



**Neutral Citation Number: [2026] CICA (Civ) 7**

**IN THE CAYMAN ISLANDS COURT OF APPEAL  
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION**

**CICA CIVIL APPEAL No. 0030 of 2024  
(formerly GC 0155 and 0164 of 2017)**

**BETWEEN**

**OSBOURNE DOUGLAS and JUSTIN RAMOON**

**Plaintiffs / Appellants**

**v.**

**(1) THE GOVERNOR OF THE CAYMAN ISLANDS**

**(2) THE DIRECTOR OF PRISONS**

**Respondents**

**Before:**                   **The Hon Sir Richard Field, Justice of Appeal  
The Rt Hon Sir Jack Beatson, Justice of Appeal  
The Rt Hon Sir Anthony Smellie, Justice of Appeal**

**Appearances:**       **Hugh Southey KC instructed by Prathna Boddin of Samson Law for Justin  
Ramoan and Lauren Miranda of Samson Law for Osbourne Douglas**

**Paul Bowen KC, instructed by Reshma Sharma KC, Solicitor General and  
Claire Allen, Deputy Solicitor General, of the Attorney General's Chambers  
for the Respondents**

*CICA (Crim) Appeal 0030 of 2024 – Osbourne Douglas and Justin Ramoon v The Governor of the Cayman Islands and The Director Prisons*

**Date of Hearing:** 18 – 19 November 2025

**Draft circulated:** 9 April 2026

**Judgment Delivered:** 1 May 2026

## JUDGMENT

**Beatson JA:**

### **I. Overview**

1. This appeal is the latest stage of a long running dispute about the approach of a court and the evidence required when considering the constitutionality and legality of decisions to transfer prisoners from the Cayman Islands to the United Kingdom (hereafter “the UK”) pursuant to the Colonial Prisoners Removal Act 1884 (“the 1884 Act”).
2. Section 2(d) of the 1884 Act authorises the removal of a person imprisoned in any British possession to any other British possession or to the UK where it appears that “*by reason of there being no prison in the said British possession in which the prisoner can properly undergo his sentence or otherwise the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect*”. By section 5, the removing authority “*shall be a Secretary of State acting with the concurrence of the Government of every British possession concerned*”. Section 3 deals with the return of a removed prisoner. It provides that a Secretary of State or the Government of a British possession to which the prisoner has been removed may order the prisoner to be returned to the British possession from which he was removed either to serve the residue of his sentence or for discharge at the expiration of his sentence. The decision-making process in this case thus involves co-operation between the UK Secretary of State and the Government of the Cayman Islands.

3. The Appellants are Osbourne Douglas and his half-brother Justin Ramoon (hereafter “Mr Douglas” and “Mr Ramoon”). They are serving sentences of life imprisonment imposed following their convictions in June 2016 of murder and possession of an unlicensed firearm. Their minimum terms for the murder were respectively 34 and 35 years, and concurrent sentences of 10 years were imposed for the firearms charge.
4. They appeal against the decision of McDonald-Bishop J (Actg) (“the Judge”) dismissing their challenges to the decisions in June 2017 (hereafter “the Decisions”) to remove them from HMP Northward, the only male prison in the Cayman Islands, to serve the remainder of their sentences in prisons in the UK, where they have since been. In applications for judicial review and claims for breaches of the rights in Part 1 of Schedule 2 to the Cayman Islands Constitution Order 2009, SI 2009 No 1379, (hereafter “the Bill of Rights”), they submitted that the Decisions are a substantively disproportionate and unjustified interference with their rights to private and family life and to be treated with humanity, and were procedurally unfair.
5. The Judge delivered her judgment on 27 November 2024 but, because no draft Order dismissing the application was prepared for the Judge by the parties until she directed one in January 2026, her Order dismissing the applications was only issued on 2 February 2026, after the hearing of the appeals. The appeal is brought as of right under section 26(3) of the Bill of Rights.
6. The First Respondent is the Governor of the Cayman Islands, who provided notices of concurrence with the Decisions on behalf of the Government of the Cayman Islands. The Governor exercises the Crown’s authority in accordance with Part II of Schedule 2 to the Cayman Islands Constitution Order 2009 (hereafter “the Constitution”) and has special responsibilities under section 55 of the Constitution which include the internal security of the Islands. The Second Respondent is the Director of Prisons, whose responsibilities under section 7 of the Prisons Act (2020 Revision) include the prison building and the discipline and good order of prisoners.
7. The questions before this Court and the submissions of the parties are essentially the same as those before the Judge. The first and central question is the substantive proportionality of the Decisions to remove the Appellants from these Islands. The second question is whether their removal was

procedurally unfair because they were not given a prior warning or an opportunity to make representations before their removal.

8. Having to serve their life sentences with long minimum terms almost 5,000 miles from their homes and families in the Cayman Islands is, as the Respondents conceded, a very significant interference with the Appellants' family life. The way the Appellants have pleaded their case on proportionality has varied. But by the time of the hearing before the Judge in November 2023, they relied on six broad reasons for their submission that the Decisions are unfair and disproportionate. These are:

- (1) The impact of the transfers on the Appellants, their family life, and the family life of the children of what were abnormal long-distance transfers to a country thousands of miles from the Cayman Islands and in a different time zone.
- (2) Particularly, in the case of Mr Douglas, the interference with the Appellants' mental health.
- (3) Interference with the Appellants' right of access to lawyers.
- (4) The failure to give consideration to mitigation at the time of the decisions.
- (5) The inadequacy and limited steps taken since the transfer to mitigate its impact by for example facilitating contact between the Appellants and their families who reside in the Cayman Islands.
- (6) The absence of plans to facilitate the Appellants' return by making provision in the Cayman Islands for high-risk Category A prisoners.

9. The bulk of the Appellants' submissions on proportionality maintains that the Judge's approach is flawed and that she erred in various ways: see Grounds at [108] – [112] below. But the primary argument in their written submissions is that this Court should assess and decide for itself whether the Decisions were disproportionate and unjustified, and that there is no need to demonstrate that the approach of the Judge is flawed: see their skeleton argument, §§1(b) and 8. The Respondents submit that the question for this Court is whether the Judge's assessment of proportionality is wrong and that this is not a case requiring an appellate court to reassess proportionality: see their skeleton argument, §§ 5 and 12-17. On the approach of an appellate court to the assessment of proportionality, the rival submissions concern the effect of the judgments of the UK Supreme Court

since the Judge’s decision in *Re JR 123* [2025] UKSC 8 and the conjoined appeals in *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* and *Dalston Projects Ltd v Secretary of State for Transport* [2025] UKSC 30 (hereafter referred to as “*JR 123*” and “*Shvidler*”).

10. There are a number of differences of emphasis and formulation in the way the parties put the proportionality issue and what can be described as sub-issues related to it. These in part reflect the further refinement of a submission in the light of recent English decisions or its reformulation so as to package it in a different way. Some of the differences are said to seek to re-open a point which one party has submitted it is no longer open to the other party to raise, is an impermissible *ex post facto* allegation or justification informed by hindsight, or a matter not raised below. Examples of the first are whether the Court can rely on summaries giving the “gist” of underlying material withheld on public interest immunity (“PII”) grounds and when a reviewing court is required to make findings of fact. One example of the second is whether the Respondents can rely on responsive affidavit evidence about the suitability of HMP Northward and the ability of the Appellants to cause significant harm to those working and living in the prison system and members of the community who could be affected by their presence. Others are whether the Appellants can rely on the Respondent’s failure to make arrangements to facilitate family contact in the UK before making the Decisions, and complaints about the impact of limited family visits in the UK and on their mental health which could not have been reasonably foreseen when the Decisions to transfer them were made. Examples of points not raised below are that the transfers could have been made conditional on a high security prison being built within the Islands and failing before making the Decisions to ensure that the Appellants’ access to lawyers would be safeguarded in the UK.
11. Many of the matters raised by the parties on the proportionality issue overlap and blend into one another and it is impossible to consider them other than compendiously, not least because that is how they are treated in many of the relevant authorities, both domestic and of the Strasbourg court. Adapting the words of Lord Kerr in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 at [7] it is necessary at the outset to recognise that examination of the proportionality issue is a multi-faceted exercise, but also to recognise that care must be taken to ensure that a point

that has been reformulated and repackaged does not in substance replicate a point that has been rejected.

12. Sections II to VI below summarise the factual and procedural background (taken largely from the judgment below), the legal and constitutional framework, the Judge’s decision, and the grounds of appeal. Section VII contains the discussion and conclusions on the questions before the court in the light of the rival submissions before it.
13. Before us, Mr Hugh Southey KC appeared on behalf of the Appellants and Mr Paul Bowen KC, Ms Reshma Sharma KC and Mrs Claire Allen on behalf of the Respondents. We are grateful to them for their oral submissions and to them and their teams for their written submissions.

## II. The factual background

14. The facts of the murders are set out in full in the decision of this court on 7 December 2018 dismissing the Appellants’ appeals against conviction and sentence: see *Ramoon and Douglas v R* 2018 (2) CILR 563. This court at [78] endorsed the trial judge Quinn J’s description of the murder as “*a very public execution of the most evil nature [and] chillingly clinical in its planning and execution*”. Its judgment, delivered by Goldring P, also stated at [118]:

*“These appellants wore no disguise. They openly had with them a gun. They were not unknown to some (if not most) of those present ... . They plainly did not believe that anyone would dare to give evidence against them. That says much about these appellants. It also underlines the difficulty in obtaining evidence in cases such as these.”*

15. The Appellants were respectively transferred from HMP Northward to the UK on 22 and 28 June 2017. The Decisions to remove them followed an urgent request by the Royal Cayman Islands Police Service (“RCIPS”) to the Cayman Government on 27 April 2017, submissions by the Government to the UK’s Minister of State for the Overseas Territories, orders for removal and warrants of reception respectively made by the UK’s Secretary of State for Foreign and

Commonwealth Affairs and its Lord Chancellor and Secretary of State for Justice on 15, 16 and 21 June 2017, and notices of concurrence with the Decisions signed by the Governor of the Cayman Islands, then HE Helen Kilpatrick on 21 and 22 June 2017. The Appellants had been given no prior warning or invited to make representations before the Decisions to transfer them.

16. Following the transfer of Mr Douglas on 22 June, the Cayman Islands Government issued a press release announcing that a prisoner had been transferred to the UK under the 1884 Act. This *inter alia* stated that:

*“[t]his removal was authorised by the UK and Cayman Islands Governments in the interests of national security and the public safety of the people of the Cayman Islands”.*

Further information about the reasons for the Decisions and the matters considered were given in responses dated 26 and 27 September 2017 by the Attorney-General’s Chambers to letters before action from the Appellants’ attorneys shortly after and shortly before these proceedings were filed on 21 and 28 September 2017.

17. The Judge summarised the information in these responses at [12] of her judgment and considered them in detail in her review at [247] – [288] of the material that was before the Governor at the time the Decisions were made. The reasons included that, while detained, intelligence showed the Appellants had continued to control serious organised criminal activity in the Cayman Islands; that HMP Northward is a lower security prison and unable to offer the level of security required to detain the Appellants securely; and that while they remained at HMP Northward their activities would continue to present a serious and tangible threat to public safety and national security in the Islands.
18. The pre-action responses stated that consideration had been given to other alternatives including transferring the Appellants to another British overseas territory in the region, but it was decided that no suitable alternative existed. They also stated that consideration had been given to the human rights implications of any transfer on their rights to respect for private and family life under section 9 of the Bill of Rights. It was noted that the Appellants had grown up in the Cayman Islands where

they had family, including children, and could receive weekly visits from family members at HMP Northward, but it was stated that their removal was considered a necessary and proportionate interference with their rights. Any disruption to their family relationships “*would be mitigated by the fact that foreign national prisoners in the United Kingdom are permitted to call abroad regularly, and that the [Cayman Islands] Government might consider providing financial assistance to enable a close family member to visit [each Appellant] if a particular need was shown*”.<sup>1</sup>

19. The reason stated for the Appellants not being given prior warning of the intended removal or an opportunity to make representations was that, in the light of the circumstances that led to the decision to remove, prior warning would have had the potential to undermine the objectives of removing them.
20. The material that was before the Governor at the time the Decisions were made also included information about the Appellants’ convictions, the submissions made to the UK authorities by the Cayman Islands Government, information that (see [27] – [28] below) cannot be disclosed on public interest immunity (“PII”) grounds, and a summary of the intelligence on each of the Appellants. The Judge’s review of that material considered the unredacted parts of the submissions made to the UK authorities and the “gists” of the underlying material and of the intelligence on each of them that were disclosed pursuant to orders made by Carter J (Actg).
21. The unredacted parts of the submissions included the following statements. Mr Douglas was the leader of Cayman’s CMT<sup>2</sup> Gang and Mr Ramoon was a senior and influential member of the gang. They were considered highly dangerous in the local community. Intelligence had shown that they had been involved in the orchestration of serious gun crime and the importation of guns and drugs from within prison and attempted to intimidate staff at the prison. The prison was designed as a

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<sup>1</sup> Notwithstanding the qualified nature of this part of the pre-action response, almost three weeks earlier on 6 September 2017 Mr Ramoon’s then partner received an email from the Director of Prisons stating that the Government had agreed to fund three visits to the UK per year by 3 family members who are spouses/partners, parents and siblings. The funding would cover flights, hotel accommodation, ground transportation to and from the hotel and a daily *per diem* allowance for one week period based on the same rates allowed for Government employees when on official travel. On 18 September 2017, the Director of Prisons confirmed that the arrangements applied to Mr Douglas.

<sup>2</sup> Central Military Killers.

Category C prison and its single fence and location by the side of a public road mean that there are significant difficulties in preventing contraband including mobile phones from reaching prisoners. The Appellants' removal to the UK would provide time for improvements to security at HMP Northward, and once it is considered adequate, their return could be considered. It was considered that Mr Douglas's relocation to the UK would help break his grip over his criminal network and lower the risk to national security in the Cayman Islands, and that Mr Ramoon would take his place at the head of the gang if Mr Douglas was removed on his own.

### III. The procedural background

22. Applications for leave to apply for judicial review were filed on behalf of Mr Douglas on 21 September 2017 and Mr Ramoon on 28 September. In December 2017, Carter J gave them leave and made orders for disclosure. The applications were consolidated on 17 January 2018. Their cases have previously been the subject of a decision of this Court delivered on 27 April 2022 and, in the case of Mr Ramoon, by the Privy Council, the advice of which was delivered on 3 March 2023. The background and complex procedural history of these proceedings and the previous decisions and changes to the pleaded grounds were clearly and fully summarised by the Judge. The issues that came before her reflect that procedural history and those previous decisions.
23. Before turning to the Judge's analysis and conclusions I give a shorter summary of the position after the consolidation of the applications based on the Judge's compressed outlines at [17], [18] and [99] of her judgment. The 6 broad reasons for the Appellants' submission that the Decisions are unfair and disproportionate are summarised at [8] above. The grounds of the challenges are:

- (1) The failure to provide written reasons for the decisions to remove the Appellants from the Cayman Islands.
- (2) The absence of any lawful or legitimate basis for their removal.
- (3) The lack of justification for and disproportionality of the removal, which is in breach of sections 6 and 9 of the Bill of Rights. Sections 6 and 9 respectively provide that prisoners *“have the right to be treated with humanity and with respect for the inherent dignity of*

*the human person” and that “Government shall respect every person’s private and family life ...”.*

- (4) The absence of proper procedural safeguards and guarantees of fairness surrounding the decision to remove the Appellants.
- (5) Breach of the right to access justice at common law and/or section 7 of the Bill of Rights, and
- (6) Failure to have regard for the best interests of his children in the decision-making process.

Grounds (5) and (6) were originally only pleaded by Mr Ramoon. Ground 2 is no longer in issue.

**24.** The Appellants seek the following relief:

- (1) declarations that the removal directions and decisions to transfer and continued detention in the UK are in breach of the Cayman Islands Constitution.
- (2) orders of certiorari and mandamus quashing the removal decisions and requiring the Respondents to order the return of the Appellants to the Cayman Islands; and
- (3) an order to ensure that the procedure by which such decisions are taken by the Respondent shall hereby be rendered fair and provide adequate safeguards for the Appellants’ rights and the rights of their family.

They also seek such further, necessary and consequential or other relief as the Court deems appropriate.

**25.** On 7 December 2018, the Appellants’ appeals against conviction and sentence were dismissed by this Court but the hearing of their substantive applications for judicial review and constitutional claims was delayed as a result of satellite proceedings on a number of issues which came before Carter J. These included whether the Grand Court has jurisdiction to review the Decisions on Bill of Rights grounds, and whether the proper forum for any challenge was the High Court in London. Those relevant to this appeal are applications by the Appellants for disclosure, and by the Respondents to withhold certain information on PII grounds, and for the determination whether a closed material procedure (“CMP”) is available in the Cayman Islands.

