IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA (Civil) Appeal 008 of 2015
(Formerly G0423 of 2013)

IN THE MATTER OF THE IMMIGRATION ACT (2012 REVISION)
AND
IN THE MATTER OF AN APPEAL AGAINST THE JUDGMENT OF THE GRAND COURT DATED 6TH MARCH 2015 ON APPEAL FROM THE DECISION OF THE IMMIGRATION APPEALS TRIBUNAL DATED 14TH OCTOBER 2013

BETWEEN:

CARMEN JACK-CHOWTEE

Appellant

and

IMMIGRATION APPEALS TRIBUNAL

Respondent

BEFORE

Sir John Goldring, President
Sir Bernard Rix, Justice of Appeal
Sir Alan Moses, Justice of Appeal

Appearances:	**Ms Kathleen Ryan (by video-link) for the Appellant** **Mr. Michael Smith, Senior Crown Counsel, Attorney General's Chambers for the Respondent**
Date of Hearing:	**30 August 2022**
Date circulated in draft:	**13 September 2022**
Date of Judgment:	**16 September 2022**

JUDGMENT

Sir Bernard Rix JA

1. This is an appeal which time has unfortunately forgot, as may be seen from the title of this action. After many years in which the Appellant, Mrs Carmen Jack-Chowtee, has sought to persuade the Attorney-General to concede her appeal, without substantive reply from the Attorney-General, new counsel in the Attorney-General's Chambers, Mr Michael Steven Smith, has taken action to bring the matter to a hearing in this Court, for which all concerned must be grateful.

2. The judgment of the Grand Court from which this appeal arises is the judgment of Justice Richard Williams published on 6 March 2015.

The facts

3. Ms Carmen Jack came to these Islands from Jamaica on 21 February 1997, on a work permit. She was then 28 years old. She was employed as a domestic helper, for various employers, and then as a kitchen helper/dish-washer in a restaurant.

4. On 6 February 2005 she married her husband, Deonairne Chowtee, a waiter. They had a son, Nicholas, who was born on 7 December 2004 in Grand Cayman. He is now 17.

5. In February 2005, Mrs Jack-Chowtee first applied for permanent residence, with her husband and their son as her dependents. Her application was refused by the Caymanian Status and Permanent Residency Board (the Board) by letter dated 10 August 2007: it would have succeeded if she had scored 100 points under the applicable point system, but she was awarded only 90 points. She appealed on 29 August 2007, and the Immigration Appeal Tribunal (the IAT) awarded her further points for community service, taking her to 95 points, but that was still not quite enough. She learned of this result by letter dated 10 May 2012. She was advised to apply for a final 1 year work permit, and she worked under that until 15 May 2013. As she was entitled to say, and did say, in her affidavit in support of her later appeal to the Grand Court: "*I have no social or criminal problems, we are law-abiding citizens.*"

6. On 7 May 2013 she made her second application for permanent residency, which is the application from which this appeal derives. As part of that application she relied on evidence of the impending purchase of a parcel of land on which a home was to be built. This purchase became the dominant issue in her application, as will appear below. Prima facie, this purchase could have earned her up to a maximum of 20 points as showing "investment" in these Islands, under the head of "Financial Assessment".[1] However, she received no points under this head. The Board on this occasion awarded her only 84 points, by its decision dated 4 July 2013. She scored highly under the heads of "Occupation", "Knowledge/Experience", "Skills" and "History/Culture Test", but scored zero points under other heads such as not only "Financial Assessment" but also "Close Caymanian Connection" and "General".

7. As for "Financial Assessment", Mrs Jack-Chowtee had scored 15 points on her original application. However, the Board appears to have held against her her failure to proceed, after the failure of her original application, in the purchase of a parcel of land which she had said she had intended to buy as part of her evidence at that first application. As the Court now knows

[1] The Immigration Regulations (2012 Revision) by para 4 of its Second Schedule (Points System) defines the head of "Financial Assessment" as (a) "Investment in property in the Islands" and (b) "Investment in a local company".

from the Board's Appeal Statement on her second application (referred to in the paragraph immediately below), the Board reasoned as follows:

> "*The Appellant did not provide evidence of any investment in property in the Islands nor in a local business, therefore no points were awarded under this category…*"

Upon review of the Appellant's file, the Board noted that her first application for Permanent Residence indicated no Financial Investment. A further letter was submitted by the agent dated 3 March 2006, advising that the Appellant was in the process of purchasing property and that the transfer of land and land register would be submitted under separate cover once the sale had been closed. The records show that only a copy of an "Offer to Purchase" between the Appellant and the vendor dated 17 February, 2006, was ever provided. It was also noted that the initial deposit on signing the "Offer" was only CI$100.00. The Board apparently used its discretion, believing she would honour and fulfil the terms of the purchase document, generously awarded her 15 points for the property. The Board took note that the property now being claimed as her financial investment is not this first property, but another one. In addition, the Appellant only entered into the contract for this new property approximately 3 months prior to the submission of her new application for Permanent Residence. The timing of this proposed purchase was suspect.

