does not mean that other relevant factors, including the effect of any taken on the rights enshrined in the BOR, should not also be considered, and be shown to have been considered in the conducting of the balancing exercise. As already mentioned, the Respondent is wrong to submit that the BOR rights are not engaged on a RERC application.

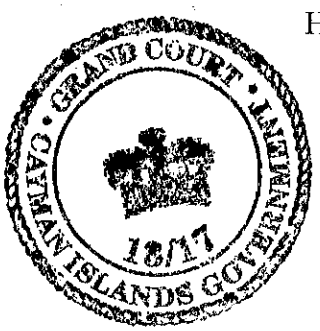
84. Having reached this decision I am satisfied that the matter should be remitted to the IAT for there to be a fresh hearing.

85. Although the BOR rights are a core issue which I have found the IAT has failed to consider and thereby erred in law and although I have already concluded that the matter should be remitted to the IAT for hearing, I will still briefly mention some of other grounds raised.

Breach of Natural Justice

86. All decisions made by a public official must be lawful, rational and proportionate and procedurally fair.[23] A person affected by a decision is entitled to request and be given written reasons for the decision.[24] A public official includes those sitting on a Tribunal or Court.

87. Reference is made by both parties to the extract from the House of Lords decision in ***South Bucks DC v Porter (No. 2)(3)*** [2004] 1 W.L.R 1953 referred to by in ***National Roads Authority v Bodden*** [2014] 2 CILR 47 at paragraph 25 when Henderson J stated at paragraphs 25-27:

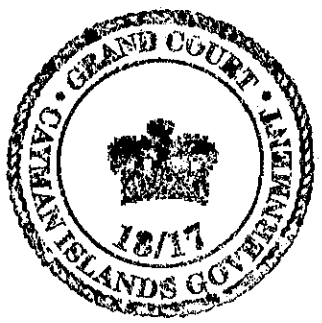


"25. The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough simply to state a result on the principle issues; the parties are entitled to know the reasoning and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this

[23] Section 19(1) BOR.
[24] Section 19(2) BOR.

fashion by the House of Lords in South Bucks. D.C. v. Porter (No. 2) (3) ([2004] 1 W.L.R. 1953, at para. 35):

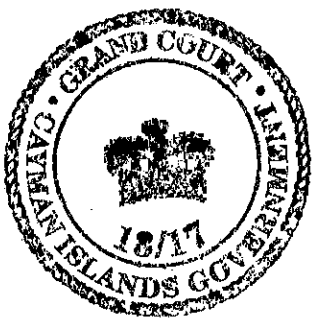
> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration... A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."* [My emphasis]



26. Regrettably, the abbreviated nature of the decision renders impossible any review by me of the implicit finding that the requisite elements of a prescriptive easement had been established. The decision presents no legal analysis at all—it simply states a conclusion. Moreover, it contains no findings of fact which would enable this court to determine that the RAC's conclusion about a prescriptive easement was within the realm of reasonableness.

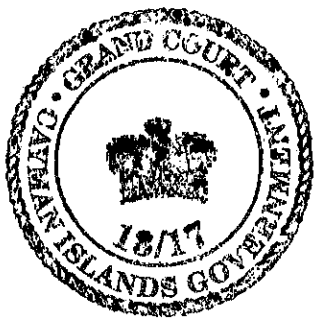
27. The failure of a tribunal to provide adequate reasons for a decision is itself a question of law. Although the NRA has not set out this ground in its notice of appeal, I am satisfied that consideration of the adequacy of the reasons on the appeal does not take the claimants by surprise. They have no doubt anticipated much of what has been said during argument and have not suggested that they are prejudiced by the attack upon the adequacy of the reasons."[My emphasis]

88. The Plaintiff contends that the IAT's decision is defective as, although it provides its decision to refuse the RERC, it fails to adequately show how that decision was arrived at. It is contended that from the brief written decision of 10 October 2018 it is *"very difficult"* to see how the IAT reached its decision and how it applied any facts that it found to the Law. At paragraph 52 of the Written Submissions it is specifically contended on behalf of the Plaintiff that the decision does not:



- Set out what findings of fact the IAT had reached, save for the fact that the Plaintiff's marriage was stable.
- Show what conclusions the IAT reached in regards to the Plaintiff's son and his step-daughter.
- Show any consideration in regard to the nature of the offence committed by the Plaintiff.
- Show any consideration in regards to the attempts that the Plaintiff took to improve himself while he was serving his custodial sentence.
- Show whether the IAT considered the BOR in particular s.9, and if it did, how it interpreted s.9 of the BOR.
- Show whether the Tribunal considered the ECHR in particular Article 8.
- Show whether the Tribunal considered the UN Convention Rights of the Child ("the UN Convention"), in particular Article 3(1) (Bundle C, Tab 6, p380).
- Confirm whether or not they considered any case law.

