CAUSE NO: G2023-0259

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

JULIUS JOSLYN ARMSTRONG

Appellant

-and-

~~**(1) CHAIRMAN OF THE IMMIGRATION APPEALS TRIBUNAL**~~
~~**(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**~~
DIRECTOR OF WORKFORCE OPPORTUNITIES AND RESIDENCY CAYMAN

Respondent~~s~~

Appearances:	**Ms M Facey-Clarke for the Appellant** **Mr Michael Smith, Senior Crown Counsel for the Respondent**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**8 October 2024**
Ex tempore judgment delivered:	**9 October 2024**
Finalised judgment approved:	**15 October 2024**

Appeal against refusal of permanent residency—whether accrued pension relevant to financial stability—whether points to be awarded for priority occupation—consideration of impact of right to respect for private life upon grant of permanent residency following Buray and D'Souza v IAT *[2023 1 CILR 109]*

Civil procedure—appropriate parties to immigration appeals

JUDGMENT

A. Introduction

1. This is my judgment on the appeal in Cause G2023-0259, *Armstrong v Chairman of Immigration Appeals Tribunal*.

2. By a Notice of Motion dated 27 December 2023, the Appellant appeals against the dismissal by the Immigration Appeal Tribunal ("IAT") on 29 November 2023 of his appeal against an earlier refusal by the Director of Workforce Opportunities and Residency Cayman ("WORC") of the Appellant's application for permanent residency within the Cayman Islands. By s.23(2) of the Immigration (Transition) Act (2022 Revision), an appeal to the Grand Court is permissible only on a point of law.

3. The Appellant is represented by Ms Facey-Clarke and the Respondents by Mr Michael Smith of the Attorney General's chambers. I am grateful to both of them for their helpful submissions.

4. I can state the background facts very briefly. The appellant is now aged 57. He was originally born in Jamaica. He arrived in the Cayman Islands in February 1992, when he was about 25 years old. His primary place of residence ever since has been the Cayman Islands, apart from periods whilst he has been "rolled over" following earlier refusals of his previous applications for permanent residency within the Islands. In the additional evidence that the Appellant has sought to place before me for the purpose of this appeal, there is some indication that he may also maintain a home in Jamaica: at least three of the witnesses refer to visiting him and spending time with him in Jamaica.

5. On 1 March 2021, the Applicant made his most recent application for permanent residency within the Islands. On 1 March 2023, two years later, that application was refused.

6. On 2 March 2023, the Appellant submitted his appeal to the IAT. On 29 November 2023, the IAT dismissed that appeal.

7. On 27 December 2023, just within the 28 days allowed for filing an appeal against that decision, the Appellant issued his Notice of Originating Motion to pursue his appeal to the Grand Court.

8. There appears to have been an unfortunate delay by the Appellant in filing a summons for directions until 8 May 2024, some 5 months after the Notice of Motion was filed. I gave directions on 11 June 2024 to move the matter towards a hearing. It was listed before me on 8 and 9 of October 2024, for hearing. In the event, counsel were able to complete their submissions on both sides during the course of 8 October 2024, and I have been able to deliver my judgment on the appeal on 9 October 2024.

9. To complete the procedural chronology, I should record that on 27 June 2024, the Appellant filed detailed Grounds of Appeal pursuant to my order for directions, and on 5 July 2024, the Respondents filed a response to those Grounds of Appeal.

10. Essentially, there are five grounds set out in the Appellant's Grounds of Appeal dated 27 June 2024.

    a) The IAT failed to consider the Appellant's rights under section 9 of the Bill of Rights, namely, his right to respect for his private life.

    b) The IAT erred in law by advising the Appellant to take up his complaints regarding the alleged deficiencies in the points system for determining permanent residency applications with Cabinet.

    c) WORC and/or the IAT unreasonably failed to consider the Appellant's accrued pension when considering his "financial stability" under Factor 4 within Schedule 2 to the Immigration Regulations (2019 Revision), which contains the points system that is applied.

    d) The IAT was guilty of procedural unfairness in failing to consider the full package of supporting documents submitted by the Appellate for his application to WORC for permanent residency.

    e) WORC and/or the IAT failed to award the Appellant any points for "priority occupation" within Factor 1 of Schedule 2 to the Regulations.