Nevertheless, in an effort to give the Appellant every opportunity to provide more substantive evidence of her clear ownership of the property, the matter was deferred in order for her to obtain an affidavit from the agent on behalf of the developer to confirm ownership by the couple, in addition other information. Unfortunately, the key piece of information was never submitted, namely an affidavit confirming ownership of the Sliver Hill property. Instead, a letter was provided highlighting the basis of the deposit paid, stamp duty information, Scotia Bank loan pre-approval etc.

In view of the previous purchase history and the developers being unable to confirm ownership by the Appellant, the Board was not minded to award points for Financial Investment on the basis of the minimal deposit of CI$2,500 on a transaction which has no guarantee of being completed and in which the Appellant has no proof of ownership.

The holding against Mrs Jack-Chowtee of her first failure some six years earlier to follow through on a purchase of property was a tough decision, essentially accusing her of a double deceit ("suspect"). I would recognise, nevertheless, the Board's general experience in such matters. In the present case, however, as will appear below, Mrs Jack-Chowtee's further evidence to the IAT went far to meet and potentially overcome the Board's scepticism.

8. On 15 July 2013 Mrs Jack-Chowtee filed a notice of appeal to the IAT. The Board prepared an Appeal Statement dated 1 August 2013, setting out the reasons for its decision, of which Mrs Jack-Chowtee was provided with a copy on 11 September 2013.

9. The appeal hearing was held on 26 September 2013. As part of the appeal the IAT was asked to consider further evidence of Mrs Jack-Chowtee's purchase of a home: namely, (a) a draft transfer of land certificate dated 30 August 2013, signed by both the seller, a Mr Pierre Foster (being the registered owner of the parcel of land concerned), and Mr and Mrs Jack-Chowtee, as buyers; (b) an extract from the Land Registry dated 5 August 2013 showing Mr Foster as the registered owner of the parcel; (c) a certificate of fitness of occupancy of the home which had been built on the parcel of land; (d) a residential full appraisal report of the home, together with photographs; (e) a final valuation of the value of the house and property, dated 2 August 2013; and (f) a Certificate of Occupancy granted by the Central Planning Authority dated 6 August 2013. All these documents, being dated *after* the hearing and decision of the Board, could not have been presented to the Board, and could only first have been presented to the IAT on appeal.

10. The IAT, which was entitled to hold a *de novo* hearing of Mrs Jack-Chowtee's claim, did not do so, saying that although it had "*noted*" the new material, it had not "*considered*" it, as it "*would have*" done if it had proceeded to a *de novo* hearing. In effect, the IAT dismissed Mrs Jack-Chowtee's appeal summarily, on the basis that no ground of appeal had been made out. The proceedings before the IAT and its decision are described in an affidavit prepared by Mr Buck Grizzel, deputy chairman of the IAT, sworn on 25 February 2014. Before that, however, the IAT's decision was given to Mrs Jack-Chowtee's legal representatives by letter dated 14 October 2013.

11. The IAT's letter dated 14 October 2013 stated as follows:

> *"The Tribunal having carefully considered the Notice of Appeal dated 15th July 2013, including the grounds of appeal dated 26th September 2013 and all other submissions made by or on behalf of the above named appellant for this appeal, determined that insufficient grounds of appeal had been made out pursuant to Section 15(2) and 16(4) of the Immigration Law (2012 Revision). Accordingly, the appeal was dismissed.*"

12. However, it is Mr Grizzel's affidavit which throws further light on this letter's bald statement that the Tribunal had "*carefully considered*" the Notice of Appeal, the grounds of appeal "*and all other submissions*" of the appellant.

13. Thus relevant extracts from Mr Grizzel's affidavit are as follows:

> "*24. In considering the appeal, the Respondent* [ie the IAT] *took into account the submissions of the Applicant's Counsel, Mr Dennis Brady, that the Board could have contacted the Applicant to obtain further evidence regarding the purchase of property in the Cayman Islands. It also considered the Board's reasoning that the Transfer of Land form dated April* [*sic,* but presumably August] *30, 2013, though signed by both transferor and transferees (the Applicant and her spouse), was not certified by the Registrar of Lands as having been received for registration. Further, the Land Register for Block 38C, Parcel 200 provided to the* [IAT] *still showed the registered proprietor of that property as Mr Pierre Foster and not the Applicant. Accordingly the new evidence did not demonstrate the Applicant's ownership of any property in the Islands.*"

14. Pausing there, I comment that this passage in Mr Grizzel's affidavit is seriously deficient. First, the transfer form produced by Mrs Jack-Chowtee was dated 30 August 2013, not 30 April 2013. Secondly, it was not before the Board, but before the IAT as "*new evidence*", as its date (30 August 2013) makes inevitable, and as the absence of any reference to it in the Board's Appeal Statement also demonstrates. Thirdly, the Land Register document provided to the IAT, the only new document which the IAT might seem to have taken into account but which in context (see below) appears to have been referred to for its content only *ex post facto* in the aftermath of the IAT's decision and Mrs Jack-Chowtee's appeal, properly understood demonstrated that the signed transferor of the property on the transfer form dated 30 August 2013 was the registered proprietor and thus someone who would give good registered title to the signed transferees.