89. Section 9(3) of the BOR is relevant to this matter as an RERC provides the applicant with a right to remain as a permanent resident in the Cayman Islands. The section provides that:



"(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society -

(a) - (d) ....
(e) to regulate the right to enter or remain in the Cayman Islands."

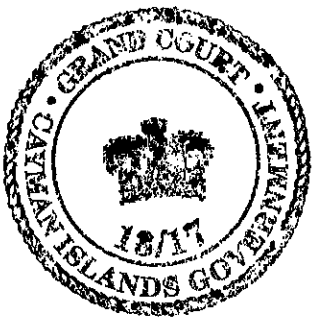
The Plaintiff highlights that there is no mention of s.9 (3) in the Minute and Letter and of how (if they did even actually consider it) the IAT interpreted the phrase *"reasonably justifiable"* and then applied the facts to it. As a consequence, it is rightly submitted that the IAT failed to illustrate whether or not they applied the right legal test. In fact, the appeal is opposed on the basis that s.9 BOR was not engaged and this supports a contention that the IAT felt that they did not need to consider s.9 as a part of their deliberation and therefore did not consider the test at all. For this reason I need not, for the purpose of this ruling, carry out the academic exercise of analysing what the correct test is under s.9(3).

90. The Respondent accepts that the reasons for the decision were brief, but contends that they were adequate and very clearly stated by the IAT, namely that, upon consideration of the s.31(3) factors, the refusal was as a result of his lack of good character under s.31(1)(c) of the Law illustrated by his conviction for being an accessory to a robbery and resulting sentence of two years' imprisonment. The Respondent contends it was not necessary for the reasons to deal with the other

issues which the Plaintiff states should have been addressed therein, as they did not go to the main issues in the dispute and therefore were not material. It is further submitted that, even if the factors raised by the Plaintiff had been considered, the IAT would still have reached the same conclusion and therefore the Plaintiff could not establish that he has been substantially prejudiced.

91. The IAT's reasons set out in the Letter and Minutes could leave no one in any doubt that the reasons for the refusal of the grant of an RERC was grounded in a correct unanimous finding, one supported by the facts, that the Plaintiff was not a man of good character. This of course would be a significant factor in its determinations and s.31(3) of the Law requires it to be specifically considered in an RERC application. However, although it may be regarded as a factor to which greater weight should be given, it is but one of a number of factors which must be at least considered, even if lesser weight is placed upon them. Additionally the IAT should have shown in the reasons that it had considered the nature of the particular offence, as offences resulting in a 12 month or more custodial sentence have greatly varying degrees of severity.

92. If the Board, or the IAT on a de novo hearing, is satisfied that (i) an applicant's spouse is Caymanian; (ii) that the applicant is of good health and (iii) that they have sufficient financial means to support themselves and any relevant dependents, then they may feel it good practice to simply state that briefly in the reasons, without the need to elaborate any further. In this case, the fact that these



are not set out in the IAT's reasons is not a concern, as there is no indication that the IAT felt that the application failed to meet these criterion. However, If the Board or IAT were to determine that these factors were not met in an application, then one would expect some reasoning to be set out containing reference to the facts to sufficiently illustrate how such a negative conclusion had been reached.

93. When addressing certain factors as set out in s.31(3) of the Law there may be an obligation to go further than simply referring to the factor, as the IAT did in its reasons in case, when it simply noted that the marriage was a stable one. It did not then go so far as to say whether they viewed it as marriage of convenience or not. A Tribunal making such decisions about the nature and stability of the marriage would be expected to comment in more detail and this could include an analysis of both positive and negative points. For example a positive factor under this heading could be a finding, supported with illustrative facts, why the marriage was viewed as being a genuine, and not a sham one. Of course, potential negative factors could also be highlighted when considering these factors, for example the shortness of the marriage and whether the applying spouse's immigration status was precarious at the time of the marriage (the start of the family life with the spouse), in regards to the latter it might be argued that the refusal of the RERC would be incompatible with s.9 in exceptional circumstances.