11. I record that during her oral submissions, Miss Facey-Clarke abandoned grounds (b) and (d) described above. My focus has therefore been on the Bill of Rights point, the accumulated pension fund point and the priority occupation point.

12. It is worth making one practical observation at the outset of my analysis which is that, as Mr Smith submits to me, by section 37(3) of the Immigration (Transition) Act, an applicant must score at least 110 points to obtain residency. WORC and the IAT have no discretion regarding this requirement. It is written into the Act with no savings for any disapplication of it. In this case, the Appellant scored 70 points. The two relevant grounds of appeal that might increase his scoring, if they were to succeed, are the third and fifth grounds mentioned above. If successful, they could not add more than 18 points to the Appellant's score, making 88 points in total. Thus, even if the Appellant were to succeed, it would not result in his appeal being allowed. For this reason, Mr Smith described the appeal as futile and, subject to the Bill of Rights point, which I will come to later in this judgment, I agree.

13. Nevertheless, I will deal with the substance of the two grounds of appeal based on the application of the points system in the Immigration Regulations.

B. Pension Fund

14. Ms Facey-Clarke's argument is that WORC and the IAT both failed to take into account that the Appellant has built up a substantial pension fund over many years of employment within the Cayman Islands and that, in doing so, they were both guilty of an error of law which justifies my overturning their decisions.

15. My conclusion is that this argument is hopeless on the merits. Schedule 2 to the Immigration Regulations states in the explanatory notes in relation to Factor 4:

> *"(1) An applicant must prove he has sufficient resources through income and salary to support himself and any dependents accompanying him. Also his ability to provide sufficient funds for his and their healthcare, education, accommodation, and maintenance is of paramount importance for prospective long term residents."*

16. The Appellant is not in receipt of any pension payments at the moment because he has not reached the age at which his pension becomes payable. I therefore cannot see how it can be said that his pension is relevant to his *"income and salary"* as referred to in paragraph (1) of the explanatory notes.

17. Secondly and more importantly, paragraph 6 of the explanatory note expressly says:

> *"(6) No credit will be given in respect to pension contributions."*

The fact that the Appellant has built up a pension fund over the period of his employment within the Islands therefore cannot be taken into account in relation to Factor 4 - financial stability.

18. Mr Smith submitted that it cannot be an error of law for WORC and the IAT to comply with the law as laid down by Parliament. I agree, and so the appeal on this ground does not get off the ground for that reason.

C. Priority Occupation

19. In relation to the appeal on the question of priority occupation, Ms Facey-Clarke argues that WORC and the IAT both failed to award the Appellant any points for priority occupation and they should have done so. This is a factor that is mentioned within Schedule 2 of the Immigration Regulations, and a priority occupation potentially earns an applicant up to 15 additional points towards their score.

20. The difficulty with Ms Facey-Clarke's argument is that the preamble to Schedule 2 says as follows:

> *"(1). The Cabinet, in its discretion, may publish a list of occupations specified as priority occupations."*

The first point, therefore, is that Cabinet has a discretion to make a list of priority occupations, but it is not obliged to do so by Schedule 2 of the Regulations.

> *"(2). Where such a list is published, the Board or the Chief Immigration Officer, as the case may be, in considering an application for permanent residency under section 30, shall take such priority occupations into account."*

The difficulty for the Appellant in this case is that Cabinet has never published a list of priority occupations. In the absence of such a list, neither WORC nor the IAT has any discretion simply to come up with their own assessment of what may or may not be priority occupations for the purpose of Factor 1, to devise a points scale and to award points as a result.