26. A substantial amount of evidence was filed after the commencement of these proceedings. That by and in support of the Appellants concerned the impact of the removals, including some about events since the Decisions and the Respondents' pre-action responses referred to above. On behalf of the Respondents, there were four affidavits of Governor Kilpatrick's successor, HE Martyn Roper,<sup>3</sup> one by HE Jane Owen,<sup>4</sup> Governor Roper's successor, and a number of affidavits by officials who were not identified on security grounds. The Respondents' evidence concerned matters such as the assessed risks to peace and security from, for example, an escape attempt involving smuggling of firearms into the prison and another gang related incident involving the use of automatic weapons on both sides,<sup>5</sup> the security arrangements at HMP Northward, and matters such as arrangements for family contact and visits. It also set out their position on PII and whether a CMP was available.
27. There were open and closed hearings on the PII and CMP issues. The Appellants and their legal representatives were excluded from the closed hearing. Mr Ashley Underwood QC (now KC), a Special Advocate appointed to represent the interests of the Appellants who had access to the withheld material, made representations on that material in the closed hearing as well as submissions during the open hearing. Carter J also had access to the withheld material for the closed hearing.
28. In a judgment delivered on 2 July 2020, Carter J held that a CMP was not available in the Cayman Islands. She delivered her open judgment on PII on 19 October 2020, upholding the claims to PII for 185 documents, the majority of the documents on which the Governor had relied in making the Decisions. She did so, *inter alia* on grounds of national security and the threat to third parties and informers. I observe that at [83] of her PII judgment, Carter J stated that the information in the underlying documents that would be withheld, all of which she had examined, "*will not advance the [Appellants'] case in any material way*". On 7 January 2021 she extended time for appealing her CMP and PII decisions until after the conclusion of the substantive applications for judicial review.

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<sup>3</sup> 4 December 2019 (containing redactions for PII), 12 and 19 March 2021, and 13 April 2021.

<sup>4</sup> 6 October 2023. One exhibit of passages in the submission to the UK Foreign Office Minister was redacted, although some previously redacted passages had been released.

<sup>5</sup> First Affidavit of HE Martyn Roper dated 4 December 2019, §5.1, parts of which are set out at [1832 – [183] below.

29. The substantive applications for judicial review were originally heard by Wood J (Actg). He refused them on 28 May 2021 and gave his reasons for so doing on 29 November 2021.
30. There was no appeal against Carter J’s PII decision but appeals from the decisions of Wood J and Carter J’s CMP decision came before this Court on 25 January 2022. It was common ground that Wood J’s decision could not stand because it did not deal with some of the issues and his reasons for dismissing the applications were inadequate.
31. This Court decided that the Bill of Rights applies to the Decisions,<sup>6</sup> that the 1884 Act is “*in accordance with the law*” for the purposes of the rights of the Appellants to respect for their private and family rights under section 9 of the Bill of Rights, and that the procedures available to the Appellants to challenge their removal were and are sufficiently precise, albeit in relation to the alleged failure to give advance warning no concluded view was expressed. It also decided that the Grand Court has jurisdiction to hold a CMP and that a CMP was necessary in this case. This, it stated, is because the Appellants’ rights could only be justly vindicated by an effective judicial review process in which the justification for and the proportionality of the Decisions is considered by the Court on the same basis and the same information as that considered by the Governor.
32. The case was remitted for the Grand Court to hear the issues of justification and the proportionality of the impugned decisions (including the alleged failure to give advance warning of the removal) using a CMP, although Moses JA (with whom Field and Birt JJA agreed) stated at [90] that “*if the grounds for the Respondents’ assessment of the risk to national security are well-founded, then to give advance warning would have been absurd*”. This Court decided that the Respondents had taken account of the Appellants’ family ties when making the Decisions but stated that whether sufficient weight was given to maintaining a relationship with the children “*must await the court’s view after a CMP*”. It also remitted the issue of the extent to which the Appellants could rely on the failure to rebuild or upgrade the prison to make provision for high-risk prisoners. Moses JA stated at [159] that “*their argument was not that the failure to build or rebuild a prison was unlawful*” but

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<sup>6</sup> Because the Constitution of these Islands was made by Order in Council rather than primary legislation, this was not accepted by the Respondents until the last day of the hearing: see 2022 (1) CILR 640 at [46] ff.

that it was open to them on the pleadings to argue that “*if there was an unjustified and disproportionate interference with [their rights], then that failure would not afford a defence*”.

33. Mr Ramoon appealed to the Privy Council which, in a judgment given on 3 March 2023, see [2023] UKPC 9, held:

- (1) No CMP is available in the Cayman Islands, and this is not an exceptional case in which a PII ruling results in a situation in which the Grand Court would be unable to decide the dispute, in particular the proportionality of the Decisions, fairly. The Board stated that there had been extensive disclosure and “gisting” of the PII material (one of which it set out at [56(h)]), reliance on which did not create unfairness, and there was compelling evidence of the dangerousness of the Appellants: see [59]. At [52] it had stated that it was well established that it may be necessary to impose procedural limitations on the use of classified information. At [53] the Board agreed with Moses JA’s statement in this Court that a decision in favour of the Appellants would deprive the Respondents of the opportunity to rely on material which it was known would support their case. At [57] it stated that it was a telling feature of the case that there had been no appeal against Carter J’s PII ruling.
- (2) Section 2 of the 1884 Act establishes a test with sufficient precision to meet the requirement that a decision under it is “in accordance with the law”. Save in respect of the absence of notification before removal, which would have to be addressed at the remitted hearing, there are adequate safeguards against abuse of the power of removal conferred by section 2.
- (3) Whether or not appropriate weight was given to the impact of the transfer on Mr Ramoon’s family life was a matter for the remitted hearing.

34. I have stated that the two broad issues remitted to the Grand Court for decision were the substantive proportionality of the Decisions to remove the Appellants from the Islands and whether their Appellants’ removal was procedurally unfair as a result of the failure to give advance notice of the removals and an opportunity to make representations. The Board at [68] stated that, as Moses JA had observed, if the assessment of the risk the Appellants posed to national security was well-founded, then to require advance warning would have been absurd. It also stated that the

Respondents' plea that the risk to national security would be exacerbated by advance notice would have to be addressed on the basis of the evidence before the remitted hearing.

35. Before turning to the Judge's decision on the two broad issues remitted and the sub-issues and collateral matters that she and the parties identified as arising primarily in relation to substantive proportionality, I briefly consider the legal and constitutional framework.

#### IV. The legal and constitutional framework

##### (A) The Colonial Prisoners Removal Act 1884:

36. Sections 2(d), 3 and 5 of the 1884 Act are respectively set out and summarised at [2] above. Section 8(1) provides that a prisoner who has been removed from a British possession under the Act shall, until returned pursuant to section 3:

*“... be dealt with in the part of Her Majesty's dominions to which he is removed, in like manner as if his sentence (with such variation, if any, of the conditions thereof as may have been duly made in pursuance of regulations under this Act) had been duly awarded in that part, and shall be subject accordingly to all laws and regulations in force in that part, with the following qualifications, that his conviction judgment and sentence may be questioned in the part of Her Majesty's dominions from which he has been removed in the same manner as if he had not been removed, and that his sentence may be remitted and his discharge ordered in the same manner and by the same authority as if he had not been removed.”*

37. The consequence in the Appellants' cases is that, save in relation to questioning their convictions and sentences, or the remission of those sentences they are to be dealt with, while in custody in the UK, in accordance with the law of England and Wales. They thus were able to exercise their rights under section 273 of the Criminal Justice Act 2003 to apply to the High Court in England to determine their minimum term before eligibility for parole and their minimum terms were reduced by three years to reflect the additional hardship caused by serving their sentence in the UK. They will have the right under the Crime (Sentences) Act 1997 to apply to the Parole Board for England and Wales to be considered for release at the expiry of their minimum terms. By section 4 of the 1884 Act, regulations may provide for varying the conditions of a sentence of imprisonment passed

in a British possession where they differ from those in the part of His Majesty's dominions to which the prisoner is removed, but not so that the sentence is longer or the conditions are more severe than the punishment to which the prisoner was originally sentenced.<sup>7</sup>

38. As the Judge noted, although the Appellants are subject to the laws of England and Wales while removed, and by virtue of section 3 of the 1884 Act it is the UK government which is empowered to order their return to these Islands, they are nonetheless seeking orders for their return to be made by the courts of these Islands.

**(B) The Constitution and the Bill of Rights:**

39. The Judge succinctly summarised some relevant provisions of the Constitution at [59] – [61]. I referred at [6] above to the fact that the Governor exercises the Crown's authority in these Islands in accordance with Part II of Schedule 2 to the Constitution and that his or her special responsibilities under section 55 of the Constitution include the internal security of the Islands. I add only that by section 43, the executive power which is vested in His Majesty is to be exercised on behalf of His Majesty by the Government consisting of the Governor, as His Majesty's representative and the Cabinet.
40. It is clear, as this Court stated at [62] of its 2003 judgment, that the Bill of Rights forms the framework, according to which the decisions of the Governor are to be judged. While recognising in section 1(2) the distinct history, culture, Christian values and socio-economic framework of the Cayman Islands, it is plainly based on the European Convention of Human Rights (hereafter "ECHR") and, although not in identical form, largely reflects its provisions: see e.g. *Day and another v Governor of the Cayman Islands and another* [2022] UKPC 6 at [10] and [11].
41. The Appellants claim that their rights in section 6(1) as prisoners "*to be treated with humanity and with respect for the inherent dignity of the human person*", and in section 9(1) that "*Government shall respect every person's private and family life ...*" were violated by their removal.

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<sup>7</sup> See the Colonial Prisoners Removal Order in Council 1907, 1907 No. 742, the Schedule to which specifies the forms to be used.

42. The right in section 9(1) that Government “*shall respect every person’s private and family life*” is analogous to Article 8 of the ECHR. It is thus subject to the provision on justification in section 9(3) which provides:

*“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) in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any other property in such a manner as to promote the public benefit;*

*(b) for the purpose of protecting the rights and freedoms of other persons ...”*

43. The language of section 6, adopted from Article 10.1 of the International Covenant on Civil and Political Rights (hereafter “the ICCPR”) rather than the ECHR, does not subject the right in section 6(1) to a proviso similar to that in section 9(3). The case advanced on behalf of the Appellants is that section 6 creates an absolute right and imposes an absolute obligation. There is, it is argued, nothing equivalent to it in the ECHR, and its inclusion in the Bill of Rights should be seen as supplementing the standards of the ECHR in the Cayman Islands and requiring separate consideration: see Skeleton Argument, paragraphs 18-19. I summarise the Judge’s decision on what can be termed “*the section 6 issue*” at [46] – [47] below.

44. The Respondents are clearly public officials within section 28 of the Bill of Rights and thus subject to Sections 19 and 24. Section 19(1) provides that “*all decisions and acts of public officials must be lawful, proportionate, and procedurally fair*” and section 19(2) that those adversely affected have “*the right to request and be given written reasons for that decision or act*”. By section 24, it is unlawful for a public official to make a decision or to act in a way which is incompatible with the Bill of Rights unless required or authorised to do so by primary legislation, “*in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified*”.

45. Sections 26 and 27 of the Bill of Rights deal with the enforcement of the rights and freedoms and the remedies for breaches of them. By section 26(1):

*“any person” may “claim that government has breached or threatened to breach his or her rights and freedom under the Bill of Rights and the Grand Court shall determine such application fairly and within a reasonable time”.*

By section 27(1):

*“in relation to any decision or act of as public official which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order within its powers as it considers just and appropriate”.*

**(C) The Judge’s decision on the Section 6 issue**

46. Although the question whether the Decisions breached section 6 of the Bill of Rights was one of the issues remitted to the Grand Court, in view of the dispute as to its scope and significance in this case, the Judge dealt with it separately from her consideration of the other remitted questions. She accepted the Respondents’ submission that, insofar as section 6 is raised within the context of the section 9 right and as pleaded, a separate analysis of it is not required because it is in effect coterminous and co-extensive with the section 9 right that is also pleaded: see [96] – [97]. At [95], she stated that the Respondents noted that the contents of Article 10 *“are undoubtedly to be implied into other ECHR Articles, including Article 8, because ‘the very essence of the Convention is respect for human dignity’”*, giving as an example the discussion by the European Court of Human Rights (hereafter “ECtHR”) of ECHR Article 8 in *Polyakova v Russia* (2017) app. 35090/09 at paras 87 – 88, 100 and 113.

47. The Judge concluded at [98] that the fact that section 6 is expressed in absolute terms does not assist the Appellants if the interference with section 9 rights has been justified. She stated that *“[f]or there to be a violation of section 6, the Plaintiffs would have to establish some other independently pleaded ground on which section 6 can properly be found to be engaged”*, and she had found none in the grounds and evidence before her. In her overall conclusion at [354] she stated:

*“To the extent that the alleged breach of section 6 depended on grounds alleging a substantive breach of the right to respect for private and family life*

*under section 9(1), I find no infringement of section 6 on the basis alleged by the Plaintiffs under this head. The justification for the interference of the section 9 right means no infringement of section 6. Section 6 warrants no separate infringement in this regard”.*

## **V. The Judge’s analysis and decision on the remitted questions**

48. The Judge’s very full judgment contains 367 paragraphs over 107 pages, 74 of which deal with substantive proportionality. As well as the material that was before the Governor at the time of the Decisions, or gists and unredacted parts of that material, there was a substantial body of evidence filed. In view of the granular and overlapping submissions before us it is necessary to summarise the Judge’s reasoning in some detail.
49. The Judge considered two overarching questions in relation to proportionality. The first is whether the Respondents could show that the Appellants’ risks to national security and public safety were such as to compel the decision to remove them. If they could, the second question is whether there any less drastic alternative which might have afforded greater protection to the Appellants’ rights and the interests of their children. For the reasons I summarise in this section of my judgment, at [353] she concluded that the Respondents have justified the interference with the Appellants’ rights to respect for private and family life under section 9(1) of the Bill of Rights.

### **(A) Collateral and sub-issues to the overarching substantive proportionality questions:**

50. The Judge identified two sub-issues: the burden and standard of proof (“*the burden and standard of proof issue*”) and the approach and standard of review in the assessment of proportionality (“*the intensity of review issue*”). The parties identified four sub-issues. The first is whether proportionality is considered at the date of removal or in the light of subsequent developments (“*the timing issue*”). The second and third are the approach the Court should take in the light of the fact that much of the underlying evidence on which the Decisions were based has been withheld by order of Carter J on PII grounds and whether fact-finding is required (“*The PII and fact finding issues*”). The fourth is whether (see the advice of the Privy Council at [29(6)]) it is open to the Appellants to rely on a failure to build or rebuild a prison with necessary security in the Cayman

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Islands as part of their challenge to their transfer and, if it is, whether the Respondents are unable to demonstrate that the removal was proportionate in light of the failure to make provision for high-risk prisoners (“*the prison upgrade/rebuild issue*”).

51. I observe that there is an overlap between these issues, sometimes a significant one. For example, part of what might be regarded as an aspect of intensity of review concerns the Court’s treatment of material excluded on PII grounds, whether fact-finding is required, and whether the onus and standard of proof is significant in particular circumstances. The Judge dealt with these under the PII and fact-finding issues, which I summarise at [66] – [72] below but her discussion of the individual issues recognises the overlap.
52. ***The burden and standard of proof issue, Judgment, [106] – [107]:*** It was common ground that the onus lies on the Respondents to justify interfering with the Appellants’ section 9(1) rights and that the State is required to prove justification on a balance of probabilities.
53. ***The intensity of review issue, Judgment [108] – [124]:*** There is also no dispute about the formulation of the four requirements of what the Judge at [108] described as the well settled test to be applied by a court in determining whether an interference with a fundamental right is reasonably justifiable in a democratic society and is thus a proportionate interference: Appellants’ Skeleton argument, §§12-14. The dispute is about the application of those requirements and the approach to answering the four questions they raise in the light of adaptations and refinements since the classic formulation of proportionality in a Commonwealth Caribbean constitution in the advice of the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, an appeal from Antigua and Barbuda. The result is what two more recent Privy Council decisions from Caribbean jurisdictions have described as “*the modern conventional approach to issues of proportionality*”: *Suraj v Attorney General of Trinidad and Tobago* [2022] UKPC 26 at [51] and *The Attorney General and The General Legal Council v The Jamaican Bar Association* [2023] UKPC 6 at [77].
54. As to the questions to be asked and answered when determining proportionality, at [109] of her judgment, the Judge set out the formulation in decisions such as *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at [19] and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC

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31 at [20]. They are: (i) is the objective sufficiently important to justify the limitation of a fundamental right; (ii) is the limitation rationally connected to the objective; (iii) could a less intrusive measure have been used; and (iv) has the interference struck a fair balance between the rights of the individual and the interests of the community? Since her decision, this approach has been endorsed in *R (AM Belarus) v Secretary of State for the Home Department* [2024] UKSC 13 at [53].