94. As already indicated herein, those factors include not only those that must be considered as set out in s.31(3) of the Law, but also the overarching requirement

to review and apply those factors in a manner consistent with relevant rights protected by the BOR[25]. The applicant is entitled, for example, to know from the reasons whether his and his family's right to family life were considered and how they were considered. In this case, where the IAT would have known that he was a PI and should have known what the effect of that was on his immigration status and what the consequences would be for the Plaintiff if the RERC was not granted, evidence of consideration of his and his family's right to family life should have appeared in the reasons. As found in ***Lee v Secretary of State for the Home Department*** [2011] EWCA Civ 348 there are cases in which the right to family life is a major consideration, but in which the conduct of a spouse in the context of the surrounding circumstances is such that there is justification for, in that case, a deportation order, with serious detrimental consequences for a family. However, the IAT did not conduct the type of review exercise commended in the ***Lee*** case.

95. Importantly, the IAT failed to even mention the BOR in its letter or in its Minutes. Although s.9, taken alone, cannot be considered to impose a general obligation on a state to respect a married couple's choice of country for their matrimonial residence or to guarantee the granting of a specific type of residence permit, it must still be a factor to be taken into account in an RERC application. A failure to so address it in the reasons is a breach of natural justice. The Board, from its reasons, appeared to recognise a requirement to consider the BOR when

[25] As mentioned in paragraph 21 herein when highlighting the Board's recognition of the need to consider the BOR in its determination of the application.

determining the RERC application. This is a case in which the spouse has Caymanian status and there is at least a need for there to be consideration in the reasons about whether, for example, the wife could leave the Cayman Islands to live with her spouse or the extent of the rupture to the family life for this married couple which may result from a refusal of an RERC. If the wife cannot move with the husband, consideration would have to be given as to whether the refusal of an RERC is a proportionate interference, in the circumstances, with the fundamental right to cohabit as married couple.

96. However, it is evident that the IAT did not feel that there was such a requirement, as this appeal has been opposed based partly on a contention that it should not (and correctly did not) take it into account because it does not appear as a factor in s. 31(3) of the Law.

97. There is no need for the IAT to analyse every material consideration, especially if it is evident that there is no dispute in relation to it. The Respondent submits that, when reviewing a decision of the IAT, a similar approach should be taken to that adopted in England and Wales when Courts review a decision of immigration judges and how that judge reached that decision. He contends that the IAT members should be considered as being specialists, being *"an expert tribunal charged with administering a complex area of law"* and therefore the Court should be extremely cautious before finding that it had erred in law. Although I recognise the valuable work undertaken by the IAT and take into account the

experience of the members of the IAT when I review its approach to the appeal, I am not satisfied that they have the same high degree of specialism that an immigration judge in England and Wales possesses.

98. In this case, I am not to substitute my view as to whether an RERC should or should not have been granted, but to review how the IAT reached its decision. I am unable, from the IAT's Letter or Minutes, to be satisfied that it took into account some of the factors which they should have considered. This is not to say that I would necessarily have reached a different decision to the one reached by the IAT. This appeal is not a rehearing of the RERC application. As already indicated, I will be remitting this matter and it will be the responsibility of the IAT, after taking into account all of the relevant factors (including s.9 BOR which I find is engaged), to reach its own decision unfettered by me. I am not in a position to agree with the Plaintiff that the IAT's decision was so unreasonable that a properly directed tribunal could not have made it. On the other hand, I am not in a position to agree with the Respondent that the IAT would certainly have come to the same decision, even if it had considered all the highlighted the factors including the BOR considerations.

Costs

99. The Plaintiff has been the successful party in this case. Costs ordinarily follow the event and at this time I see no reason for departing from that. My preliminary view is that the Respondent should pay the Plaintiff's costs on the standard basis

to be taxed if not agreed. However, as the parties have not been afforded the opportunity to make submissions in relation to costs, if a party feels that a different costs order should be made, then they should, by or on the 14th day after the circulation of this sealed Judgment, file a Summons for a costs hearing. If a costs Summons is not filed by that date, then I will make an order that the Respondent should pay the Plaintiff's costs on the standard basis to be taxed if not agreed.

Honourable Mr. Justice Richard Williams
Judge of the Grand Court