15. Mr Grizzel continued:

> "*25.At Tab 10 of the Applicant's Hearing Bundle (which accompanies her affidavit)* [ie Mrs Jack-Chowtee's affidavit dated 26 November 2013, prepared for the purposes of her further appeal from the IAT to the Grand Court]*, she has exhibited a Land Register for Block 38C, Parcel 200 which shows her and her husband as the registered proprietors of that property as at September 18, 2013. However, the Applicant did not provide this document to the [IAT] at any time prior to or during the hearing of the appeal or before the [IAT] reached its decision.*"

16. Further comment is also needed on this paragraph. Before the IAT, Mrs Jack-Chowtee had produced, as new evidence, the draft transfer form dated 30 August 2013 signed by Mr Foster as seller and by Mrs Jack-Chowtee and her husband as buyers. However, as at that date, and as at the date of the hearing before the IAT, 26 September 2013, the Registrar of the Land Registry had not yet registered the transfer. Nevertheless, it appears that as at 18 September 2013, i.e. 8 days before the hearing before the IAT, the transfer form had been received by the Registrar, because on 2 October 2013 the transfer was registered in the Cayman Islands Land Register as

of 18 September 2013 and Mrs Jack-Chowtee and her husband became the registered proprietors of the parcel of land with absolute legal title as of that date. A copy of that registration was annexed, with other relevant documents which had been before either the Board and/or the IAT, to Mrs Jack-Chowtee's affidavit produced for the Grand Court. The registration form might have been available to Mrs Jack-Chowtee before the IAT's decision letter dated 14 October 2013, but it was not available to her at the time of her hearing before the IAT on 26 September 2013. As it was, however, albeit retrospectively, Mrs Jack-Chowtee was in fact the registered proprietor, with her husband, of the parcel at the time of the IAT hearing.

17. Mr Grizzel's affidavit went on:

> "*26. Similarly, the Transfer of Land form dated August 30 2013, signed by Mr Foster and the Applicant and her husband and registered with the Land Register on September 18, 2013 was not among the documents before the* [IAT] *during its deliberations on the Applicant's appeal. The Applicant states at paragraph 10 of her affidavit that this document was presented to the Board but it is not referenced in the list of documents attached to the Appeal Statement."*

18. Mr Grizzel is mistaken about this. He is right to say that the form (pre-registration) was not before the Board, but wrong to say that it was not before the IAT. It was, as "*new evidence*". However, he is right to say that Mrs Jack-Chowtee's affidavit at para 10 incorrectly says that the transfer form dated 30 August 2013 was "*presented to the Board*" (it of course could not have been), but reference there to the "*Board*" is clearly a mistaken reference to the IAT. At para 10 of her second affidavit dated 7 March 2014 she corrected this mistake, emphasising that the transfer form had been submitted to the IAT prior to the hearing.

19. Mr Grizzel's affidavit continues with critical paragraphs as to the IAT's reasoning and decision-making. He says:

> "27. In relation to the allegation at paragraph 14 of the Applicant's affidavit[2], *the appeal process is a two-step step which requires the* [IAT] *to first consider whether or not grounds of appeal have been made out before moving to the second stage of the test, namely to a hearing de novo, wherein changes in circumstances may be taken into consideration by the* [IAT]. *In the instant case, the* [IAT] *considered that insufficient grounds had been put forward on behalf of the Applicant to show that the Board's decision was erroneous in law, unreasonable, contrary to the principles of natural justice or at variance with the Regulations. As such it did not hold a hearing de novo at which time*

[2] Where Mrs Jack-Chowtee had said: "The Appeals Tribunal received copies of all these documents, I was led to believe that the Tribunal had taken all those document[s] into account and assess the[m] in relation to the point system in my favour. It is now that I realise that was not done."

it would have considered the new information before it, namely the valuation of the house and property and the Certificate of Occupancy.[3]

28. The Applicant's counsel and her husband attended the hearing on 26 September 2013 and was given every opportunity to provide all relevant evidence to the [IAT].

29. Pursuant to section 12(6) of the 2012 Law the [IAT] *may regulate its own procedure. It is the* [IAT's] *policy to consider the Appeal Statement by the Board, which gives the Board's reasons for its decision, along with any defence submitted by the Board and all documentation provided by the appellant, including new information. As a matter of procedure, at the initial grounds stage the [IAT] will look at, but not consider, information that was not before the Board when it made its decision.*

30. For these reasons, the [IAT] *did not consider that the Appellant had made out any basis for interfering with the Board's decision not to award the Applicant any points under the heading of "Financial Assessment".*"

[*Emphasis added*]

The law

20. The Immigration Act (2012 Revision) (the Act) provides as follows:

"*15. (1) Save as otherwise provided by this Law, any person aggrieved by, or dissatisfied with, any decision…of a Board under section 14, may…appeal therefrom by way of rehearing to the Immigration Appeals Tribunal, and matters referred to the Tribunal may not be remitted to the Board…*

(2) An appeal under subsection (1) may be lodged on the ground that it is

(a) erroneous in law;
(b) unreasonable;
(c) contrary to the principles of natural justice; or
(d) at variance with the Regulations.[4]

16. (1) Appeals under sections 14 and 15…

(7) Appeals to the Immigration Appeals Tribunal shall be by way of rehearing.