55. At [112] – [124], the Judge stated that she sought to distil and compress the principles established in the many cases she considered while adhering as closely as possible to the formulation of the principles in them. Her starting point was that “[t]he intensity of review is greater under the proportionality approach. The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck and not merely whether it is within the range of rational or reasonable decisions”: [116]. She also stated that “a more intensive review and a closer factual analysis of the justification is required than under traditional grounds of judicial review”, and “[i]n a proportionality challenge ... the focus is on the result, not the process”: see [118] and [121]. However, although the differences “may sometimes yield different results” ... “[t]his does not mean that there is a shift to merits review”, and “the respective roles of judges and administrators are fundamentally distinct and will remain so”: see [118]. This she stated is because “[t]he margin of appreciation recognises that the court does not become the primary decision maker on matters of policy, judgment, and discretion so that public authorities should be left with room to make legitimate choices” but “the width of the margin of appreciation and the intensity of the review which it dictates can change depending on the context and circumstances”: [120]. Her concluding words in [118] were that “context is everything”.
56. Two important components of the Judge’s conclusion at [122] are: (a) “proportionality is a matter of judgment, not fact” and (b) that “it will remain a rare case where findings of fact will need to or should be made in judicial review” save “perhaps in the procedural challenges where it may be necessary to establish what happened during the course of the decision-making process rather than what material was before the decision-maker”.
57. **The timing issue, Judgment, [139] – [156]:** The Judge first identified the positions of the parties. The Appellants contended that proportionality is considered in the light of developments up to the

date of the hearing, and the Respondents that the court can only be concerned with the lawfulness of the transfer at the time of the Governor's concurrence to the removals.

58. She then noted that the impact of the Decisions would have been felt after their removals and when they were in the UK. She stated that what transpired in the UK is relevant in showing the fact of the interference, and its extent and impact. At [144] she stated that “[t]he acceptability of the Governor’s justification for concurring in the transfers ... depends on the prevailing circumstances at the time she made the decisions ...” and “[i]t was when the Plaintiffs were removed from the Cayman Islands that the Governor’s concurring decisions would have crystallised”.
59. The Judge stated that she had gained invaluable guidance as to the appropriate timeline for considering proportionality from two decisions of the Court of Appeal of England and Wales, *R (A) v Chief Constable of Kent Constabulary* [2013] EWCA Civ. 1706 at [79] – [84] and *R (BAA) v Secretary of State for the Home Department* [2021] EWCA Civ. 1428 at [44] – [46]. She stated at [145] that these decisions established three circumstances in which “a Court may consider the lawfulness of executive action by reference to fresh material that was not before the decision-maker at the time the impugned decision was made”. These are where: (a) The court is effectively the primary decision maker rather than carrying out a process of judicial review; (b) the decision-maker is a public body with a continuing duty concerning the matter; and (c) the fresh material relates to a fact in issue that existed at the time of the decision and which the decision-maker ought to have known.
60. In relation to “continuing duty” cases the Judge stated that “the more appropriate course is usually for the affected individual to ask the decision maker to consider the up-to-date material and to make a fresh decision that may be the subject of judicial review”. At [153] she also stated that the *Kent Constabulary* case established that the court may employ a more flexible approach in some cases to enable it to do justice but that even within that context “the proper way of proceeding would be for a claimant to make a fresh application to the decision-maker, which would be subject to further review by the court”.

61. The Judge stated that it was explained in the *Kent Constabulary* case that “*the first task is to establish the relevant facts, which may have changed since the decision was made*”. At [149] she stated:

*“In this case, the relevant facts are (a) whether the removal of the appellants to the United Kingdom was expedient for their safer custody due to the risk they allegedly posed to national security and public safety and the inability of the Cayman Islands Government to securely accommodate them at HMP Northward in the light of that risk assessment; and (b) whether the removal was the necessary and proportionate response to the alleged risk.”*

62. The Judge concluded at [150] that “*having applied the applicable principles of law to the relevant facts for determination, I find that none of the three circumstances that would justify this court considering material or information not available to the governor at the time of the decisions were made arise in the circumstances of this case.*” Accepting the Respondents’ submissions, she stated that “*even though the court is the decision-maker regarding proportionality, it is not the primary decision-maker concerning the removal .... It is still conducting a judicial review of the Governor’s decisions, which is not a merits review.*”
63. As to the statutory context, the Judge described the removal as a composite decision between the Cayman Islands and the UK Governments. She had stated at [144], with reference to section 8 of the 1884 Act which is set out at [36] above, that on removal the status of the Appellants changed “*from that of Caymanian prisoners to being United Kingdom prisoners in their capacity as transferred prisoners*”. She stated at [151] that “[*t*]herefore there came a time when the responsibility for the Plaintiffs would have shifted to the United Kingdom especially in matters over which the Cayman Government had no control or jurisdiction” and at [152] that neither Respondent “*has any continuing statutory duty regarding the Plaintiffs while they are in the United Kingdom as transferred prisoners*”.
64. The Judge’s overall conclusion at [156] and the approach she stated would be demonstrated in her analysis of the overarching questions in the substantive proportionality ground was:

*“The pertinent time for assessing proportionality and determining justification, in this case, would be at the time the Governor gave her concurrence for the Plaintiffs’ removal and up to when the Plaintiffs were removed from the Cayman Islands. This approach has considered matters known and ought to have been known or anticipated by the Governor as the probable and reasonably foreseeable consequences of the decisions on the Plaintiffs’ right to respect for family life. The inquiry also involves an evaluation of the measures taken to mitigate those consequences following the Plaintiffs’ removal from the Cayman Islands. In essence, not all the subsequent developments, following their removal from the Cayman Islands, that have been relied on ... as constituting unjustifiable interference with their sections 9 and 6 rights can be laid at the feet of the Governor and/or the Director of Prisons.”*

65. At the beginning of her analysis of proportionality, the Judge noted that there was material before her on developments since the decisions and stated that she had to be careful not to permit *ex post facto* challenges and justifications. In the same way that the Appellants were not allowed generally to rely on updated developments in the UK to impugn the Governor’s decisions, the Respondents could not rely on later occurrences to justify those decisions: see [234] – [235].
66. ***The PII and fact-finding issues, Judgment, [157] – [218]:*** The Judge rejected the two limbs of the Appellants’ submissions about the consequences of material available to and relied on by the decision-maker being withheld from the court on PII grounds. The first is that the court cannot conclude that the interference is justified because *inter alia* summaries in “gists” may mislead and no weight can be given to them. The second is that the result of the imbalance between the information available to the decision-maker and that available to the court is that the court is in no position to make findings of fact and has no evidential basis to assess proportionality.
67. Her reason for rejecting them was that both this Court and the Privy Council had “*roundly rejected*” this argument: see [165], [167] and [168] and the summary at [33(a)] above of the Privy Council’s decision. Although the Judge stated that she was bound by those decisions, she went on

to consider the arguments, particularly in relation to the question of fact-finding, and found them unmeritorious. She considered that the Court could not ignore the material relied on by the Governor which, from the summaries in the gists, supported the Respondent's case. To proceed as though the undisclosed information does not support that case would she stated be unfair to the Respondent: see [175].

68. The Judge also rejected the Appellants' submission that fact-finding is required to the extent that the reason for transferring them is their continued criminality, because that is either a "hard-edged question of fact" on which the court has to make a binding finding, or is at least a question of fact on which the court needed evidence that suggested criminality. She did so after considering two lines of authority.
69. The first consists of the statements of principle in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 at [44], *Ali v Secretary of State for the Home Department* [2016] UKSC 60 at [32], the *Jamaican Bar Association case* referred to above, and *Abortion Services (Safe Access Zones) (Northern Ireland Bill)* [2022] UKSC 32 at [30]. She stated that she was also assisted by the identification in *Al Sweady v Secretary of State for Defence* [2009] EWHC 2387 (Admin) of the main areas of factual disputes that are regarded as "hard-edged" questions of fact the determination of which is bound to be crucial to the outcome. The Judge's conclusion at [189] in the light of what was said in those cases was:

*"[i]n the instant case, where the remaining issue for determination is whether the interference is reasonably justifiable in a democratic society, and around which there is no material dispute of fact, there would be no need for fact-finding and the standard of proof would have no relevance."*

70. The second limb of the Judge's analysis was an examination of the strands of justification advanced by the Respondents in the light of the decisions in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, *R (Pearce) v Parole Board* [2023] UKSC 13; *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; and *U3 v Secretary of State for the Home Department* [2023] EWCA Civ. 811. These cases concerned different situations in which an

evaluative judgment or assessment of risks posed in the future was made by having regard to all the material before the court including unproven complaints or allegations.

71. In *Rehman* Lord Slynn stated at [22] that the decision-maker is entitled to have regard to the precautionary and preventive principles rather than to wait until directly harmful activities have taken place. In *Begum* Lord Reed stated at [70] that some aspects of an assessment “*will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment*”.

72. The Judge’s overall conclusions on the PII issue were:

*“The first point of departure in conducting the judicial review of the decisions is the statutory framework within which the Governor gave her concurrence to remove the Plaintiffs. The central legal question that confronted the Governor was whether on the facts and circumstances disclosed to her from the various sources on which she relied it was expedient to remove the Plaintiffs for their safer custody under the 1884 Act given the risk they posed to the national security and public safety and the inability of HMP Northward to secure them. This was a decision for the Governor in the exercise of her evaluative judgement and not for the court, which has no special knowledge of those matters. In her assessment, discretion and judgement, she considered it was expedient to remove them for their safer custody. She based her decision on established and proved facts, as well as on allegations of continued criminality derived from intelligence. The latter had not been objectively verified in their truth and veracity.” [211]*

*“This was the evaluative executive discretion or judgment to be exercised by the Governor within the legal framework of section 2(d) of the 1884 Act in her capacity as the government official responsible for internal security of the*

*islands. Accordingly, the exercise of the Governor’s discretion, insofar as she relied on the underlying material that the court has not seen, was not based on findings of facts that particular events had happened but rather, on an overall consideration of and global approach to the available material in evaluating future risk, that is, what might happen.” [212]*

See also [216], part of which is set out at [183] below.

73. **“The prison upgrade/rebuild issue, Judgment, [125] – [138]:** The dispute before the Judge concerned the scope of this issue that falls for determination. Did the Respondent have to demonstrate that the removal was proportionate in the light of the failure to make provision for a high security prison on the Islands, as the Appellants submitted, or was only a much narrower point left open by this Court’s earlier decision and what was stated by the Privy Council? The Respondents submitted that all that was left open to the Appellants to argue was that, if they established an unjustified and disproportionate interference with their rights, the failure to upgrade or rebuild the prison would not afford a defence.
74. The Judge considered the language used in this Court by Moses JA at [159] - [160] and in the Appellants amended pleadings. She noted that this Court had not struck out this ground, and although the way the Appellants had framed the issue did not accord with this Court’s formulation, the Privy Council’s advice at [29(6)] stated that this Court had concluded that at the remitted hearing the Appellants could rely on a failure to build or rebuild the prison with necessary security as part of their challenge to the transfer. She therefore concluded at [137] – [138] that it was open to the Appellants to argue the issue as part of their case under the proportionality grounds.

**(B) Applying the proportionality test:**

75. I turn to the Judge’s analysis and conclusions on the six broad reasons relied on by the Appellants for their submissions that the Decisions are disproportionate and not justified: see Judgment, [219] – [354].
76. **The abnormal long-distance of the transfers, Judgment, [219] – [230]:** The first of those was the Appellants’ submission that the distance of the transfers, which was greater than in any other

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reported case, and the reluctant resultant adverse impact on their and their children's family life in itself suffices to ground a violation of section 9 of the Bill of Rights. The Judge rejected that submission. In her summary of the contents and scope of sections 6 and 9, at [85] she had noted, citing *Khoronshenko v Russia* (2015) Application no. 41418/04 that, in the context of prison visits, the margin of appreciation has been narrowing. At [226] she cited 12 other decisions of the ECtHR and or the European Commission of Human Rights (hereafter “ECssnHR”), and the decision of Simler J as she then was in *R (Richards) v Secretary of State for the Home Department* [2015] EWHC 4280 (Admin) relied on by the Respondents. After referring to the Strasbourg cases, the Judge singled out *Richards’* case because it involved a transfer from the Cayman Islands to the UK and was held to be justified on the basis that the Cayman Islands did not have a high security prison which could accommodate the claimant given his high-risk status.

77. The Judge at [225] stated that in the cases in which a violation of ECHR Article 8 was found there was more than just a consideration of the distance and impact of transfer.<sup>8</sup> They were cases where the decision was taken without assessment of the personal circumstances of the prisoner and close family, objective justification for the transfer, an opportunity for an effective challenge, or without balancing the rights and interests of the prisoner with those of the community. No violation was found in cases where a fair procedure was deployed which took account of these factors and provided suitable means of mitigating the impact.<sup>9</sup> She rejected the submission that the cases relied on by the Respondents do not reflect the modern jurisprudence of the ECtHR regarding distance and at [230] stated that the long distance cannot be determinative of the issue of proportionality. She then turned to the more fact-sensitive analysis that she had earlier identified was required by the four questions to be asked and answered when determining proportionality.

78. ***Did the Decisions pursue a legitimate aim which was sufficiently important to limit the Appellants’ fundamental rights? Judgment, [236] – [291]:*** Most of the proportionality analysis is concerned with this, the first of the four questions to be asked and answered. The question for the

<sup>8</sup> *Polyakova v Russia* (2017) app. 35090/09; *Khordorkovskiy v Russia* (2014) 59 EHRR 7; *Vintman v Ukraine* (2014) app.28403/05; *Rodzevillo v Ukraine* (2016) app.38771/05; *Piechowicz v Poland* (2015) 60 EHRR 24 and *Danilevich v Russia* (2021) app. 31469/08 were cited.

<sup>9</sup> *X v United Kingdom* (1974) app. 5712/72 ECssnHR; *R (Richards) v Secretary of State for the Home Department* [2015] EWHC 4280 (Admin); *PK v United Kingdom* (1992) app 19085/91 ECssnHR; *Messina v Italy* (2000) app. 25498/94; *Ocalan v Türkiye (No 2)* (2014) apps 2409/03, 197/04, 6201/06 and 10464/07; *Serce v Romania* (2015) app. 35049/08 and *Palfreeman v Bulgaria* (2017) app. 59779/14 were cited.

Judge was whether on the evidence, the Respondent's claim that the Appellants posed a risk to national security was made out or whether the evidence only pointed to what the Judge referred to as ordinary criminality.

79. The Judge started with a review of the material before the Governor at the time the Decisions were made. At [236] ff, she considered the evidence referred to at [16] – [21] above as to the reasons for the transfers and the material that was before the Governor at that time, the “gists” of material withheld on PII grounds, and a summary of the intelligence on each Appellant.
80. This included evidence filed about matters such as information on the convictions, the Appellants' disciplinary records and offending history, their status as Category A prisoners, the submissions the Cayman Government made to the UK authorities, and information regarding the Appellants' membership of the CMK gang. The open evidence included a photograph of a large tattoo with the letters CMK on Mr Ramoon's back and the gist of information regarding their gang membership. It also included evidence about security arrangements at HMP Northward Prison, and arrangements for facilitating contact in the UK between the Appellants and their families who reside in the Cayman Islands.
81. The Judge made the observations I have referred to at [65] above about the need to avoid reliance on *ex post facto* justifications and allegations based on developments since the Decisions. As to material excluded on PII grounds, she stated at [250] that such material:

*“... cannot advance the Plaintiffs' case in any material way, and neither would it undermine the Respondents' case ... The court cannot reject the gist of the underlying material. Therefore, available for the consideration of the court, is the gist of allegations against the Plaintiffs, which I have already accepted is supported by the underlying undisclosed material based on the judgments of Carter J (Ag), the appellate courts and the role of the special advocate in the PII hearing. Therefore, I am obliged to take the gist of the undisclosed material into account when assessing proportionality. They form part of the body of facts which the Governor could have properly regarded as*

*possibly true in the exercise of her evaluative and predictive judgement in arriving at the challenged decisions.”*

82. She thus accepted that there was underlying undisclosed material that supports the gist of the intelligence reports that the Appellants were members of the CMK gang and continued to be involved in criminality despite their imprisonment and stated that the CMK tattoo would have provided compelling evidence that Mr Ramoon was a member: [254] – [255]. The ultimate question facing the Governor was whether there was no suitable penal facility to safely secure the Appellants in the Cayman Islands, and, if so, whether they should be removed to the UK in accordance with section 2(d) of the 1884 Act. For that purpose, the Governor’s assessment of risks was evaluative and predictive in relation to future risks,<sup>10</sup> and she was only required to determine whether there was a possibility that the information regarding the Appellants’ alleged criminality was true: [257] – [258]. The Judge concluded at [259] that:

*“The court’s task on review is not to determine whether the underlying facts on which the risk assessment was based are true and provable but rather to assess whether the governor would have been entitled to regard them as possibly true”.*

83. The Judge rejected the Appellants’ submission that the Respondents’ responsive evidence about the suitability of HMP Northward and the failure to provide the necessary resources for them to remain in the Cayman Islands was *ex post facto* justification. Having considered *R (United Trade Action Group Ltd and others) v Transport for London* [2021] EWCA Civ. 1197, [2022] LLR 141 at [125], she did so on the ground that the responsive evidence was part of the Respondent’s “*genuine elucidation of the basis for the decision and not an impermissible justification or contradiction after the event*”: see [268].