21. This topic has already been considered and dealt with by Ramsay-Hale J, as she was at the time, in the unreported decision of *Keeble Kevin Knight and Ors v IAT* (unreported, 31/03/20). This was the hearing of four conjoined appeals on 10 March 2020. At paragraphs 11 to 14, Ramsey-Hale J said:

> *"11. As best as I am able to summarise them, the appeals centered on the question of whether the Chief Immigration Officer erred in awarding zero points to the Appellants under Factor 1(b). The putative error of law alleged was that the Chief Immigration Officer considered and made an assessment of the priority of the appellants' occupations and assessed zero points with respect to thereto, despite there being no established list of priority occupations. The Appellants each asserted that had the Chief Immigration Officer properly exercised his discretion to award them points they* 'could have qualified' *for the grant of permanent residency."*

That is precisely the argument that Ms Facey-Clarke advances on behalf of the Appellant in this case.

22. Continuing in paragraph 12 of the judgment in *Knight*, Ramsay-Hale J said:

> *"12. The Appellants contended that the IAT erred in finding the Chief Immigration Officer was right not to award points under Factor 1(b) as to do otherwise would be contrary to the Regulations and asked this court to set aside the decision of the IAT and direct the Chief Immigration Officer to grant PR to the Appellants.*
>
> *13. It is plain from a reading of the Chief Information Officer's Appeal Statement and the decision of the IAT, that no points were awarded under Factor 1(b) because no points were available for award either to these or any other applicants, as the list of priority occupations has not been established by Cabinet. It follows then that [the] Chief Immigration Officer was not exercising a discretion in assigning zero points under Factor 1(b).*
>
> *14. The allegation that he made an error of law, either by referring to a non-existent list of priority occupations in deciding to award the Appellants zero points for their occupations or, conversely, by failing to take the Appellants' occupations into account and awarding an award of points in respect thereof, cannot be sustained. The appeals, therefore, raise no point of law that could found the Court's jurisdiction under section 23(1)"*

23. In my judgment, that completely disposes of the fifth ground of appeal that Ms Facey-Clark seeks to advance before me. That ground of appeal is as hopeless as the third ground of appeal for that reason.

D. Claim under Bill of Rights

24. So that leaves the question of the Appellant's argument that his right to respect for his private life in s.9 of the Bill of Rights was infringed.

25. Ms Facey-Clark invites me to make a declaration of incompatibility in respect of the Immigration Act and Immigration Regulations under s.23 of the Constitution because the points system does not adequately take into account the Appellant's right to private life.

26. It is important to note at the outset that, unlike some of the other rights enshrined in the Bill of Rights, Freedoms and Responsibilities, the right under s.9 is not an absolute right. It is not like, for example, the right not to be tortured or to be held in slavery or servitude. It is a qualified right, which is expressed in terms of a right *to respect* for every person's private and family life, his or her home, and his or her correspondence. Section 9 includes a number of derogations from that right in subsection 3, which reads

> *"(3) Nothing in any law or done under its authority, shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –*
>
> *(a) 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;*
>
> *(c) to enable an agent of the Government or a public body established by law to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or that public body;*
>
> *(d) to authorise, for the purpose of enforcing the judgment or order of a court, the search of any person or property by order of a court or the entry on any premises by such order; or*
>
> *(e) to regulate the right to enter or remain in the Cayman Islands."*

27. I have read that subsection in full because it is important that people understand that the s.9 right to respect for private life is qualified in a number of important respects, and is not an absolute right, unlike some other rights enshrined in the Bill of Rights.

28. The question of the compatibility and the adequacy of the points system with the Bill of Rights was extensively considered by the Court of Appeal in the case of *Buray and De Souza v IAT* [2023] 1 CILR 409. In particular, the Court of Appeal addressed this aspect at paragraph 64 of the judgment,

which was delivered by the President and was a joint judgment of all members of the Court of Appeal, comprising the President, Martin and Field JJA. At paragraph 64, the President said.