(8) The Immigration Appeals Tribunal, when hearing an appeal, may take into account fresh evidence and any change in circumstances that may have arisen in relation to the parties.

17. (1) On an appeal, the Immigration Appeals Tribunal may make such order, including an order of costs, as it thinks just.

[3] And other important documents such as the registration of the transfer to Mr and Mrs Jack-Chowtee.
[4] These are the grounds referred to at para 27 of Mr Grizzell's affidavit (above).

(2) An appeal may be made to the Grand Court from a decision of the Immigration Appeals Tribunal on a point of law only."

The Grand Court judgment

21. The judgment of Williams J (the judgment) was founded on an immediately earlier judgment of Chief Justice Smellie in *Aitken v. Immigration Appeals Tribunal* [2015] (1) CILR 27 and focussed on the "*two-stage process adopted by the IAT*" (para 26 of the judgment). In *Aitken* the Chief Justice had to consider whether that process was lawful, or, as was there contended, an unlawful fetter on the IAT's discretion and therefore *ultra vires*. The Chief Justice considered that it was lawful. Williams J cited the following passages from *Aitken*:

"66. …to mandate a strict obligation to embark on a full rehearing de novo upon the filing of every appeal, would be to require the IAT to overlook the requirements of the law for the establishment of at least one of the four grounds of appeal stipulated by section 15(2)…

70. …If a workable meaning is to be ascribed to this provision [section 15(2)], as a first step a valid appeal must be brought within at least one of the four permissible grounds. Otherwise, the IAT could be invited to embark upon an appeal which is not prescribed upon any ground deemed permissible by the Law. For that reason, it seems plain to me that the IAT may not overlook the limitations in section 15(2).

71. As advised by Lord Pannick QC in his guidance note, in terms with which I agree, the IAT has correctly regarded itself as required to direct its mind to whether or not the particular ground(s) of appeal relied upon by an appellant is made out. And, if it decides that no ground of appeal within section 15(2) has been made out, to dismiss the appeal…

84. So, in summary, I conclude:

(i) Section 15(2) of the Law requires an aggrieved person to identify his ground(s) of appeal upon which he relies in bringing an appeal under that section to the IAT.

(ii) Such ground(s) must come within those identified and permitted by s. 15(2). A person aggrieved must be aggrieved upon at least one of those grounds.

Any other construction would render the prescribed grounds meaningless, as the IAT would be required to embark on a rehearing de novo in every case of an appeal, on whatever ground – or absence of ground – is presented by an appellant. In this regard, I am content, for the sake of emphasis, to adopt Lord Pannick, QC's advice as appears from para 25 of the guidance note:

"First, a valid appeal must be grounded within one of the four permissible grounds, as set out in section 15(2). The IAT cannot simply ignore the limitations in section 15(2) and consider appeals on some other basis. It must do justice to the words of section 15(2), and only consider grounds of appeal which are there set out."

(iii) As the right of appeal to the IAT is delimited by the permissible grounds, the IAT is correct in regarding itself as needing to be satisfied that at least one of the permissible grounds can be made out before it embarks upon a rehearing de novo of the matter.

(iv) In doing so, the adoption of the two-stage policy by the IAT is sensible and a reasonable exercise of its discretionary powers vested in it for the fair and timely dispensation of appeals. The two-stage policy is not a fetter upon those powers but is a workable implementation of the discretion compliant with the principles of the case law most authoritatively settled in British Oxygen, *Simms* and *Daly*."

22. Before Williams J, Mrs Jack-Chowtee's counsel challenged the Chief Justice's reliance on Lord Pannick's guidance note and his conclusions in *Aitken* head on. However, unsurprisingly, Williams J found himself unable to accept that submission and briefly concluded by saying that *"I adopt the Chief Justice's conclusions and fully endorse them as being the correct procedure for such appeals before the IAT*".

23. That only left the judge with the need to apply his understanding of the two-stage process to the facts in the instant case. He disposed of that final issue as follows:

> *"33. I have already indicated that I am satisfied that the IAT when considering the first stage, the grounds stage, afforded the Applicant the opportunity to appear and considered both the representations made by her attorney and the additional documents submitted to the extent required to determine whether a ground had been made out. I am satisfied that the IAT, having afforded the above opportunities, cannot be viewed as being unreasonable for concluding that, on the evidence placed before the Board by the Applicant, the Board's refusal to grant points for investment in property in the Islands was unreasonable and amounted to a ground of appeal. I am also satisfied that the two-stage process to an appeal adopted by the IAT is the correct procedure to be followed when reviewing the relevant provisions of the Law as a whole.*"
>
> [*Emphasis added*]

The judge therefore repeated and endorsed the IAT's decision (demonstrated by Mr Grizzel's affidavit) that the Board's decision had to be reviewed at a preliminary grounds stage "*on the evidence placed before the Board*" and without consideration of Mrs Jack-Chowtee's new evidence.