84. The Judge also stated:

- (a) At [269]: in any event, the Court does not have the institutional competence to reject the Respondents’ evaluation of the state of the prison and its ability to hold

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<sup>10</sup> The material part of his evidence is set out in Note 17 to [175] below.

the Appellants securely, and what was necessary for the interests of national security and public safety, and

- (b) At [273]: The Governor's evaluation of the security standards of the prison was connected to the risk assessment based on the Appellants' convictions for murder, past convictions and offending history, their Category A status and the intelligence reports of continuing criminality. *"There were ample grounds for the Governor, the Director of Prisons, the RCIPS and other advisers to the Governor to form the view that there was a serious possibility of risk or danger to the security or well-being of the nation created by the Plaintiffs' alleged conduct, past conduct and threat of escape in the light of the unsuitability of HMP Northward to house them as Category A prisoners"*.

85. As to the Appellants' prison disciplinary records, the Judge noted at [277] that there was no direct indication that these were considered by the Governor. There was, however, evidence of intelligence regarding the Appellants' conduct in prison which linked them to intimidation, manipulation of and threats to staff, plans to escape and the use of weapons. The Judge stated that could not be said to be irrelevant in considering whether the risk assessment was reasonable and the Governor was entitled to arrive at her decisions.
86. The last factual issue considered by the Judge in her decision as to whether the Decisions pursued a legitimate aim which was sufficiently important to limit a fundamental right was whether there was an urgent need for the Appellants' removal. The immediate catalyst appeared to be an apparent gang related attack on the home of the Appellants' mother on 3 June 2017 and concerns that they would retaliate. At [280] the Judge stated that the Governor could not be faulted in considering this as of critical concern to her risk assessment. At [281] she stated that the evidence by the Governor in December 2019 setting out the intelligence available to his predecessor who made the Decisions painted a compelling picture of the threat to the national security and public safety of *"a small island nation"*.
87. The Judge reiterated her recognition that the court is the primary decision-maker on the violation of the Bill of Rights, but stated at [283] that it was not the primary decision-maker regarding the risk posed by the Appellants and the steps to be taken to neutralise or eliminate it. She had stated at

[269] and [282] that with access to information and expert advice not available to the court, “*at the time the decisions were made, the Governor was undoubtedly in a better position to judge what was needed in the interests of national security and/or public safety*”. She also referred to the statements in *CG v Bulgaria* (2008) 47 EHRR 51 that despite the large margin of appreciation left to the executive, the court must be able to react when a claim that there is a threat to national security has no reasonable basis in the facts or reveals an interpretation that is unlawful or contrary to common sense: see [283] – [287].

88. The Judge rejected the submission that the evidence only pointed to ordinary or “normal” criminality. Her conclusions were:
- (a) The eradication or reduction of crime for the preservation of public safety is a component of national security, and the security of prisons is a pertinent consideration because of the risks posed by those who escape: [287].
  - (b) The information before the court including the gist of the allegations in the undisclosed material sufficed to establish that there was a risk or danger to the national security and public safety of the Cayman Islands which made it desirable for the Appellants to be removed: [288] – [289].
  - (c) It was indisputable that the aim of securing the Appellants’ safer custody to ensure the national security and public safety of the Cayman Islands is a compelling objective sufficiently important to limit their section 9 rights: [290].
89. ***Were the Decisions rationally connected to the objective? Judgment, [292]:*** The Judge also concluded that it is beyond dispute that this requirement is satisfied.
90. ***Could a less intrusive measure have been used to achieve the objective? Judgment, [293] – [301]:*** As well as the matters discussed when dealing with national security, the Respondents pointed to possibilities that were considered as alternatives, such as moving the Appellants to a prison in Bermuda and transferring prison officers from the UK to the Cayman Islands. Their evidence was also that the tactical responses for managing prisoners posing the risks the Appellants pose such as placing them in separate prisons used in larger jurisdictions could not be used given the size of the Islands and the absence of another prison for men.

91. The Judge stated at [295] that this criterion is closely connected to the court’s consideration of the justification by the Respondents based on the unsuitability of HMP Northward. That, she stated, was, for the reasons given earlier in her judgment, a matter “*totally within the institutional competence and executive judgement of the removing authority*” with which she would not interfere. At [297] she stated that in the light of the intelligence of a planned escape and the attack on the Appellants’ mother’s house, and the fear of reprisal, it could not be said that the Governor acted irrationally when she failed to ensure an upgrade or the rebuilding of the prison in the time the events unfolded and the Decisions were made. She also considered (see [298]) that any decision to upgrade or rebuild the prison was not for the Respondents but for the Cayman Government, which should be given a wide margin of appreciation because it involved substantial expenditure and decision-making about the allocation of scarce resources.
92. Her conclusion at [299] – [301] was that the removal of the Appellants was within the range of reasonable options open to the Respondents. The third component of the proportionality test was satisfied because nothing suggested that a less intrusive measure was reasonably open and could reasonably have been used.
93. ***Was a fair balance struck between the Appellants’ constitutional rights to respect for family life and other rights and the interests of the community? Judgment, [302] – [352]:*** The Judge stated at [302] that she regarded the family life aspect of this question as raising the thorniest issue, at [305] that the burning question was whether the Governor got it wrong, and that the Court was the primary decision-maker as to whether a fair balance was struck. At [321] she stated that the Appellants accepted the conclusion of this Court and the Privy Council that when making the Decisions, the Governor had taken account of their impact on their children, respectively aged seven and under two at the time of their transfer.
94. Her starting point was to summarise the evidence adduced by the Appellants of the impact of removal on them and their families, and that adduced by the Respondents. She did so in detail at [308] – [317], including for example numbers of telephone calls made. For present purposes, it suffices to highlight the main points she made.

95. It was clear, she stated, that before their transfer the Appellants were in better and more frequent contact with their family members than they have been since then. When imprisoned at HMP Northward, they both had weekly visits from family members, in particular their mother, Mr Douglas's elder daughter and Mr Ramoon's son, and daily telephone contact with them, and also had visits and telephone contact with other family members.
96. After their transfer, initially, neither had any contact with family members for a protracted time, in Mr Douglas's case nearly three months. They then had 5-10 minute telephone calls once or twice a week to family in Cayman, and after October 2019, one free call a month and paid calls, which depended on their mother sending money. Conversation was sometimes difficult due to technology problems, and the time difference made it difficult to speak to the children. Mr Douglas stated the limitations on contact damaged his bond with his daughter. In December 2020, he had a video visit with his mother and daughter. Mr Ramoon's evidence is that he has had two video calls with his son, with whom it is important to him to maintain a relationship, and that he has faced mental and emotional challenges due to the separation from his family.
97. After the Decisions to remove were taken, HMCIPS agreed to fund one family visit a year for up to six close family members. The Judge stated at [315] that this was not known when the Decisions were challenged.<sup>11</sup> The first family visit was in September and October 2019. The Appellants' mother and Mr Douglas's elder daughter were among those who visited, but subsequent visits were prevented due to Covid-19 and did not resume until the Autumn of 2022. Mr Ramoon received almost daily visits but Mr Douglas declined visits. Both received separate visits from five family members on at least five occasions in September 2023, but Mr Ramoon's young son, two years old at the time of Mr Ramoon's removal, was not one of those. The child's mother would not permit him to travel to the UK to visit.
98. The Judge accepted at [320] that, given the age of the children, the impact of the transfers on the Appellants' contact with them deserved to be given deeper consideration and greater weight than the impact on their contact with others but stated at [322] that a salient starting point is that the impact started upon their imprisonment following their convictions. At [324] she also accepted that it was reasonably foreseeable that as contact became less frequent and personal after their removal

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<sup>11</sup> It was, however, known to Mr Ramoon's former partner, see Note 1 to [18] above.

their relationship would be adversely affected but not that the termination of family contact between the Appellants and their children could have been reasonably foreseen by the Governor at the time of the Decisions. She recognised at [332] that the best interests of the children would be to have their fathers in close proximity and the serious impact of having no contact or limited contact from such a distance, noting that Mr Ramoon’s son, a toddler, at the time his father was transferred, by that time had no recollection of his father.

99. Relying on the decision of the UK Supreme Court in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25,<sup>12</sup> the Judge rejected the submission of the Appellants that the impact of this later unforeseen development made the interference with their section 9 rights disproportionate and unjustified. She stated at [328] that while that decision identified the best interests of young children in proceedings to extradite their parents who had been convicted of drug trafficking offences as “*a primary consideration*” in the balancing exercise they were not “*the primary or paramount consideration*”. At [330], she stated that “*the balancing exercise requires careful consideration of the interests of the children in maintaining close contact with their fathers, who are separated from them by a far distance, and the public interest in having the fathers remain at that distance due to the risks they pose to national security and public safety*”.
100. She started her analysis of the circumstances of the present case by stating at [332] that the best interests of the children would be to have their fathers in close proximity to them and to be able to see them more often and interact with them rather than either no contact at all or contact from such a far distance. But after analysing the other circumstances of the case, she concluded at [338] that in the light of them, especially that the Appellants are not caregivers or attachment figures, and the reasoning in *H (H)*’s case where both parents were extradited, she was “*propelled to the conclusion that ... the interests of the children must yield to the weightier countervailing public interest considerations of public safety and national security*”. A fair balance was struck by the removing authority which had carefully weighed the competing considerations and rightly concluded that the interference with the section 9 right was justified on the substantive proportionality ground: see [340].

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<sup>12</sup> The Judge mistakenly identified the case as a decision of the Privy Council.

101. As to interference with other private rights, in view of her decision on the timing issue, summarised at [57] – [64] above, the Judge rejected complaints about the consequences of detention in the UK to Mr Douglas’s mental health and by Mr Ramoon about the absence of offence-focused work. The Appellants argued that those matters could not have been considered by the Governor at the time of her decisions. She held that those matters fell within the purview of the UK authorities under whose jurisdiction the Appellants now are as transferred prisoners.
102. The Judge also rejected complaints that the challenged decisions limited their ability to make contact with their lawyers in the immediate aftermath of their transfers. She stated that the Appellants’ problems in contacting their lawyers were outside the control of the Caymanian authorities, were not prolonged, and did not result in any unfairness to them in pursuing their criminal appeals and commencing these proceedings.
103. ***Suitability of mitigating measures:*** In the light of the pre-action responses by the Attorney General and the evidence filed, the Judge concluded that the submission that the interference with the Appellants’ section 9 rights was disproportionate because no consideration was given to mitigation at the time of the Decisions was without merit. At the time of the Decisions, due regard was paid to mitigating measures by considering the prospects of state-funded family visits and measures in UK prisons allowing telephone and other means of communication, and steps have been taken since the Decisions, for example in funding annual family visits.

**(C) The Procedural Fairness Question:**

104. The only aspect of this which was remitted was whether the Appellants’ removal was unfair and breached section 9 of the Bill of Rights in its procedural aspect and section 19(1) because they were not given a realistic opportunity to make representations before their removal.
105. The Respondents relied on this Court's view, not criticised by the Privy Council that, if the Respondents' assessment of the risk to national security and public safety is well founded, it would have been absurd to give prior warning of the intent to remove them. The judge stated at [359] that she was bound to adopt that conclusion.

106. The Judge also stated, in the light of *BX v Secretary of State for the Home Department* [2010] EWCA Civ. 481 and *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, that the urgent requirements of national security and public safety are good reasons for not giving advance notice. Such reasons were present in this case. The gists contained startling allegations regarding continued criminality and a plan to escape custody, which were exacerbated by the attack on the Appellants mother's house which triggered fear of a reprisal. Her conclusion that there is no unfairness is, she stated at [363], fortified by the fact that the Appellants' grievances have been thoroughly ventilated in these proceedings.

## VI. The grounds of appeal

107. There are 4 grounds of appeal.

108. **Ground 1**, the Appellants' primary argument,<sup>13</sup> is that the judge erred in reaching the wrong conclusion in deciding that the interference with the Appellants' right was proportionate and submit that this Court should determine proportionality for itself.

109. Grounds 2 and 3 are formulated broadly. Each has a number of component elements or sub-grounds which at times the Appellants appeared to rely on as free-standing grounds, with, for example in the case of the interests of the children, an overlap between grounds 2 and 3. I identify the sub-grounds as (2(a), etc, and 3(a) etc).

110. **Ground 2** is that the Judge misdirected herself in her approach to and legal directions regarding proportionality. The way the Appellants pleaded their case is summarised at [8] above. The submissions about the specific errors and flaws in the Judge's approach are discussed in Section VI of this judgment. Here it suffices to refer to the 4 broad components of this ground. They are:

**Ground 2(a):** Error in the Judge's approach to the intensity of a Court's review in a case where it is claimed that an interference with human rights is justified because of the risk to national security.

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<sup>13</sup> Appellants' Skeleton Argument, § 1(b).

**Ground 2(b):** Error in relation to material obtained after the date of the Decisions by concluding that none of the circumstances arose that would justify the Court considering such material as part of its assessment of proportionality material.

**Ground 2(c):** Error in taking account of the disclosed gists of material withheld on grounds of PII.

**Ground 2(d):** Error in deciding that the court was not required to make findings of fact because the assessment of risk did not depend upon any “hard-edged” questions of fact when there were disputes of facts, such as about whether the Appellants had continued to engage in crime.

111. **Ground 3** is that the Judge erred in four respects in her overall assessment to proportionality and in six respects in her approach to specific issues in relation to proportionality. The specific errors and flaws alleged are identified and discussed in Section VII of this judgment.

112. **Ground 4** is that the Judge erred in concluding that the procedure adopted by the Governor was fair and that she was bound by the conclusion of this Court that in the circumstances of this case it would (as this Court indicated in its earlier decision) have been absurd to give prior notice of the intention to remove the Appellants.

## VII. Discussion and conclusions

### (A) Introduction

113. It is well established that in a claim for breach of the rights in the Bill of Rights the court has to assess proportionality for itself and that its function is not the conventional one in public law of reviewing the legality of the process by which a public authority has reached its decision. The judge recognised this, stating (see my summary at [55] above) that a more intensive review and a

closer factual analysis of the justification is required than under traditional grounds of judicial review and that in a proportionality challenge the focus is on the result not the process. One of the issues between the parties is whether she misdirected herself in her approach to and her self-directions regarding specific issues relating to proportionality and in her overall assessment.

114. The Appellants maintain that the logical starting point in this case is to determine the approach an appellate court should take to proportionality and to the first instance judge's assessment of it. The most recent discussion of this difficult question is that by the UK Supreme Court in *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30 handed down some eight months after the Judge's decision in this case. The judgment of Lord Sales and Lady Rose (with which Lord Reed PSC and Lord Richards agreed) stated at [146] that "*where a first instance court has made an assessment of proportionality the question for an appellate court is whether that court's assessment is wrong.*" This was in their extensive discussion of two broad approaches they had identified at [142] – [143]. While they stated at [143] that each approach is justified in the proper context, at [162] – [163] they also stated that simple categories do not exist in this area and that it may be unclear in a given case which approach is correct.
115. The first approach, described as a "review approach" is to check whether the first instance court's assessment was arrived at on the basis of a proper self-direction as to the test to be applied and whether the result arrived at was reasonable in the sense of being within the legitimate parameters of judgment for the judge. Under this approach, exemplified by the decision of the UK Supreme Court in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47 at [64] *per* Lord Carnwath, with whom the other members of the court agreed, particular weight is given to the assessment made by the first instance judge. *Shvidler*, at [142], states that the appellate court will not intervene even though it thinks it might have reached a different view if it was deciding the issue for itself. It will only intervene "*if the lower court has made a significant error of principle or there is an identifiable flaw in the judge's reasoning such as a gap in logic, a lack of consistency, or a failure to take account of such material factor which undermines the cogency of [their] conclusion.*" The review approach "*puts emphasis on the dispute-resolution effect of the first instance judgment on a determination of the facts, militates against repetition of arguments up through the legal system by the loser seeking without sufficient reason to have a second bite at the cherry, and protects appellate courts from being overburdened by appeals*". Under the second

approach, described as the “fresh determination” or “assessment” approach, the appellate court makes its own fresh assessment of the proportionality of the measure in question and gives priority to the authority vested in it as an appellate court to decide and give guidance on legal questions.

116. As stated above, the Appellants submit as part of ground 1 of their appeal that the logical starting point in this case is to determine which approach applies and that in the circumstances of this case it is the second approach. They submit that this court should adopt the “fresh determination” or “assessment” approach and itself assess and determine whether the challenged decisions of the Respondents are disproportionate. The primary contention in their written submissions is that this court should do so without first having to demonstrate that the Judge’s approach was flawed.<sup>14</sup> At the hearing, however, it was accepted that a flaw is required. Mr Southey submitted that the “flaw” does not have to be an error of law or infringement of a specific principle, but the only examples he gave were the standard public law factors identified in *R (R) v Chief Constable of Greater Manchester Police* and cited in *Shvidler*.
117. As well as recognising that it may be unclear in a particular case which appellate approach is correct, the judgment in *Shvidler* stated at [161] that, since proportionality assessments involve elements of both fact and law, ordinarily the review approach is likely to be an appropriate starting point for an appellate court.<sup>15</sup> It also stated at [163] that where it is not clear which approach is correct, an intermediate appellate court may find it prudent to make an assessment of proportionality according to both approaches.
118. The guidance in *Shvidler* reflects the wide range of measures and decisions the proportionality of which may have to be determined. The fresh determination approach is likely to be appropriate where what is in issue are matters of general principle, the Convention compatibility of general rules set out in legislation, and the application of a general policy which covers many cases, particularly on the first occasion when it arises: see [147] – [148] and [157]. The review approach is likely to be appropriate where what is in issue is a one-off decision which only affects persons

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<sup>14</sup> Skeleton argument, §8. Their oral submissions reflected their secondary contention at §10.

<sup>15</sup> At [145] it was stated that “*the question whether a measure is proportionate is a question of law calling for assessment in the light of the facts of the case*”.

involved in the proceedings. This is particularly the case where the case turns essentially on a factual assessment of the circumstances which the lower court was particularly well placed to make or where previous appellate decisions have already provided relevant guidance: see [146] – [147] and [158]. See also *Re JR 123* [2025] UKSC 8 at [36] where it is stated that in such a case, where the lower court has directed itself correctly and has had due regard to relevant matters, there is no need “to second guess that court's proportionality assessment”. The Appellants submit that this court should adopt the fresh determination approach because what is in issue is whether the government of the Cayman Islands has made adequate provision for high-risk prisoners. That, they argue, is an issue of social significance given the importance attached to the rights of prisoners. The Respondents point to the guidance on the compatibility of the 1884 Act with the Bill of Rights given by the Privy Council. They submit that, for that reason and because this case essentially turns on a factual assessment of the circumstances which the first instance judge was particularly well placed to make, this is not the case for a reassessment of proportionality.

119. I noted (at [51] above) that there is some overlap between the issues and sub-issues considered by the Judge and (at [109]) significant overlap between the second and third grounds of appeal, and that the bulk of the Appellants’ submissions sought to identify flaws and errors in the Judge’s approach. Mr Southey stated that the submissions sought to identify why the judgment below is flawed but are also narrative directly relevant to a fresh determination or re-assessment by this court.
120. It is for the court to assess proportionality for itself and to decide whether the four requirements summarised at [54] above have been met. Importantly, as stated in *Shvidler* at [158], in a complex proportionality assessment it may appear that, notwithstanding this, some factors which feed into the overall assessment are best assessed by the decision maker on grounds of institutional expertise or democratic authority. With both points in mind, I shall first consider grounds 2 and 3 and take the review approach as my starting point. Where I conclude either that it is not the appropriate approach or that it is not clear which approach is correct in respect of any of the many strands of the Appellants’ submissions in this case, as suggested in *Shvidler* at [163], I consider whether the “fresh determination” test for which the Appellants contend applies to that strand.

121. I turn to the grounds of appeal. As stated, ground 2 is that the Judge misdirected herself in four ways in her approach to and legal directions regarding proportionality, and ground 3 that she erred in four respects in her overall assessment to proportionality and in five respects in her approach to specific issues in relation to proportionality.

(A) **Ground 2(a): Error in the Judge’s approach to the intensity of a Court’s review in a case where it is claimed that an interference with human rights is justified because of the risk to national security.**

122. Although the Judge referred to the relative institutional competence of the Governor and the Director of Prisons as compared to the Court when assessing risk, the Appellants maintain that her approach was flawed in the light of six factors which resulted in her giving too much weight to their assessment of the risk. The six factors listed at paragraphs 17 and 18 of the Appellants’ skeleton argument are:

- (i) While national security is a significant factor, it is not determinative.
- (ii) In the context of prison transfers, the ECtHR has recognised that the margin of appreciation is narrowing.
- (iii) The Appellants’ risk was of normal criminality, a matter which courts have institutional competence to assess.
- (iv) In assessing the weight to be given to the fact that the case involved children, whose interests are to be given “*significant weight*”, the judge erroneously drew an analogy with the approach in cases of extradition.
- (v) There are contexts where no national security issues could possibly arise such as whether there is a justification for not building a high security prison in the Cayman Islands.
- (vi) The Judge erred in her conclusion that no separate analysis was necessary under section 6 of the Bill of Rights.

123. **(i) national security significant but not determinative:** It is well established that when the court assesses proportionality for itself it has to consider the balance to be struck between two incommensurate values: the fundamental rights engaged and the interests of the community relied

on to justify interfering with them: *Shvidler* at [126]. In *R (FTDI Holding Ltd) v Chancellor of the Duchy of Lancaster* [2025] EWHC 241 (Admin) the Divisional Court of England and Wales (Singh LJ and Chamberlain J) stated at [40] that while it is the court not the executive which holds the scales in deciding where the balance falls between competing public and private interests, where one of the interests is national security, the court must show great respect to the judgment of the executive about whether the risk is made out and the weight to be attached to it. The court also stated that “*in many cases it may be difficult to find interests sufficiently weighty to outweigh the public interest in national security*”.

124. Although the Judge stated at [283] that she had to accord a high degree of deference to the institutional competence of the Governor and the Director of Prisons and at [269] and [295] that the unsuitability of HMP Northward was “*a matter totally within the institutional competence and executive judgment of the removing authority*”, she did not treat national security as determinative. The latter statements related to the Respondents’ evaluation of the state of the prison and its ability to hold the Appellants securely and reflected the Respondents’ access to information, expertise and advice not available to the court as to the risks posed by the Appellants, some of which was secret and from covert sources: see *U3 v Secretary of State for the Home Department* [2025] UKSC 19 at [65] – [68] and *Shvidler* at [127] – [129]. For the following reasons, the Judge’s use of the word “*totally*”, while in a sense inappropriate, should be seen in the context of that evaluative judgment of risk and as reflecting the superior institutional competence of the Respondents rather than determinative.
125. First, it is clear that the Judge was (see [283]) mindful that the court is required to subject any claim of risk to national security raised as justification for a breach of a fundamental right to “*intense scrutiny*”. At [286], she stated that the ECtHR in *CG v Bulgaria* (2008) 47 EHRR 51 essentially established that “*in assessing whether a claim of threat to national security is made out, the court must be competent to reject the executive’s assertion that there is a threat to national security where it finds it arbitrary or unreasonable*”. Secondly, when applying the four-stage test of proportionality summarised at [54] above, she had carefully reviewed the material before the Governor, and was alert to avoid reliance on *ex post facto* justifications and to the fact that the exercise was of an evaluative and predictive nature: see the summary of this part of her judgment at [75] – [103] above. Thirdly, the Judge was also conscious (see [283]) that, in the light of *CG v*

*Bulgaria* at [40] and [43], she had to consider whether there was a sufficient factual basis disclosed upon which the Respondents could have properly formed the view that the Appellants posed a threat to national security and public safety in these islands. She concluded at [211] that they had done so in this case, basing her decision on established and proved facts as well as allegations derived from intelligence.<sup>16</sup>

126. **(ii) Failure to apply the narrowing margin of appreciation in prison transfer cases:** The Judge, citing *Khoronshenko v Russia* (2015), expressly stated at [85] of her judgment (see [76] above) that in this context the margin of appreciation is narrowing. I reject Mr Southey’s submission that, despite this, her statement at [283] that she had to accord a high degree of deference to the institutional competence of the Governor and the Director of Prisons shows that she did not apply the narrowing margin but gave very substantial weight to the conclusions of the Respondents. Where national security is relied on it is generally accepted that the margin is wide, but she nevertheless subjected the Decisions to “*intense scrutiny*”. Moreover, the summary at [93] – [100] above shows that, contrary to Mr Southey’s submission the Judge did review the steps taken by the Respondents to maintain family contact. The summary at [90] – [91] above shows that she also reviewed other steps considered such as moving the Appellants to a prison in Bermuda and transferring prison officers from the UK to the Cayman Islands. For the reasons I give at [201] ff below, the Appellants are not assisted by their submission that the approach of the Judge to prison rebuilding also does not reflect a narrowing margin of appreciation in this context.
127. **(iii) The Appellants’ risk was not to national security but of ordinary or normal criminality which courts have institutional competence to assess:** The failure of the Appellants’ legal team to explain what communications they had with the Special Advocate regarding any potential grounds of appeal against the finding that their risk was to national security means there is force in the Respondents’ submission that it is not open to the Appellants to raise this point.
128. However, putting that to one side, it is in any event unarguable that the conclusion that the justification for transferring the Appellants was related to national security was one that it was not reasonable for the Governor to reach, and therefore, for the Judge to reach. I have summarised the

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<sup>16</sup> The Judge’s overall conclusions at [211] – [212] are set out at [70] above

relevant parts of her judgment at [79] – [88] above. She carefully considered evidence of established and proved facts and allegations derived from intelligence in the gists and (at [250]) took account of the fact that Carter J, who had seen the material withheld on PII grounds, upheld the claim to PII on grounds of national security.

129. *(iv) Erroneously drawing an analogy with the approach in extradition cases when assessing the weight to be given to the fact that this case involved children, whose interests are to be given “significant weight”*: The Appellants submit that extradition is a necessary and normal part of the criminal justice system which secures international co-operation whereas transfers of this sort putting such a great distance from family are abnormal. They argue that when looking at the balance to be struck the weight to be given to children is different because what the Respondents have to do is to justify abnormal action. The flaw in that argument is that it does not or does not adequately recognise the weight to be given to the public interest relied on to justify the interference, here national security.
130. The Judge carefully analysed the effect of the decision of the UK Supreme Court in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa*. That case makes it clear that although the children are a primary consideration, the public interest in extradition will outweigh the Article 8 (and section 9) rights of the family unless the consequences of the interference with family life will be exceptionally severe. But, referring to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, not an extradition case, *H(H)* also makes it clear that, as the children’s interests are not either the primary consideration or the paramount consideration, the question is whether their interests are outweighed by the cumulative force of other considerations. That will depend on the nature of those other considerations and the weight that is given to them: see *H (H)* at [30]. That the approach in deportation cases is similar is seen from *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 at [29] as well as from *ZH (Tanzania)*.
131. The Judge stated at [328] that the children’s best interests must be accorded due weight in the balancing exercise as a primary consideration. She started her analysis of the circumstances of the present case by stating that their best interests would be to have their fathers in close proximity. She then considered the other circumstances. She concluded that in the light of those other circumstances, especially that the Appellants are not caregivers or attachment figures, their

interests were outweighed by the competing public interests in national security and public safety. I agree with her approach and conclusion. The considerable weight to be accorded to national security, the margin of appreciation to be accorded to a public authority which has relied on it, and the difficulty in many cases of outweighing it are illustrated in a prison transfer case by *CG v Bulgaria*, and more generally by *FTDI Holding Ltd, U3*, and *Shvidler*, all of which I have referred to earlier in this section of my judgment.

132. **(v) *There are contexts where no national security issues could possibly arise such as whether there is a justification for not building a high security prison in the Cayman Islands:*** It is difficult to see how this point, which substantially overlaps with what I have described as ground 3(c), assists the Appellants. National security is not the only context in which the State and public authorities are given a wide margin of appreciation. On the question of the prison upgrade or rebuild, the reason the Judge stated at [298] that the Cayman Islands Government should be accorded a wide margin of appreciation was that she did not accept that a narrow margin of appreciation should be applied to the question of the allocation of scarce resources in relation to upgrading or rebuilding HMP Northward. This is well established: see *McDonald v United Kingdom* (2015) 60 EHRR 1 at [54] (“*the margin is particularly wide when ... the issues involve an assessment of resources in the context of limited State resources*”) and *R (Drexler) v Leicestershire CC* [2020] EWCA Civ 502 at [56] *per* Singh LJ (“*the allocation of scarce resources is inherently one which calls for political judgement, and in which courts must tread with caution affording appropriate weight and respect to the judgement formed by the executive or the legislature*”).
133. **(vi) *The Judge erred in her conclusion that no separate analysis was necessary under section 6 of the Bill of Rights:*** The Appellants submit that the Judge erred in not recognising that the unqualified language of section 6 imposes an absolute right to respect for the dignity of prisoners which supplements the standards of the ECHR in the Cayman Islands and required separate consideration. They point to ICCPR General Comment No 21 which at §4 states that treating prisoners with humanity and respect for their dignity is a fundamental and universally applicable rule the application of which cannot be dependent on the material resources available in the State. They also point to §12 requesting States to give the Committee information about the conditions under which contacts are ensured with the outside world including family and lawyers.

134. Their case is that the inclusion of section 6 in the Bill of Rights demonstrates that Cayman Islands prisoners have a particular need of protection which should be given particular weight. They argue that this is so whether or not section 6 merely reflects Article 10 ICCPR because Article 18 ICCPR protects family life, so Article 10 is plainly intended to go beyond that. Section 6 adds to section 9, they maintain, because it is not subject to a requirement of proportionality but is unqualified and imposes an absolute obligation.
135. Like the judge, I accept the Respondents' submissions. I note that no positive authority was cited for the proposition that ICCPR Article 10 was intended to go beyond ECHR Article 8. What is evident is that the ECtHR's jurisprudence refers to and has been developed against the backdrop of ICCPR Article 10 and other international instruments to, in Mr Bowen's words, "*give colour and meaning*" to the ECHR right to family life, by including the rights that are protected under ICCPR Article 10. That is shown in the decisions of *Vitner v United Kingdom* GC (2016) 63 EHRR 1, at [80] – [81], *Khoroshenko v Russia* (2015) GC app no. 41418/04, and *Polyakova v Russia* (2017) apps nos. 35090/09, and the reference in those cases to dignity and in *Polyakova* to the "*very essence*" of the ECHR being "*respect for human dignity*". ECHR Article 8 and its aims have been said to be consonant with rights which are protected by ICCPR Article 10 and in this way Article 8 (and thus section 9) has been effectively extended to include them. With respect to family life, rather than section 6 adding to section 9, the right to be treated with respect for the inherent dignity of the human person has thus been made a component of the right to respect for family life in section 9 of the Bill of Rights.
136. As to the particular submission that section 6 adds to section 9 because it is unqualified by a requirement of proportionality and imposes an absolute obligation there are four significant factors. The first is the legislative purpose for which the UK enacted constitutional instruments such as the Cayman Islands Bill of Rights for its overseas territories. When the UK acceded to the ECHR in 1953 it also did so for what were then called its colonies and accepted responsibility under international law for breaches of it by their governments. It subsequently encouraged colonies which were about to become independent or moving to internal self-government to adopt constitutions which protected fundamental rights and negotiated with them for the adoption of rights which corresponded with ECHR rights and to abide by the same basic standards of human

rights as the UK. The process is discussed in the context of Bermuda by the Privy Council in *Attorney General for Bermuda v Ferguson* [2022] UKPC 5 at [11] – [15] and [131] – [134].

137. The policy which led to the enactment of the Cayman Islands Bill of Rights in 2009 is seen in the UK Government’s 1999 White Paper *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (Cm 4264) and Hendry and Dickson, *British Overseas Territories Law* 2<sup>nd</sup> ed, 2018. Paragraph 1 of chapter 4 of the White Paper states:

*“Our objective is that those territories which choose to remain British should abide by the same basic standards of human rights, openness and good government that British people expect of their government. This means that Overseas Territory legislation should comply with the same international obligations to which Britain is subject, such as the ECHR and the ICCPR.”*

Hendry and Dickson, at pp 161-162 state that:

*“When the UK Government entered into constitutional review negotiations with several overseas territories following the White Paper, the United Kingdom’s position was that it would not agree to a new territory constitution which did not contain a fundamental rights chapter, and its objective was to ensure that any new or updated chapter should give effect to the Convention and the Covenant to the extent that constitutional legislation was considered necessary.”*

138. The second factor is that ICCPR Article 10 has not been given full effect by section 6. While sections 6(1)-(3) in substance reproduce ICCPR Articles 10(1) and (2), section 6 has no provision corresponding to the statement in Article 10(3) that the “*essential aim*” in the treatment of prisoners “*shall be their reformation and rehabilitation*”. It is to that extent an attenuated version of Article 10. On the other hand, as illustrated by *Khoroshenko* at [146], developments in the Strasbourg Court’s Article 8 jurisprudence have been made by reference to Article 10, including the essential aim stated in Article 10(3). Since section 9 reflects ECHR Article 8, it can therefore be said that to that extent it is section 9 which adds to section 6. Additionally, in the Cayman Islands, in order to

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allow for necessary preparations for the introduction of constitutionally enshrined fundamental rights, the Bill of Rights only came into force in 2012, three years after the Constitution. Moreover, the sections dealing with the segregation of juveniles and those remanded in custody while awaiting trial did not come into force until 2013: Hendry and Dickson, p 162.