Mrs Jack-Chowtee's grounds of appeal

24. Mrs Jack-Chowtee's grounds of appeal to the IAT from the Board were as follows (as taken from a letter dated 25 September 2013 addressed to the IAT by IICS (Integrated Immigration and Concierge Services). Her first three numbered grounds were that Board had acted unreasonably in various ways, including a failure "*to adequately consider or at all or*

alternatively, to objectively consider the Applicant's Financial Assessment, by an award of zero points to the Appellant, which assessment was not fairly and logically reached…which decision is in all the circumstances inconsistent and unreasonable." The grounds continued as follows:

> "***AND THE APPELLANT PRAYS that the TRIBUNAL*** *will in addition, exercise its powers under the provisions contained in Section 16(8) of the Immigration Law 2012 Revision and consider the fact of "fresh evidence and…change of circumstances…that…have arisen" in relation to…*[the Appellant] *and her spouse Deonarine Chowtee* [citing Exhibits to the letter containing the various documents described in this judgment above] *and rule in favour of the Appellant."*

25. Although these grounds did not in terms cite the language of section 15(2) of the Act (see at para 20 above), other than by repeated reliance on expressions such as "*not fairly and logically reached*" and "*inconsistent and unreasonable*", it is nevertheless plain from these grounds that Mrs Jack-Chowtee was saying both that the Board's decision was irrational and unreasonable on its own terms *and* that it should be regarded by the IAT as such in the light of the new evidence which was expressly called in aid for the purposes of section 16(8). Indeed, the IAT was prepared to ask itself whether any of the grounds stated in section 15(2) had been properly invoked (see para 27 of Mr Grizzel's affidavit cited above).

26. In form, therefore, Mrs Jack-Chowtee's appeal to the IAT was properly *founded* or *grounded* on one or other of the statutory grounds. Of course, whether Mrs Jack-Chowtee's appeal could *succeed* on any of those grounds was another question, and that was for the IAT to determine.

27. In her further appeal to the Grand Court (which had to be on a question of law, see Section 17(2) of the Law cited above), Mrs Jack-Chowtee relied on the following grounds (which I take from para 16 of the judgment below):

> *"1. The Immigration Appeals Tribunal in reviewing all the Applicant's documentation to support the allocation of additional Points…failed to take relevant considerations into account.*
>
> *2. The Immigration Appeals Tribunal in reviewing the Appeal statement…together with the Grounds of Appeal and the Applicant's submissions failed to exercise its statutory discretion reasonably toward the Applicant.*
>
> *3. The Immigration Appeals Tribunal…failed to take into account the fresh evidence and the change of circumstances of the Applicant that had arisen before/and or at the time of the Appeal hearing.*
>
> *4. The Immigration Appeals Tribunal erred in law as it failed to treat the Applicant's appeal as a rehearing…*
>
> *5. The decision of the Immigration Appeals Tribunal in all the circumstances of the case and the documents before it, failure to award the Applicants one hundred*

(100) points of the system is so unreasonable that no reasonable tribunal seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case would have refused the Applicant Permanent Residence and Employment Rights."

28. The judge ruled that ground (i) was not a question of law, and that grounds (ii) to (v) failed (although amounting to questions of law). In the circumstances, it is unnecessary to decide whether ground (i) is also itself a question of law. But, in my opinion, it raised, albeit in somewhat different terms, the same questions as the other grounds, involving the issue whether the IAT had properly applied, as a matter of law, the two-stage process which it had undertaken and the judge had gone on to analyse and apply. Its error perhaps was that it made an assumption that the IAT had reviewed Mrs Jack-Chowtee's documentation: but if it did, the question was whether it had conducted that review so as to take relevant considerations into account (in circumstances where, as Mr Grizzel expressly stated, the IAT did not consider Mrs Jack-Chowtee's fresh evidence before dismissing her appeal).

29. On this further appeal to this Court, Mrs Jack-Chowtee's memorandum of grounds of appeal dated 23 September 2021 is as follows:

"*1. The Learned trial Court had failed to properly appreciate the evidence that the appellant had paid the stamp duty to the Land Registry and has fallen into error in not finding that the Immigration Appeals Tribunal was unreasonable in not granting the points for ownership of property.*

2. There was sufficient evidence led by the Plaintiff to prove that the Registration of the Transfer of land Form was a mere matter of formality as the Land Registry had already accepted the Plaintiff as the owner of the land.

3. The Learned trial Court has failed to properly appreciate that the Plaintiff had an equitable title and in possession of the land thereby requiring the Immigration Appeals Tribunal to conduct a de novo hearing.

4. The Learned trial Court has fallen into error when it found that the Immigration Appeals Tribunal had not acted unreasonably.

5. The decisions failed to take into account relevant evidence regarding the general nature of the Appellant's purchase, building on and settlement on the land in particular, extensive evidence of possession supported by Transfer properly executed."

30. These inexpertly drafted grounds may be criticised, and Mr Smith on behalf of the IAT did criticise them as not raising any question of law (which is again needed at this stage of proceedings, see section 29(1) of the Court of Appeals Act (2011 Revision)). He also submitted that the "*ground of appeal in respect of the adoption of a two-stage process…is not taken on this further appeal*". In my judgment, however, this criticism goes too far. Ground 4 plainly (if

rather generally) disputes the Grand Court's view that the IAT had acted reasonably in applying the two-stage process in the way in which it had. Ground 3 expressly invokes the need for a *de novo* hearing, albeit on a narrow basis. And ground 5 is a complaint that the Board, the IAT and/or the Grand Court had failed to take into account relevant evidence: itself a question of law and one which implicitly invokes a criticism of the IAT's and the Grand Court's use of the two-stage process to render the fresh evidence irrelevant and thus left out of account.

Discussion and analysis

31. On this appeal, Ms Kathleen Ryan, attorney for Mrs Jack-Chowtee, was indisposed but kindly agreed to appear remotely to assist the Court. Her ability to do so was, however, severely curtailed by her indisposition. The Court, of course, had her written skeleton. In the circumstances, the appeal proceeded largely by interrogation of Mr Smith's written and oral submissions on behalf of the IAT.

32. In essence, Ms Ryan's (written) submission was that the IAT had failed to take account of relevant evidence and change of circumstances. The submission may have been light on analysis, but it plainly put in issue whether (by reason of the two-stage process or for any other reason) the IAT was justified in law in ignoring Mrs Jack-Chowtee's new evidence (cumulatively with existing evidence).

33. Mr Smith's submissions, on the other hand, took for granted that Williams J in his judgment had been right for the reasons which he had given, and that all that remained was whether there was a remaining question of law on the application of the facts and the two-stage process to those facts, which he submitted there was not. He also submitted that the process of using the concept of *Wednesbury* unreasonableness to render the IAT's decision unreasonable was notoriously difficult, citing cases such as *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014, *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374, *Gokool v. Permanent Secretary of the Ministry of Health and Quality of Life* [2008] UKPC 54 at [18], and *Axis International Ltd v. Civil Aviation Authority & Cayman Islands Helicopters Ltd* [2014] (1) CILR 12 at [89]-[92]. Mr Smith might however have conceded that in matters of personal status and the heightened scrutiny required in such circumstances the bar is not as difficult as he had submitted: see for instance *R (Daly) v. Home Secretary* [2001] 2 AC 532 at 547 and *In the matter of an Application for Permanent Residence by Hutchinson-Green* [2015] 2 CILR 75 at [39]-[42] (Smellie CJ).

34. To determine this appeal, however, it is necessary first to see exactly what it was that Lord Pannick advised (since his guidance was adopted by the Chief Justice) and exactly what it was

that the Chief Justice decided in *Aitken* (since the judge regarded himself as following that authority).

35. In *Aitken* the headnote reads as follows:

> *"In 2010, the applicant applied for permanent residence in the Cayman Islands. This was rejected on the basis that he only attained 95 points under the permanent residence assessment points system, a minimum of 100 points being required…Zero points had been awarded under the financial element of the assessment on the basis that the applicant had no investment in Cayman property or companies. The applicant had entered into a transaction to purchase property, but this had not been completed.*
>
> *On appeal to the IAT, the applicant submitted that the rejection of his application was unreasonable in that he should have been awarded 106 points on the basis of his changed circumstances, including new employment, a settled agreement to purchase property and enrolment in a mentoring programme. In considering the appeal, the IAT adopted a two-stage process, according to which it would first consider whether the appeal was based, prima facie, on one of the four grounds of appeal listed under the Immigration law (2010 Revision), s 15(2) and, if so, would then conduct a full rehearing. It did not find any of the grounds to be established and dismissed the appeal without conducting a rehearing*."

36. I have considered *Aitken* as a whole. Unfortunately, it was not provided to the Court for the purposes of the hearing of the appeal, but a copy of it was, at the Court's request, provided following the hearing. The Court has not therefore heard oral submissions directly on it. However, the analysis of what a two-stage process must amount to was put in argument to Mr Smith, and he accepted the validity of that analysis. Subsequent reading of *Aitken* has, in my judgment, confirmed that analysis.

37. In *Aitken* three different expressions are used to describe what the IAT is entitled to do at the first stage of its two-stage process.

38. One expression is that of Lord Pannick's guidance note, quoted by the Chief Justice in *Aitken* at para 84, namely "a valid appeal must be *grounded* within one of the four permissible grounds" (emphasis added). In other words, no grounds other than the four allowed by section 15(2) can found an appeal to the IAT thereunder. That requirement is not a concern in this case. Mrs Jack-Chowtee's appeal to the IAT was grounded within the statutory grounds.