139. It is, however, the third and fourth factors that more directly address the Appellants' submission that Section 6 adds to section 9 because it is unqualified and not subject to a requirement of proportionality in the way that section 9 is. The third factor is that ICCPR General Comment No 21 on Article 10 adopted in 1992 states that ICCPR Article 10(1,) which is in substance reproduced by section 6, "*imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty ...*". If Article 10(1) imposes an obligation, section 6 does so too. In some circumstances, for example the requirement in ECHR Article 6(1) that a judgment be publicly pronounced, the ECtHR has been willing to limit the apparently absolute nature of the wording of the obligation: *Werner & Szücs v Austria* (1998) 26 EHRR 310 at [43]. But in the case of positive obligations imposed by ECHR rights, it is clear that the obligation must not be interpreted so as to place a disproportionate burden on States and other public authorities.
140. Many of the cases concern the positive obligations ancillary to ECHR Article 8, but those ancillary to the unqualified and absolute right to life under ECHR Article 2 and prohibition of torture and inhumane or degrading treatment under Article 3 are also subject to what is in effect a balancing or proportionality requirement. As Clayton and Tomlinson's *The Law of Human Rights*, 2<sup>nd</sup> ed., 2009 states at §6.178, "*The existence of a positive right ultimately depends upon a fair balance being struck between the general interests of the community and the interests of the individual*", and at §6.67 "*proportionality has defined the limits of positive obligations under Convention rights*".
141. For example, *Budayeva and others v Russia* (2014) 59 EHRR 2 was concerned with Article 2. It was held that there had been a violation of the substantive aspect of Article 2 because of the State's failure to discharge its positive obligation to protect the right to life by preparing for the risk of mudslides in an area prone to them. It was also held that there had been a violation of Article 2 in its procedural aspect because the question of state responsibility for what had happened and the death of the first applicant's husband and the threat to the lives of the other applicants had not been

considered at the inquest, any other inquiry, or in the civil proceedings brought. In relation to the substantive aspect, the ECtHR stated that:

*“[t]he Court has consistently held that where the state is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation.”*: [134]

*“In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in principle, to the operational choices which they must make in terms of priorities and resources ...”*: [135]

*“In assessing whether the ... State had complied with the positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities acts or omissions, the domestic decision making process ... , and the complexity of the issue, especially where conflicting Convention interests are involved.”*: [136]

142. As to the implied positive obligations to investigate, in *Osman v United Kingdom* (1998) 29 EHRR 245 at [116], the ECtHR stated that given the difficulties and *“the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities”* and for that reason *“not every claimed risk to life can entail ...[a] requirement to take operational measures to prevent that risk from materialising”*. In *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, Lord Mance, at [99] stated that only *“serious defects in the performance of the investigatory duty under Article 2 (and equally under Article 3) can succeed”*. See also *Smith v Ministry of Defence* [2013] UKSC 41 at [144] – [145].
143. Although concerned with Article 8, which provides for the justification of an infringement, Lord Reed PSC’s judgments in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 and in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, also

illustrate the approach to positive obligations. In *Elan-Cane*, Lord Reed stated at [55] that the margin of appreciation “*is a concept of particular significance in relation to positive obligations*”. Such obligations require states to modify their laws and practices, and possibly to incur public expenditure, in order to advance social policies they may not support or not regard as priorities. For this reason, he considered that caution is required before imposing positive obligations. He also noted that the ECtHR exercises such caution “*by interpreting and applying the Convention in a way which allows contracting states a margin of appreciation*”. In *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 at [32] he said that “*ultimately, whether a case is considered to concern a positive or a negative obligation, the question is whether a fair balance has been struck*”. See also *Re JR 123* [2025] UKSC 8 at [43].

144. The fourth factor that led me to reject the Appellants’ submission that section 6 adds to section 9 is the approach to the interpretation of the constitutions of British Overseas Territories in the light of the policy which aimed to ensure that they included the same standards of human rights and complied with the same international obligations as the UK. The discussion of the process in *Attorney General for Bermuda v Ferguson* to which I have referred led the Privy Council to state that while these constitutions must be interpreted subject to the special provisions applying to the particular territory, the starting point “*is that the rights conferred by the Constitution which merely echo Convention rights should be read and applied in accordance with the jurisprudence relating to the Convention*”: see [2022] UKPC at [17].
145. Tying these threads together, first, the notion of “dignity” is not clear-cut, and it and what amounts to a breach of dignity will depend on context. This will especially be so where positive obligations implicit in the notion are concerned. There is, for instance, no indication in ICCPR General Comment No 21 on Article 10, in particular in §12 on the provision of information on conditions under which contacts with the outside world including family and lawyers that there is a right to proximate contact or that a restriction on contact that results from distance must be regarded as not respecting dignity.
146. Secondly, there may be some differences between the way balancing works in cases of positive obligations and cases of negative obligations. In the case of negative obligations requiring the state to abstain from interfering with a fundamental right, the four requirements of the well settled test

will determine whether an interference is a breach of that right or is reasonably justifiable. But the decisions and commentary to which I have referred shows that there is a balancing element in both kinds of obligation. I have also referred to *Werner & Szücs v Austria*, an example of a situation in which the apparently absolute nature of the wording of an ECHR obligation was interpreted so as not to place a disproportionate burden on the state. As was stated in *Polyakova*, respect for human dignity is the very essence of the ECHR and therefore of the Bill of Rights.

147. This case concerns the situation of the two Appellants in their particular circumstances, histories and the risks they posed. I consider that, given their circumstances, and the way ICCPR Article 10 has effectively been made a component of the right to respect for family life in ECHR Article 8 and therefore in section 9 of the Bill of Rights, the Judge did not err in finding that a separate consideration of section 6 was not required on the facts of this case. I add that her approach does not make section 6 otiose. It will have an independent role in relation to issues of dignity concerning the segregation of juveniles and those remanded in custody while awaiting trial because there is no equivalent in the ECHR.

148. If my conclusion that the Judge did not err in relation to section 6 is wrong, the discussion above, in particular the analysis of the way balancing works in the case of positive obligations, in effect contains a fresh assessment of this strand of the proportionality of the decisions to remove the Appellants which reaches the same result.

**(B) Ground 2(b): Error in relation to material obtained after the date of the Decisions (“the timing issue”)**

149. The Appellants’ primary submission, based in part on the language in [88] of the ECtHR’s judgment in *Polyakova* was that the fact that the Respondents (in particular the Governor) were at all times subject to the Bill of Rights and the obligations in sections 6 and 9, “implies” that they were under “a continuing duty to ensure as far as possible, [that] the Appellants are able to create and sustain family ties with family members”: skeleton argument, §21. It followed, they argued, that the case fell within one of the three situations in which (as the Judge found, see [59] above) it is recognised that there can be a duty to consider material obtained after the decision.

150. In his oral submissions, Mr Southey relied on two passages in paragraph [140] of *Shvidler*. The first states: “*The proportionality of a measure, including a legislative provision, is to be assessed by reference to the circumstances prevailing when the issue of its compatibility with Convention rights has to be decided rather than when it was promulgated.*” The second states: “*In line with this principle it was common ground in the present appeals that the court which makes the assessment of proportionality should have regard to all the evidence available at the time of the hearing.*” These, he submitted, were predicated on the fact that the decision-maker had some continuing responsibility in circumstances such as those in this case. He also maintained that, if there was no duty on the Respondents to give the Appellants the opportunity to make representations before making the decision, there is a stronger reason to consider post-decision developments. That reason is that at the time of the Decisions the Respondents could not have had the full picture because they would not know what the Appellants had to say.
151. Paragraphs 23 and 26 of the Appellants’ skeleton argument contain two alternative submissions. The first is that there is a duty to keep the matter under review pending the conclusion of these proceedings. The second is that, even if all that can be considered is material available at the date of the Decisions, the obligation to ensure as far as possible, that the Appellants are able to create and sustain ties with family members suggests the need for the Governor to consider at that time what opportunities would be available to them to demonstrate risk reduction which would allow them to return to Cayman as soon as possible. They also submitted that the Judge took an unbalanced approach to material that was not available to the Governor at the time of the Decisions.
152. I start with the general rule. It is clear that in judicial review claims including those based on Article 8 the lawfulness of executive action is to be determined on the basis of material which was or ought to have been available to the decision maker when the decision was made. That is evident from the decisions in the *Kent Constabulary* and *BAA* cases considered by the Judge and referred to at [59] – [61] above. As Mr Bowen observed, the approach in those decisions is also evident in *Re McAleenon* [2024] UKSC 31 and *U3 v Secretary of State for the Home Department* [2025] UKSC 19, decisions of the UK Supreme Court respectively delivered since the hearing and the judgment in this case. He submitted that *Shvidler* concerns a situation in which the general rule does not apply and is distinguishable from the Appellants’ cases.

153. In *Re McAleenon* Lord Sales and Lord Stephens (with whom the other Justices sitting agreed) stated:

- (1) *“The general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it. This may include examination of whether the authority should have taken further steps to obtain more information to enable it to know how to proceed.”*: [40]
- (2) *“The correct approach for a reviewing court would have been to subject the information available to the defendants to critical analysis to see whether they could lawfully make the decisions they did on the basis of it.”*: [44(ii)]
- (3) *“The addition of [a] claim based on Article 8 does not change this basic picture regarding the role of the reviewing court, even though the test for the lawfulness of the conduct of the defendants under section 6 of the HRA taken with Article 8 is different from the test under general domestic principles of public law. In human rights cases brought against public authorities the court’s role remains essentially one of review ...”*: [45]

154. I do not consider that the Judge erred in identifying the three exceptions to the general rule where the Court is able to consider the lawfulness of executive action by reference to material not before the decision-maker at the time the challenged decision was made or in her formulation of those exceptions: see [145] – [149] of her judgment, summarised at [58] – [60] above.

155. The first, where the court is effectively the primary decision-maker rather than carrying out a process of judicial review is not relevant to this case. The two that are relevant are where the decision-maker has a continuing duty concerning the matter and where the fresh material relates to a fact in issue that existed at the time of the decision and which the decision-maker ought to have known. The Judge’s formulation of the latter is strikingly similar to the words used by Lord Reed PSC in *U3* at [45] in identifying one of the differences between an appeal to the Special

Immigration Appeals Commission (hereafter “SIAC”) and an application for judicial review. Lord Reed stated that, unlike an application for judicial review:

*“SIAC is not confined to considering material which was or ought to have been available to the Secretary of State at the time the decision under appeal was taken. It can consider other material, including evidence which has only subsequently come into existence”*

156. The question is whether, as Mr Southey submitted, *Shvidler* at [140] indicates that the general rule has been modified or is subject to a further exception which applies to the Appellants’ case, or whether, as Mr Bowen submitted, it is distinguishable. *Shvidler* concerns sanctions imposed under the complex regime put in place in the UK to put pressure on the Russian Federation to end its war in Ukraine. To see the statements in [140] in their context it is necessary to consider the legal framework in the Sanctions and Money-Laundering Act 2018 (“SAML A”) and the Russia (Sanctions) (EU Exit) Regulations 2019 as amended in 2022 and the circumstances of the case.
157. The sanctions regime includes power to designate individuals and businesses within broadly defined classes, including those involved in specified activities and those associated with a person so involved. Designation is subject to a statutory right of review in which the court must apply the principles applicable to judicial review but section 38 of SAML A provides that the court may not review a designation unless the designated person has first exercised his right under section 23 to request the Minister to vary or revoke the designation: see *Shvidler* at [22] and [24]. Mr Shvidler was so designated on 24 March 2022 and in July 2022 he requested its revocation. On 11 November 2022 he was informed that the designation would not be revoked but would be varied and was given a new statement of reasons which differed from the original ones: see *Shvidler* at [96]. On 24 February 2023 he challenged the decision not to revoke his designation.
158. Section 22 of SAML A provides that “*if at any time the Minister considers that the required conditions are not met in respect of a relevant designation, the Minister must revoke the designation*”. Moreover, section 38 “*makes it clear that the object of review by the court is the decision taken under section 23 to maintain the designation rather than the original decision to*

*designate*”: *Shvidler* at [24]. Those provisions indicate that the statutory framework of the sanctions regime provides that the decision-maker is to have a continuing responsibility.

159. Paragraph 140 of the judgment in *Shvidler* is in the section on reliance by the decision-maker on reasons given that were not in its mind at the time of the decision. Lord Sales and Lady Rose had stated at [136] that on the facts of the two appeals before them, the assessment of the decision-makers regarding the compatibility of the measures “*was not fixed in time at the point when the measures were first introduced, but has been subject to constant review since then*”. They also stated that the evidence and grounds filed to meet the challenges “*are not reasons introduced after the relevant assessment had been made by the decision-makers, but are themselves the considered reasons for maintaining the measures in place which are contemporaneous with the decision to do so which is the subject of proportionality analysis by the court*”. Those features are the consequences of the statutory framework and are what enabled the statement at [137] that the position is analogous to that in an appeal to SIAC.
160. Mr Bowen’s primary submission is that *Shvidler* and the statement at [140] are distinguishable because the statement concerned determining the proportionality “*of a measure including a legislative provision*”, and that it may recognise an exception that was not recognised in the *Kent Constabulary* and *BAA* cases, although I would characterise it as a nascent exception. His secondary submission is that it was also predicated on the assumption that the decision-maker had some continuing responsibility. I accept Mr Bowen’s submission that *Shvidler* and the statement at [140] does not represent a departure from well-established principles and is distinguishable from the present case but I do so for the following reasons.
161. First, while the judgment in *Shvidler* reiterated that where the issue is whether there has been a violation of ECHR rights the court’s task is to assess proportionality for itself, it also stated that the court does not become the primary decision-maker: [121]. It stated at [125] that the assessment of proportionality involves a spectrum between substantive decision-making and elements of review.
162. Secondly, sections 22 and 38 of SAMLA, referred to at [158] above, as interpreted by *Shvidler* at [24], show that the statutory framework of the sanctions regime in that case provided that the decision-maker is to have a continuing responsibility. Accordingly, the statements in paragraph

[140], are made in a case in which the statutory framework is predicated on the decision-maker in *Shvidler* having some continuing responsibility and so falling within the “continuing duty” exception.

163. Thirdly, there is no indication in [140] or elsewhere in *Shvidler* that the statements of the general rule in *Re McAleenon* set out at [153] above have been superseded. It was observed in *Re McAleenon* that the addition of a claim based on Article 8 does not change the basic picture. If decisions about individuals made on the basis of information about those individuals are treated as not subject to what has so recently been stated to be the general rule even in claims based on ECHR Article 8 that in reality would be the substitution of a new general rule. As stated above, the judgment in *Re McAleenon* was given by Lord Sales and Lord Stephens. If, what they then described as “the general position” and “the general approach” was, some nine months later, as a result of the judgment of Lord Sales and Lady Rose in *Shvidler*, no longer the case, there would surely have been explicit discussion.
164. I therefore turn to the legal framework in the 1884 Act and the factual circumstances of this case. For the reasons given below, the Appellants’ written submissions and the way they have been elaborated in the oral submissions made on their behalf do not, in my judgment, take account or sufficient account of a number of features of that framework and those circumstances. The decisions of this court and the Privy Council in this case established that the interference with rights was in accordance with the law and that, save in possibly in relation to advance notice, the Appellants have adequate means to challenge the removal decisions.
165. It is clear from the 1884 Act that after prisoners are removed from a British possession to the UK or another British possession they are by section 8 subject to the laws and regulations in the jurisdiction to which they have been removed and the authorities in that jurisdiction, in the UK a Secretary of State, are responsible for their treatment and by section 3 for ordering the prisoners’ return to the British possession from which they have been removed. Paragraph 21 of the Appellants’ skeleton argument states that the provision in section 3 that decisions regarding return will be taken by the Secretary of State does not mean “*that the Governor (and the Cayman government more generally) do not have a continuing role by reason of the Bill of Rights in the light of their knowledge of Cayman conditions*”. Save for that, however, their written and oral

submissions do not grapple with the complications that result from two jurisdictions having a role in the legislative scheme in the 1884 Act, especially in relation to matters which were not reasonably foreseeable at the time of the decisions.

166. Those complications were, however, addressed by the Judge, who I do not consider erred in concluding at [151] – [152] that once the Appellants had been transferred to the UK responsibility for them would have shifted to the UK authorities especially in matters over which the Cayman Islands Government has no control or jurisdiction. Examples of such matters include the availability in their UK prisons of programmes addressing offending behaviour and dealing with mental health issues that arise after removal.
167. Accordingly, here there is a clear distinction from the statutory framework in *Shvidler* which, as the UK Supreme Court recognised, provided that the decision maker had a continuing responsibility. In the present case the statutory framework did not do so. Indeed, on transfer, pursuant to section 8 of the 1884 Act the Appellants became UK prisoners and subject to UK law, with the rights of such prisoners in relation to parole and minimum terms: see [37] above. Moreover, it is a UK Secretary of State who is empowered by section 3 of the 1884 Act to order their return to the Cayman Islands.
168. The Appellants' case on this is that the crucial questions are the risks they pose and whether those risks have been sufficiently reduced to enable them to be returned. They maintain that calling on the UK authorities to exercise their powers under section 3 is no answer because the UK authorities do not have access to local knowledge or intelligence about these matters. It is also submitted on their behalf that the UK Secretary of State's duty to make inquiries of the Cayman Islands authorities about them is limited: skeleton argument, §24.
169. I agree with the Respondents that this is not a realistic submission. If the Appellants ask the UK authorities to exercise their power under section 3, particularly in view of the impact of removal on their section 9/ECHR Article 8 rights, the relevant UK minister would be bound to seek information about the risk posed by them from the Cayman authorities and the UK Prison authorities. The Cayman authorities, who have undertaken to keep the Appellants' return under review, would be bound to provide that information. Any decision by the UK authorities would be

susceptible to challenge in judicial review proceedings. If it is, its lawfulness under section 6 of the Human Rights Act taken with ECHR Article 8 and any other relevant ECHR Articles could be determined. That would have been known when the Decisions were made.

170. As to the factual circumstances and the nature of the challenges, the grounds pleaded by the Appellants, summarised at [8] above concern the lawfulness of the Decisions to transfer them rather than subsequent developments. The Respondents conceded that the Decisions are a significant interference with the Appellants' family life. The Judge regarded the impact of the Decisions on family life, in particular in relation to the children, which the Appellants accepted the Governor had taken into account, as raising the thorniest issue. Her starting point (see the summary at [94] – [96] above) was the evidence of that impact of the Decisions which she described as direct emanations of the Decisions in the immediate aftermath of their removal which she stated could be laid at the Governor's feet: see the judgment at [345]. She did so in a similar way to the approach of the ECtHR in *Fraile Iturralde v Spain* (2019) app 66498/17 and *Bechi v Romania* (2024) app 45709/20 which are relied on by the Appellants. She also took account of the foreseen and foreseeable consequences of their removal to UK prisons on their family life and contact with family members. She gave the greatest weight to the impact of removal on contact with the two children with whom the Appellants had contact while at HMP Northward.
171. I do not consider that the Judge fell into error in not considering material relating to matters that she had properly decided were not foreseeable at the time of the Decisions or were clearly the responsibility of the UK authorities. In this case, her conclusion that, while it was foreseeable that contact would become less frequent and personal after the Appellants' removal, the termination of contact between them and the two children with whom they had contact while at HMP Northward could not have been reasonably foreseeable is an example of the first. The fact that issues concerning the Appellants' access to pre-discharge offence related programmes and contact with their lawyers and about Douglas' mental health arose after their transfers to the UK are examples of the second. As the Judge stated, those issues were, in any event, outside the control of the Caymanian authorities.
172. The Appellants also submit that before making the Decisions the Respondents should have given assurances about the steps that would be taken to maintain family contact after their removal to the

UK and made a commitment to facilitate contact. Their second alternative submission is that at the time of the Decisions, the Governor should have considered what opportunities would be available to the Appellants in a UK prison to reduce their risks. These issues are also raised under what I have described as Ground 3(b)(iii) but I deal with them here. A similar point is also alluded to in respect of matters that first arose in the UK, where it is submitted that the Respondents should have established before making the Decisions that the Appellants' right of access to lawyers would be safeguarded by the UK authorities, any mental health issues that arose would be addressed, and that the Appellants would be able to access pre-discharge offence related programmes. As to establishing that the UK authorities would safeguard their rights of access to lawyers, the Respondents could rely on the enforceability of those rights against the UK authorities. I note that notwithstanding what is said about those matters, it was not suggested that the Respondents' statement (skeleton argument §45) that the Appellants have not challenged any aspect of their post-transfer treatment in prison in the UK is incorrect.

173. The statutory process understandably took some time to complete after the RCIPS's request to the Cayman Government on 27 April 2017. As the Judge stated, after the apparent gang-related attack on their mother's home on 3 June, it was considered that there was an urgent need to address the risks the Appellants were assessed to pose. Those risks included an assessment that they planned to escape which was subsequently relied on as a reason for not giving them advance notice of the Decisions. The submission to the UK Minister before the Decisions were made referred to the degree of mitigation of disruption to family relationships as a result of rules enabling foreign national prisoners to make regular telephone calls abroad, some at public expense. It also stated that the Cayman Islands Government would consider offering financial assistance to a close family member who expressed a particular need to see the Appellants and in that sense was open to that possibility. Given the matters canvassed in the submission to the UK Minister and the perceived urgency after 3 June, the criticism that before removing the Appellants the Respondents did not give assurances about the steps that would be taken to maintain family contact or establish the arrangements for visits to the UK is unfounded.
174. For these reasons, the Appellants in this case are not assisted by the statutory framework, or the two relevant exceptions to the general rule about material obtained after the Decisions. As to the

“continuing duty” exception, the Cayman Islands Government accepts that it has a public law duty to assist the Appellants to maintain contact with their families, to keep their cases under review, and to co-operate with and provide information to the UK authorities. But the summary of the grounds pleaded by the Appellants at [8] above concerns the lawfulness of the decisions to transfer them, and the residual duty the Government accepts it is under is not a continuing duty with the one it was under at the time the Governor concurred on its behalf in the decisions to transfer them. The third exception is in respect of “material which was or ought to have been available to the decision-maker when the decision was taken”. It also does not apply because the Judge took account of the foreseen and foreseeable consequences of the Appellants’ removal as well as of material relating to a fact in issue that existed at the time of the Governor’s decisions, but not of material that she found was unforeseeable.

175. The submission that the Judge took an unbalanced approach to this issue is also unwarranted. The Judge clearly explained which matters not before the Governor could and which could not be taken into account, identified the relevant principles, and applied them. She took account of the impact of the transfers on family life with contact being primarily via telephone and the facilitation and funding of family visits after the Appellants’ transfer to the UK, and of the assessment that a prison rebuild would not address the risks posed by the Appellants. The complaint that her imbalance is shown by her consideration of the impact of the Decisions is misconceived. It is necessary to consider impact in order to determine whether there has been an infringement of fundamental rights and, if so, its extent. Considering it thus differs from evidence of subsequent reasoning which is deployed to justify an impugned decision or as a further basis for challenging it. As to the complaint that the Judge took account of the assessment that a prison rebuild would not address the risks posed by the Appellants,<sup>17</sup> the Judge was entitled to accept, on the basis of the *United Trade Action Group* case, that this was not *ex post facto* justification but an elucidation of the contemporaneous basis of the Decisions in response to the pleaded case brought against the decision makers.

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Paragraph 4.5 of Governor Roper’s second affidavit dated 12 March 2021 stated: “*The critical risks in this particular case are not only about the physical and dynamic security deficits of HMCIPS but also about the capability of the Plaintiffs to cause significant harm to those working and living in the prison system and also to those members of the community who would/could be affected by their presence. A rebuild of Northward does not eliminate these risks.*”

176. I also reject the Appellants' two alternative submissions. The first, that the Governor did not consider the opportunities that would be available to the Appellants in a UK prison to reduce their risks, would depend on a number of contingencies unknown at that time including to which UK prison they would be transferred, and about which, as stated above, there has been no complaint to the UK authorities. The two authorities relied on by Mr Southey for the submission that the Governor was under a duty to keep the matter under review pending these proceedings are *U3* to which I have referred, and *D5 v Secretary of State for the Home Department* [2025] EWCA Civ 967. They do not assist him. Both are SIAC cases, that is concerning “*appeals in reality as well as in form*” where the Secretary of State’s national security assessment is kept under review throughout the appellate process and material that has come into existence after the decision under appeal can be considered: see *U3* at [20] and [46] and *D5* at [32].

**(C) Ground 2(c): Error in taking account of the disclosed gists of material withheld on grounds of PII.**

177. Before the Judge and in the Memorandum of Grounds of Appeal there were two limbs to the Appellants' submissions on this issue. The first is that the summaries in gists may mislead and no weight can be given to them. The second is that because of the imbalance of information available to the decision maker and that available to the Court, the Court is in no position to make findings of fact and thus in no position to assess proportionality.

178. After a full consideration of the authorities (see the summary at [68] – [72] above), the Judge correctly rejected both of these for the reasons she gave. Those reasons are notably but not exclusively the Privy Council's decision in this case. At [59] the Privy Council stated that reliance on the gists did not create unfairness and that it is unlikely that the underlying material withheld made the case untriable. In reaching that decision the Privy Council referred to the statement of Carter J in her unappealed PII judgment that the undisclosed material, which Carter J had seen, could not materially assist the Appellants. Although, considering herself bound by that decision, the Judge went on to provide her own analysis of the circumstances. She relied *inter alia* on the absence of a material dispute of fact in this case and the entitlement of the Governor as decision maker to rely on her evaluative judgment on matters such as the level of risk posed by the

Appellants. She also relied on the statement of Carter J in her PII judgment that the undisclosed material could not materially assist the Appellants.

179. The Appellants now state (skeleton argument, §36) that it is accepted that in principle gists could be considered by the Judge. But they submit (skeleton argument §35) that the Judge erred in concluding that, on the basis of the summaries in the gists, she should assume that the undisclosed material supports the gists because she could not know what weight to give them and was not in a position to make findings of fact about the underlying undisclosed material. If that is so, it is difficult to see how gists could be considered. Perhaps recognising this, in his oral submissions, Mr Southey reformulated the point, accepted that the Privy Council’s decision means that the Court has to do its best with the information in the gists, and maintained that the error was a failure by the Judge to direct herself that gists have inherent limitations. In my judgment, the written submissions are also inconsistent with the conclusion of the Privy Council, which also relied on Carter J’s judgment in the PII proceedings. Given the submissions before her, the limitations of gists must have been obvious to the Judge, and the oral modification before this court is really about weight, a matter for her. Applying the “review approach” of an appellate court to proportionality, I have concluded that the Judge did not err in relation to the PII issue in the way stated in *Shvidler* at [142] and [145] – [147]. I agree with her detailed and well-structured analysis of this issue.
180. I add that, had I been conducting a fresh assessment of the PII aspect of the proportionality of the Decisions I would have come to the same conclusion. I am, however, doubtful that the circumstances of this case make it appropriate for an appellate court to make such a “fresh determination” of this aspect of the proportionality assessment. It was recognised in *Shvidler* at [143] that there is a need to ensure that the limited resources of appellate courts are employed in a focussed and efficient way which minimises the scope for delay and unnecessary duplication of effort, repetition or arguments, and re-litigation of issues. This is not the first occasion in which the PII issue has arisen. This court and the Privy Council considered the compatibility of the 1884 Act with the Cayman Islands Bill of Rights in relation to the PII issue: see the summary of their decisions at [31] — [33] above. The number of appellate decisions by UK courts that have been cited on the point shows how often the PII issue has arisen elsewhere.

**(D) Ground 2(d): Error in deciding that the court was not required to make findings of fact**

*CICA (Crim) Appeal 0030 of 2024 – Osbourne Douglas and Justin Ramoon v The Governor of the Cayman Islands and The Director Prisons*

181. It was submitted on behalf of the Appellants that the Judge erred in deciding that the court was not required to make findings of fact because the assessment of risk did not depend upon any “hard-edged” questions of fact when there were disputes of facts. I reject this submission, largely for the reasons given by the Judge which are summarised at [72] above.
182. Mr Southey argued that the fact that future risk is in issue does not mean that there cannot be findings of fact regarding issues relating to risk, as the Governor appeared to have made as to the Appellants continuing to engage in crime. He relied on paragraph 5.1 of the first affidavit of HE Governor Roper dated 4 December 2019. After stating that the basis that his predecessor decided to transfer the Appellants was that they could not be safely detained at HMP Northward and that their activities presented a threat to national security, an assessment with which he agreed, Governor Roper stated that “[d]espite the conviction and imprisonment, the Plaintiffs had continued to engage in serious criminal activity”. Mr Southey submitted that the lack of uncertainty in that statement suggests that there were findings of fact about it and “*there was a clear finding about continued engagement in crime*”: skeleton argument, §§ 46 and 48(b).
183. The four sentences following the statement from Governor Roper’s affidavit set out in the last paragraph show that the statement is not a simple finding of fact, but a composite assessment and evaluative judgment based on what intelligence on a number of matters had revealed and on established and proved facts.<sup>18</sup> The question for the Judge was whether, as she stated at [216]:

*“There was sufficient material before the Governor on which she could have reasonably concluded that the facts presented to her in the underlying intelligence-based material, on which the Plaintiffs’ risk assessment was made, were possibly true. There is no onus on her to prove that those undisclosed underlying facts are, in fact, true”.*

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First affidavit, §5.1: “Intelligence revealed that they had, or were seeking to obtain, high-powered automatic weapons: they had criminal associates with the knowledge and propensity to use them, including professional ‘hitmen’ brought from Jamaica: a track record of murdering and attempting to murder gang rivals and witnesses and of making threats of harm, including to a senior prison officer. There was intelligence that they exercised control over other inmates and might be able to influence prison officers through threats. A series of tit for tat gang killings and shootings involving the Plaintiffs was threatening to escalate, including an incident in which the Plaintiff’s mother’s house was shot up by a rival gang using automatic weapons. There was credible evidence that they were planning an escape.”

The Judge applied that approach in her consideration of matters about which there was no material dispute and those based on assessments derived from intelligence.

184. Mr Southey also submitted that there is a further consequence of his submission that Governor Roper's evidence demonstrates that findings of fact were in fact made as part of the decision-making process, in particular about continued engagement in crime. It is that, as that finding was challenged, and because the Appellants were not given an opportunity to participate in the Decisions and the Governor could not take account of what they had to say, the fair trial rights in section 7 of the Bill of Rights (reflecting ECHR Article 6) applied and required the Judge to make findings of fact.
185. This appears to be an attempt to refashion the argument that the court cannot rely on gists of material withheld on PII grounds and, because it is in no position to make findings of fact, it is in no position to assess proportionality. That argument was rejected by the Privy Council, and, which as reformulated at the hearing, I would reject. Moreover, the premise upon which this submission is based falls away in the light of the fact that the Governor's overall decisions reflected a composite assessment and evaluative judgment based on what intelligence on a number of matters had revealed and on established and proved facts.
186. I conclude by observing that in *Re McAleenon* Lord Sales and Lord Stephens stated at [45] that in a claim based on ECHR Article 8, "*although sometimes there may be a requirement for the court to establish disputed facts for itself in order to determine the legal issue before it, this will not usually be the case*".

**(E) Ground 3(a): Errors in the Judge's overall assessment of proportionality**

187. There are significant overlaps between the submissions about two of the four matters listed at paragraphs 53 and 54 of Mr Southey's skeleton argument and arguments he deployed under ground 2 which I have addressed. The submission that the Judge's overall assessment of proportionality relied on matters that did not appear to be central to the Governor's reasoning when making the decisions, such as the Appellants' convictions and their conduct in jail, concludes with a complaint

that there was no evidence that the risk demonstrated by the convictions could not be managed. This, and the submission that the Judge's focus on the material before the Respondents is problematic because of the material withheld because of PII, are in a sense reworkings of the complaint about the need for fact-finding considered at [68] – [72] above. The first also overlooks the contents of the unredacted parts of the submissions made to the UK authorities considered by the Judge, see the summary at [21] above. Those submissions included references to the prison's single fence and location by the side of a public road and the intelligence-based assessment that the Appellants had been involved in the orchestration of serious gun crime and the importation of guns and drugs from within prison. Unredacted versions were before the Governor when she made the decisions: see Governor Roper's first affidavit, referred to at [182] — [183] above.

188. Reliance on the Appellants' status as Category A prisoners was not, as Mr Southey submitted, a form of double counting because that status was a result of the risk they were said to pose. That status was, as Mr Bowen submitted, the result of a separate expert assessment by the prison and which was clearly relevant to the Governor's subsequent assessment.
189. The complaint that "*the Judge did not engage with*" paragraph [56(q)] of the Appellants' skeleton argument in the Grand Court about the need for separate consideration of the positions of each appellant is also misconceived. The Judge considered what the submission to the UK authorities had said about the risks each Appellant posed and the impact on them and their families, particularly in her discussion of whether a fair balance was struck in their cases: see [94] — [98] and [101] – [102] above.

**(F) Ground 3(b): Errors in the Judge's approach to specific issues in relation to proportionality**

190. *(i) Failure to recognise that the distance between the Cayman Islands and the UK meant that the Appellants were separated from their families by an exceptional distance:* It was submitted that the Judge failed to give any account to the exceptional distance when considering proportionality and that it was inevitable that the distance would have a significant impact on family life. It was also submitted that she failed to recognise that, as stated in their skeleton argument before her, the demanding nature of section 9/Article 8 in this context is clear because it appears that there is no

judgment of the ECtHR in over 20 years in which it has been held that Article 8 was not violated by transferring prisoners thousands of miles from their homes.