39. The second expression is that of *making out* one of the four permissible grounds at the first stage of the two-stage process. That is the expression which the IAT in the *Aitken* case itself adopted: see, for instance, paras 4 and 7 of Mr Garcia's first affidavit quoted by the Chief Justice at para 33 of his judgment:

> "*4. Appeals to the IAT are conducted in two stages. The first stage is to establish whether any ground of appeal is made out under s 15(2) of the Immigration law ("grounds stage"). If grounds are made out under s 15(2), the IAT proceeds to the second stage, and conducts a full rehearing ('rehearing')…*
>
> *7. The IAT also looks at any other document provided by the appellant, including new information. At the grounds stage* [the first stage of the two-stage process] *the IAT will look at, but not consider, information that was not before the Board when it made its decision.*
>
> *If the IAT is satisfied that one or more of the grounds alleged by the applicant is* made out**,** *the IAT will move on to the rehearing stage. If the IAT does not find any of the grounds alleged by the appellant to be* made out**,** *the IAT writes to the appellant to inform him of this decision.*" [*Emphasis added*]

40. It is possible, but I do not know, that the expression of a ground *made out*, derives from language used by Lord Pannick in his guidance note: for the Chief Justice says, at para 71 of *Aitken*, that –

> *"71. As advised by Lord Pannick, QC in his guidance note, in terms with which I agree, the IAT correctly regarded itself as required to direct its mind to whether or not the particular ground(s) of appeal relied upon by the appellant is made out. And if it decides that no ground of appeal within s 15(2) has been made out, to dismiss the appeal.*" [*Emphasis added***]**

41. The third expression is that of the Chief Justice himself, under the heading "Analysis" (starting at para 42), where the Chief Justice speaks of "a *prima facie* ground of appeal". Thus he repeatedly refers to the concept of *making out* a legitimate ground of appeal as *establishing a prima facie ground of appeal*. I cite from the Chief Justice as follows:

> "*58. If the IAT had agreed that the points allocated by the Board was unreasonable, then that ground of appeal would have been made out, leading to a full rehearing de novo being afforded to the applicant. In the event, the IAT found the ground to be unsubstantiated, and, on that basis, refused to take the matter to the second stage of entertaining the appeal further by way of rehearing de novo.*
>
> *59. The applicant having thus been afforded deliberate consideration of his ground of appeal, it cannot be said that the exercise by the IAT of its discretionary powers, by way of the imposition of the two-stage policy, requiring that an appellant first establishes what I would describe as a prima facie ground of appeal before there will be a rehearing de novo, is an unwarranted and impermissible fetter upon the powers.*
>
> *60. The rationale of the two-stage process is that it serves as the necessary filter required by ss 15(1) and 15(2). These sub-sections are interpreted as requiring that there is a prima facie showing of at least one of the four*

grounds of appeal recognized by s 15(2) before the IAT is required to afford a rehearing de novo under s 16(7)." [*Emphasis added]*

And again:

"*71. As advised by Lord Pannick, QC in his guidance note, in terms with which I agree, the IAT correctly regarded itself as required to direct its mind to whether or not the particular ground(s) of appeal relied upon by the appellant is made out. And if it decides that no ground of appeal within s 15(2) has been made out, to dismiss the appeal.*

72. Thus, the particular ground upon which an aggrieved person seeks to challenge a decision of the Board must be prima facie established within the limitations of the grounds permitted by the Law."

42. In his summary at para 84, the Chief Justice reverts to the language of *making out*: see his conclusion (iii), cited at para 21 above. The judge below in the instant case, Williams J, in citing from *Aitken*, only cited passages using the expression of *making out*, which, without the Chief Justice's gloss, is apt to mislead.

43. In my judgment, the Chief Justice's formulation of a legitimate two-stage process, consistent with section 16(7)'s requirement ("*shall*") of a rehearing, is the correct formulation. The proper concern of the IAT, following Lord Pannick's guidance, was to find a process, consistent both with its right to regulate its own procedure (see section 11(6)) and its statutory obligation to hear appeals "*by way of rehearing*" (section 16(7)), was not to become overwhelmed in rehearings on appeals for which there was either no legitimate ground (i.e. appeals based on a ground outside the four allowed by statute in section 15(2)) or, where a legitimate ground had been raised, for which there was no realistic prospect of success. In other words, there had to be a realistic *prima facie* case on appeal grounded in at least one of the statutory grounds.

44. It follows that the expression of *making out* is harmless if it means no more than the above; but is potentially undesirable if it is thought to mean that a valid ground is not made out (and the appeal must therefore fail *in limine*) where there is only a realistic prospect of success but the appeal cannot be determined without considering that realistically arguable prospect on a rehearing.