191. The judgment, however, expressly referred to the latter point at [220] – [221]. That may explain why the Judge at [220] characterised the Appellants’ case as being that the distance of the transfer is in itself enough to ground a violation of section 9. The Judge considered and rejected that submission: see Judgment, [225] and [230] and the summary at [76] – [77] above. After citing the 13 decisions of the ECtHR referred to in the footnotes to [77] above, she concluded that the Strasbourg jurisprudence showed that cases where a transfer was held to be a violation of ECHR Article 8 and thus, in these Islands, of section 9 of the Bill of Rights, were based on more than just a consideration of distance. They were the result of a fact-sensitive analysis of the four questions to be asked and answered in assessing proportionality, which she then undertook in relation to the circumstances of these Appellants at [236] ff., which I have summarised at [78] – [103] above.
192. I agree with the Judge’s characterisation of the Appellants’ case before her as being that distance is in itself enough to ground a violation of section 9. The statement in paragraph 56 of Mr Southey’s skeleton argument that “*it was inevitable that the distance would have a significant impact on family life*” suggests that it remains a component of the Appellants’ case. I also agree with the Judge’s analysis of the Strasbourg authorities.
193. I note that, as Mr Bowen observed, more recent ECtHR decisions, for example *Ilerde v Türkiye* 2023 *app nos.* 36514/19, support the Judge’s conclusion. In his written and oral submissions on this point, Mr Southey accepted that the ECtHR has never said that a specific distance is automatically not permitted and did not challenge the Respondents’ explanation of *Ilerde*. He submitted only that *Ilerde* shows the “*potential importance*” of making provision for high security prisoners on these Islands and in understanding whether family visits would be facilitated. I observe that that point primarily relates to three of the other specific proportionality issues about which it is submitted that the Judge erred.

194. For these reasons, I reject this strand of ground 3(b).<sup>19</sup> The Judge’s fact-sensitive analysis of the four questions to be asked and answered in assessing proportionality is considered in the sections of this judgment dealing with a number of its other strands.
195. **(ii) Failure to build a high security prison:** Mr Southey submitted that the focus by the Judge in passages in paragraphs [257], [269] and [299] of her judgment on the options available at the time of the Governor’s decision and the state of the prison then was wrong. She should, he argued, have focussed on the submission that the need for a high security prison should have been appreciated long before the issue of transferring the Appellants arose.
196. His foundation for this submission are the statements in *Polyakova v Russia* at [88] that the State is required “to assist prisoners as far as possible to create and sustain ties with people outside prison”: and at [113] “to organise its penal system so as to ensure respect for the dignity of detainees, regardless of any financial or logistical difficulties”. Before the Judge, (see [128]) he had argued that the duty to provide resources is intended to prevent separation such as the ones in this case and is not simply to be considered when a breach of fundamental rights has been established. His skeleton argument, §60 states that lack of “resources are no answer”.
197. It was, Mr Southey submitted, the failure to anticipate future needs and address the matter in the over six years since the transfers of the Appellants or indeed since the transfer in 2009 of a Cayman Islands Category A prisoner on the ground that the Cayman Islands did not have a high security prison that needed to be justified if there was not to be a breach of section 9. A challenge to the 2009 transfer resulted in a decision refusing permission to apply for judicial review on the ground that it was not arguably a disproportionate or unjustified breach of ECHR Article 8: see *R (Richards) v Secretary of State for the Home Department* [2015] EWHC 4280 (Admin) referred to at [76] above. In that case Simler J stated at [9] that the Cayman Islands indicated to the UK Government that the purpose of the transfer was “to ensure [Richards’] safety while construction of suitably high security accommodation in the Cayman Islands for Category A prisoners was undertaken”. Mr Southey observed that the latest evidence suggests that no contract will be agreed for a new prison until at least the 2024-2025, and indeed none has.

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<sup>19</sup> The submission that the Judge failed to apply the narrowing margin of appreciation in prison transfer cases is considered and rejected at [126] above.

198. Paragraphs 65 - 67 of the Appellants' skeleton argument submitted that Judge was also wrong to rely on the Respondents' evidence indicating that the problem with locating the Appellants in a Cayman prison did not simply relate to HMP Northward's physical and dynamic security deficits but to the other risks the Appellants posed to those in the prison and members of the community.<sup>20</sup>
199. On the Appellants' principal submission, the Respondents maintain that, while on the original pleaded case, one of the grounds for challenging the Decisions was the unlawfulness of the failure to upgrade or rebuild the prison, the amended grounds on which the Decisions are now challenged do not rely on the unlawfulness of the failure not to do so. They maintain that the amended pleaded case does not challenge the failure to upgrade or rebuild the prison in the past but that for a high security prison to have been built by the time the Appellants were imprisoned, a decision would have had to have been made to do so many years earlier. They submit that, only if the failure to build or upgrade the prison in the past was unlawful, would it have any bearing on the proportionality of the transfer of the Appellants to the UK.
200. On this, the Judge accepted that the Appellants' formulation of the issue did not accord with what this Court had left it open to them to argue on this when it refused the Respondents' application to strike out this part of the challenge. She, nevertheless, rejected the Respondents' submission that the Appellants could only do this if they first established that their removal was an unjustified interference with their section 9 rights. She allowed them to raise it as part of their case on the proportionality of the Decisions to remove them.
201. In her judgment, which gave extensive consideration to *Polyakova* and other prison transfer cases, she considered the issue as one aspect of the need to consider whether a less intrusive measure could have been used without compromising the need to manage the Appellants' risks. She cannot be criticised for that. The Appellants accept that the prison upgrade/rebuild issue arose, at least in part, because of that need: skeleton argument, §60. In *Polyakova*, the ECtHR applied the modern conventional approach to issues of proportionality in its examination of the particular circumstances of each of the four applicants in that case.

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<sup>20</sup> The material part of §4.5 of Governor Roper's second affidavit is set out in Note 17 to [175] above.

202. I have referred to Lord Kerr’s statement in *Commissioner of Police of the Metropolis v DSD*, that examination of the proportionality issue is a multi-faceted exercise. One strand of that exercise may be the issue of resources where, see [132] above, a wide margin of appreciation is given to the State and, see [141] —[142] above, in the context of express and implied positive obligations, resources also have a role in considering whether a fair balance has been struck. In this case, the Judge examined a wide range of factors. They included the nature of the risks the Appellants posed, including those stemming from the incident in which their mother’s house was shot up by a rival gang using automatic weapons, intelligence-based assessments based on credible evidence that they were planning to escape and the other intelligence-based assessments referred to above, and the assessment that there was an urgent need to address those risks.<sup>21</sup> They also included the position of the less intrusive alternatives considered by the Respondents, such as moving the Appellants to a prison in Bermuda and transferring prison officers from the UK to the Cayman Islands and what they had said about considering the prospects of state-funded family visits and the arrangements in the UK for foreign national prisoners in the UK to have telephone contact with family members and the evidence before her as to upgrading or rebuilding the prison.
203. The Judge considered the evidence before her about all those strands, including the resource implications of them where there were any. On resources and the wide margin accorded where the allocation of resources is involved, see the judgment at [128] – [132], [264] and [298], and the summary at [91] above. I have dealt with this above, in particular at [132]. The Judge also considered the assessment that there was an urgent need for the Appellants to be removed from the Islands: see the Judgment at [279] – [282] and the summary at [86] above. I have already dealt with this, in particular at [173].
204. It is clear from [132] of the judgment that, if the Judge’s conclusion in the light of the multi-faceted exercise she had conducted had been that the interference with the Appellants’ section 9 rights was disproportionate and unjustifiable, she considered that a lack of resources would be no excuse or defence. I accept Mr Bowen’s submission that her analysis is consistent with the approach of the ECtHR in the passage from *Polyakova* at [113] relied on by the Appellants. To state that the

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<sup>21</sup> See especially [86], [173] above and in Note 17 to [175] above.

treatment of a prisoner without dignity cannot be excused “*by financial or logistical difficulties*” is premised on and assumes that the prisoner has in fact been treated without dignity, which, as I stated at [145] above is not a clear-cut concept and which depends on context. That understanding is also consistent with the fourth basic principle in Part 1 of the Council of Europe’s European Prison Rules (2006), which states that “[p]rison conditions that infringe prisoners’ human rights are not justified by lack of resources”<sup>22</sup>. For these reasons, I reject the Appellants’ principal submission that it is the failure to anticipate future needs and address the security status of the prison in the over six years since the transfer of the Appellants (or indeed since the transfer of Mr Richards in 2009) that needed to be justified, if there was not to be a breach of section 9.

205. I also do not consider that the Judge erred in considering the Respondents’ evidence that the problems with returning the Appellants concerned the risk they posed to others in and outside HMP Northward and not only to its physical and dynamic security deficits. For the reasons given at [175] above, that was not *ex post facto* justification but an elucidation of the contemporaneous basis of the decision in response to the pleaded case brought against the Respondents. It is not inconsistent with the letter dated 27 September 2017 from the Attorney-General’s Chambers to Mr Ramoon’s lawyers or the submission to the UK Minister dated 16 June 2016. The former only said that if security conditions at HMP Northward improve “*consideration will be given to [their client’s return]*”. The latter was also tentative, stating only that “*once security is considered adequate the return of the prisoners could be considered*”.
206. As to the submission that the Respondents’ reasoning fails to give any consideration to how high-risk prisoners are managed in other small jurisdictions,<sup>23</sup> in his oral submissions Mr Southey referred to information about what transfers had been made in a number of other British Overseas Territories.<sup>24</sup> He stated that Pitcairn, for example, has not transferred anyone, and suggested that

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<sup>22</sup> The Rules, formally Recommendation Rec. (2006)2-rev Committee of Ministers to member States, are frequently referred to in the Strasbourg jurisprudence, including in *Polyakova* at [58], and the Grand Chamber judgment in *Vinter v UK* (2016) 63 EHRR 1 which, at [77], refers to them as the leading Council of Europe instrument on the treatment of prisoners.

<sup>23</sup> Skeleton argument, § 66(c).

<sup>24</sup> The information was in a letter dated 27 April 2021 from the Attorney General’s Chambers which listed a number of Overseas Territories, including Pitcairn, which had transferred no prisoners to the UK or to another Overseas Territory in the preceding 10 years. The letter also stated that in that time there were 2 prisoner transfers from other Overseas Territories to the Cayman Islands, no transfers from the Cayman Islands to other Overseas Territories, and one transfer apart from the Appellants to the UK. It also refers to Mr Richards who was transferred in 2009 and whose case is mentioned at [76] and [197] above.

whatever Pitcairn is doing works on the face of it, although he also accepted that it was probably a bit pointless to try and speculate about what Pitcairn is doing. The fact that the Respondents' reasoning does not give consideration to how high-risk prisoners are managed in other small jurisdictions does not suggest that small jurisdictions can handle high risk prisoners. In fact, consideration was given to the position in other Caribbean British Overseas Territories, including transfer to Bermuda, with an estimated population that is slightly smaller than that of the Cayman Islands, and the submission to the UK Minister refers to "*over-crowding in the other Caribbean OTs*".

207. My analysis, like the submissions of counsel, has focused on whether the Judge's approach and conclusions on this part of her proportionality assessment were flawed. For the reasons given above and in the sections of my judgment dealing with urgency and resources, I have concluded that neither were. As in the earlier sections of this judgment, while conscious of the fact that it is for the court to assess proportionality for itself, I have adopted the "review approach" to my assessment, checking whether the Judge's assessment was arrived at on the basis of a proper self-direction as to the test to be applied and whether the result arrived at was reasonable in the sense of being within the legitimate parameters of judgment for her. Again, in the light of *Shvidler* at [163], I add that, having done that, I carefully considered the position had I been conducting a fresh assessment of the prison upgrade/rebuild aspect of proportionality. For the reasons given, I concluded that I would have come to the same conclusion.
208. **(iii) The remaining errors alleged in relation to specific issues concerning proportionality:** The submissions that at the time of the Decisions the Respondents failed to establish arrangements for family visits to the UK and that the UK authorities would safeguard their rights of access to lawyers in the UK are dealt with at [171] — [174] above as part of the consideration of the timing issue.
209. The submission about the Judge's approach to the family life of the children has been addressed and rejected when considering whether she erred in assessing the weight to be given to the interests of the children at [129] – [131] above. The submission that before removing the Appellants the Respondents should have given assurances about the steps that would be taken to maintain family contact or establish the arrangements for visits to the UK has been addressed and rejected at [173] –

[174] above. My conclusions there in substance also reject the argument that the Respondents should have done more to facilitate, in particular, the relationship between Mr Ramoon and his young son after the relationship with the child's mother had ended.

210. The Judge's proportionality assessment is summarised at [98] – [100] above. Her conclusion at [324] was that it was foreseeable that as contact became less frequent and personal after the Appellants were in the UK their relationship with their children would be adversely affected but that the termination of contact with their children could not have been reasonably foreseen by the Governor at the time of the Decisions. I agree with her methodological approach to the four questions to be asked and answered in what is the well settled test to be applied in determining the proportionality of an interference with a fundamental right. But in view of the importance of this matter, which the Judge stated raised the thorniest issue, I reassess and readdress this aspect of the assessment of proportionality.
211. It is common ground that the impact of transfers of the Appellants interferes very significantly with their section 9 rights in relation to their children. Six years after Mr Ramoon was transferred, his young son no longer remembered him. But whether this Court, in itself assessing the proportionality of the very significant interference of the transfers of the Appellants with their section 9 rights in relation to their children, does so on the "review approach" or on the "fresh assessment" approach, for the following reasons I have concluded that the Decisions are proportionate.
212. The best interests of the children would be to have their fathers in close proximity with frequent visits, but, while that is "a primary" consideration, it is not "the primary" or "paramount" consideration: *ZH (Tanzania)*, applied in *H (H) v Deputy Prosecutor of the Italian Republic, Genoa*. The children's best interests have to be weighed against the countervailing and incommensurate public interest factors, in the circumstances of this case those of national security and protection of the public in the Cayman Islands. Those are factors about which the Court, for the reasons given earlier in this judgment, accords considerable respect to the assessments of government. In *FTDI*, in the passage also set out at [123] above, the Divisional Court stated at [40] that "*in many cases it may be difficult to find interests sufficiently weighty to outweigh the public interest in national security*".

213. Here, at the time of the Decisions, the Respondents were willing to consider facilitating and funding visits by close family. They agreed to do so before the commencement of these proceedings and, albeit with interruptions due to the Covid-19 pandemic, they have done so. It is difficult to see what more could have been done to facilitate the relationship with a child as young as Mr Ramoon's once his relationship with the child's mother had broken down.
214. In effect the substance of Mr Southey's submission is to rely on this point as a trump card precluding removal, as it was before the Judge. That, however, would make the best interests of the children "the primary" or "the paramount" consideration, which is contrary to the authorities. The Judge certainly understood the submission in this way. At [321], she stated that before her the Appellants had argued that the fact that contact would end was not identified as likely in the decision-making papers and "*accordingly*" this made the interference disproportionate.
215. For the reasons given in this and the last section of this judgment, I have concluded that all the elements in Grounds 2 and 3 do not succeed. On some of them I have considered the position under a fresh assessment approach as well as a review approach. On either approach, although there are slight differences in my formulation of a number of the matters considered, I have come to the same conclusions as those in the Judge's careful, full and sophisticated analysis.

**(G) Ground 4: Error in deciding that the procedure adopted by the Governor was fair**

216. It was submitted on the Appellants' behalf that the remarks by this Court, not criticised by the Privy Council that if, after trial, the risk to national security and public safety is well founded, "*to give advance warning would have been absurd*"<sup>25</sup> were *obiter*. Their substantive grounds were that no justification had been offered for the Respondents' position that "*the justification for the procedure was the risk of disclosing information necessary for representations to be obtained*" would have had the potential to undermine the objectives of removing them and that, "*assuming that representations could not have been sought, no steps were taken to counterbalance the resulting unfairness*".

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<sup>25</sup> See 2022 (1) CILR 640 at [90] and [32] above, and [2023] UKPC 9 at [68], and [32] above

217. In the light of the Judge's conclusion and, as Field and Smellie JJA agree with me, of this Court, that the Respondents' assessment of the risk to national security and public safety is well founded, the substantive grounds are utterly unarguable. Moreover, whether or not the views previously expressed in this Court and the Privy Council are technically *obiter*, they are highly persuasive. They are also clearly in line with the authorities, including those cited by the Judge when, after stating she was bound by what had been said, considered them to reach her own conclusion. I agree with both her approach and the conclusions she reached.

**(H) Conclusion**

218. For the reasons given above, I consider that the Judge was right to dismiss these applications for judicial review and claims for breaches of the rights in the Cayman Islands Bill of Rights, and that these appeals should be dismissed.

**Smellie JA**

219. For all the reasons so carefully considered and explained by Beatson JA, I agree that these appeals should be dismissed.

**Field JA**

220. I also agree.