45. If it were otherwise, and an appellant had to establish not merely the *prima facie* validity and realistic arguability of his or her ground(s) at stage one of a two-stage process, but had to succeed in proving his case on appeal at that first stage, then it would follow that every appeal would be determined at the first stage, either with success or failure, and the second stage would never be reached. In that case, the IAT's discretion to regulate its own procedure would be illegitimately fettered, because every case would be determined for better or worse at stage one,

without a rehearing, and no case would proceed to a rehearing. On that basis, the two-stage process would fall foul of the doctrine that there must not be an undue and illegitimate fetter on a discretion and would in any event be illegal in terms of section 16(7) of the Act: see the jurisprudence ably discussed by the Chief Justice at paras 41-54 of his judgment in *Aitken*, where he cites authorities such as *R v. Port of London Authority, ex p Kynoch* [1919] 1 KB 176, *British Oxygen Co v. Minister of Technology* [1971] AC 610, *Lavender (H) & Son Ltd v. Minister of Housing & Local Government* [1970] 1 WLR 1231, *Stringer v. Minister of Housing & Local Government* [1970] 1 WLR 1281, *Sagnata Invs v Norwich Corp* [1971] 2 QB 614, *R v Chief Const (N Wales Police), ex p AB* [1999] QB 396, *R v. Home Secretary, ex p Simms* [2000] AC 115, *R (Daly) v. Home Secretary* [2001] 2 AC 532, and *R (WL (Congo)) v Home Secretary* [2010] 1 WLR 2168.

46. In the present case, the IAT might have been entitled to consider, at the first stage, in the absence of any new material presented by Mrs Jack-Chowtee, that there was no realistic prospect of faulting the Board's determination. I do not consider that there is any need to go further into that question, even if the Board can be seen to have taken the strong line in its reasoning that it would totally discount her and her husband's apparent investment in a home in these Islands on the basis of what had happened some six years earlier.

47. However, Mrs Jack-Chowtee had in fact put forward much new material to support her case of investment. One of those documents was a signed transfer form, signed not only by her and her husband but also by the registered seller of the parcel of land. It was a stamped transfer, and stamp duty of no less that CI$ 3,000 had been paid on it, as the document showed. Even though that transfer had not yet been registered (we now know that it was registered between the time of the IAT hearing and its decision), it shows that the Chowtees' purchase of the parcel had been not merely contracted for but completed: which gave them an equitable title even if legal title had to await formal registration. In any event, the test of "Financial Assessment" was investment, not formal ownership. There were also documents which evidenced the construction and completion of a home on that parcel of land, and the offer of a mortgage to pay for that.

48. In such circumstances, the IAT, using a phrase which also appeared in the IAT's affidavit in *Aitken*, said that at the first initial grounds stage of its two-stage process it "*will look at, but not consider*" new information not before the Board. In my judgment, that is illegitimate. Whatever that unsatisfactory phrase means, it states that the IAT left out of account the new material. However, it was obliged to take it into account, if not for a rehearing, at least for asking itself at the first stage whether the new material raised a prima facie realistic prospect of success for the appellant.

49. In my judgment, the IAT therefore acted illegally, irrationally and unreasonably.

50. In his judgment in the Grand Court, Williams J, although citing other passages from *Aitken*, did not cite the paragraphs in which the Chief Justice reformulates the "*made out*" language in terms of establishing a *prima facie* case within the grounds sanctioned by statute.

51. Moreover, Williams J used language which went beyond the language of Mr Grizzel's affidavit in concluding that, in rejecting Mrs Jack-Chowtee's appeal, the IAT had analysed "*whether the Board, on the material which had been before the Board, and the additional material now before the IAT, had been wrong*" (at para 28). However, the IAT plainly stated that "*it did not hold a hearing de novo at which time it would have considered the new information before it"* and that its policy at stage one of the two-stage process is that it "w*ill look at, but not consider, information that was not before the Board*". In his conclusory paragraph 33, he was more faithful to Mr Grizzel's evidence when he stated that the IAT "*cannot be viewed as being unreasonable for concluding that, on the evidence placed before the Board by the Applicant, the Board's refusal to grant points for investment in property in the Islands was unreasonable and amounted to a ground of appeal*".

52. Thirdly, Williams J again went beyond the language of Mr Grizzel's affidavit when he said (at para 7 of his judgment) that Mrs Jack-Chowtee's new documents "*do not prove conclusively the ownership or completion of the transaction, but more an intention to purchase the property"*. The question before the IAT was not whether she could prove her ownership conclusively, but whether she had presented a *prima facie* case of investment which arguably could have raised her points to the necessary number of 100. The IAT did not ask itself that question before summarily dismissing her appeal.

53. At the hearing of the appeal to this Court, Mr Smith was gracious enough both to acknowledge the force of the analysis put to him in questioning by the Court, and to accept that, if the Court was minded to allow the appeal, then he would concede that, rather than an impossibly unrealistic remission to the IAT, a grant of 100 points should be made to Mrs Jack-Chowtee.

Decision

54. In the circumstances, the Court allowed the appeal and granted the declaration prayed that Mrs Jack-Chowtee qualifies for Permanent Residence and Employment Rights and that her dependents be included.

55. The Court's decision was given at the end of the hearing. This judgment contains the reasons which led me to join in that decision.

Sir Alan Moses, JA:

56. I agree

Sir John Goldring, President:

57. I also agree.