> *"**Interference with s.9 rights***
>
> *64. The next question, therefore, is whether the decisions not to grant permanent residence interfered with the rights of these appellants under s 9. Both appellants speak of some interference with relationships with friends and with business associates. Mr Buray says*
>
> > *'The decision means that I will have to leave the Cayman Islands, my home for the past 13 years and I will also have to leave two businesses of which I am a part owner. I will also be leaving a large number of very close friends.'*
>
> *65. Mr D'Souza says*
>
> > *'I came to the Cayman Islands in 2009, I have now been a lawful resident of the Cayman Islands for over 11 years. I very much regard the Islands as my home. I have a wide circle of friends here, a good job (before I had to stop working due to PCW issues) and I hope to invest in a local company. My whole life is in the Cayman Islands and I would be very disappointed if I was required to leave.'*
>
> *66. While it is correct that, as the respondents submit, the appellants may return as tourists and seek new work permits subsequently, there is plainly an adverse impact on their private life after refusal of the status of permanent resident. They are entitled to a final 90-day permission to continue working, but thereafter must leave the Cayman Islands, and neither the Board nor the Director of WORC may grant or renew their work permits until they have ceased to hold them for not less than one year after leaving the Islands (see section 37(4), s.66(1), and s.66(8) of the Act). It seems to us that that is an impact on their private life of a significance which amounts to interference with their s.9 rights.*
>
> ***Ought there be consideration of s.9 outwith the points system?***
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> *67. The real question however relates to the proportionality of the decision, assessed in accordance with the factors identified in* Razgar, [which the Court of Appeal had earlier discussed], *and* Quila, [another decision discussed by Court of Appeal]. *Of the four questions which Lord Wilson reiterated in* Quila *([2011] UKSC 45, at para 45), the first three seem to us to be beyond argument and were not contested in this case. The crucial point turned on whether the rules which leave no room for any consideration of s.9 rights outwith the points system strike a fair balance between the rights of these appellants and the interests of the community or, even if they do in the instant appeals, whether, absent any provision for consideration of s.9 rights outwith the points system, they are compatible with s.9.*
>
> *68. The first of those issues does not appear to us to cause any difficulty. Neither of these appellants advanced any aspect of family or private life at risk of particular interference as a result of the refusal of permanent residence other than that which might reasonably be anticipated, were permanent residence to be refused. They did not draw attention to any particularly acute impact or hardship which might flow as a result of the refusal. Their description of the impact was just as might be expected. Nothing was advanced in either of their cases which would require some particular consideration outside the points system. In those circumstances it seems to us plain that the refusal of permanent residence was justified in the interests of immigration control, and struck the right balance between their limited private life and the interests of the Islands."*

29. Apart from the fact that the Appellant in this case has lived in the Cayman Islands, subject to rollover periods, for a more lengthy period than either Mr D'Souza or Mr Buray, there is no significant or material difference between the current situation and their cases. Thus, to the extent that the

Appellant's s.9 rights under the Bill of Rights are engaged, they were adequately addressed within the scope of the points system in Schedule 2 of the Immigration Regulations.

30. As Ms Facey-Clarke has asked me to make a declaration of incompatibility, I will go on to consider what the Court of Appeal said further in its judgment in *Buray and DeSousa*. First of all, to summarise, in paragraphs 69 and 70 the Court of Appeal noted that the Immigration Regulations do not allow any departure from a strict application of the points system. Having then carried out a detailed comparative law consideration of the position within the United Kingdom, the Court of Appeal picked up the thread in relation to the Cayman Islands at paragraph 83, as follows:

> *"83. The upshot, accordingly, is that the legislation and the points system do not provide a comprehensive code which would provide for the issue of proportionality to be determined in every case in accordance with s.9 of the Bill of Rights. The system fails to allow for the possibility that the impact on private or family life which follows from a refusal of permanent residence may be such as to warrant striking the balance between individual and public interests other than in the way the points system dictates. It does not permit consideration of the type of case to which the ECtHR referred in* Jeuness *and* Pormes*, in other words cases where, exceptionally, the points system does not give sufficient weight to the particular individual circumstances of an applicant."*

31. I do not need to read paragraph 84, but I will read paragraphs 85 and 86, where the Court of Appeal continued:

> *"**The decisions in the appellants' cases***
>
> *85. What then follows? As we have already indicated, neither of these appellants has advanced any case whatever which would justify a reliance on s.9 outside the points system. In describing the impact on their private lives, they have not pointed to any feature which would lead to the balance between their interests and those of the islands being struck in a way any different to that which is dictated by the points system under the Rules. In those circumstances, these are paradigm cases in which a Board or Tribunal on appeal would be justified in saying that no issue under s.9 arises other than under the points system, in the way suggested by Sales J in* Nagre*."*

32. Paragraph 86 seems to me to be particularly significant:

> *"86. If applicants want some particular feature to be taken into account under s.9, which they assert the points system fails to reflect, they must identify that feature, and explain why it is not reflected in the points they foresee will be awarded when they make their case for permanent residence to the Board, or, on appeal to a tribunal. Neither of these appellants did or could do so. There were no factors which would have justified consideration of their s.9 rights outside the points system and thus, even if the legislation had allowed consideration of s.9 other than by an award of points, it could have made no difference in light of the cases they advanced. The decisions in their cases were proportionate and consistent with s.9. They are not entitled to any relief on that ground."*

33. There is no material difference between the Appellant's circumstances in this case and those of Mr Buray and Mr D'Souza. Secondly, at no stage, whether before the Board, the IAT or before me, has the Appellant sought to identify any feature of his case which arguably takes his appeal outside the

scope of the points system. For that reason, it seems to me that any appeal in relation to s.9, or the impact of his s.9 rights and the Bill of Rights, is as hopeless as the other two grounds of appeal advanced.

34. Finally, in relation to this, the Court of Appeal dealt with the question of the declaration of incompatibility in paragraph 87 of its judgment and said:

> *"87. However, the absence of any provision which allows for consideration of s.9 factors other than within the points system, and the legislative exclusion of any possibility of granting permanent residence other than under that system are, for the reasons we have given, incompatible with s.9 of the Bill of Rights. We are required by s.23(1) of the Bill of Rights so to declare. We cannot, however, dictate how Parliament should remedy the incompatibility but would only suggest that the model adopted in the United Kingdom, which accepts that a points system is not comprehensive but allows for 'exceptional cases' may remedy the incompatibility we have identified."*

35. In summary, what the Court of Appeal is saying in *Buray and DeSousa*, is that the points system is generally sufficient in the vast majority of cases but there needs to be a safety valve to allow exceptional cases to be addressed outside the strict application of the points system. The absence of that safety valve is the reason the Court of Appeal in *Buray and DeSousa* determined that it was appropriate to make a declaration of incompatibility.

36. Turning to Ms Facey-Clarke's invitation to me to make a declaration of incompatibility in this case. That seems to be completely otiose. It is not going to be of any benefit to anyone for me to make a second declaration of incompatibility in the same terms as that already made by the Court of Appeal. Ms Facey-Clarke did not have any answer to the question, when I put it to her, what is the practical benefit of me making such a declaration? I decline to make a declaration of incompatibility in this particular case because the Court of Appeal has already done so in relation to the relevant legislation at issue.

37. In my judgment, the Appellant's situation is materially the same as in *Buray and DeSousa*. None of the features that have been put forward on his behalf in terms of the impact on his friendships within the Islands are outside the reasonably expectable consequences of being required to leave the islands for 12 months. The questions of friendships and community connection and involvement within the Islands, on which the Appellant seeks to rely, are explicitly addressed within the points system already.

38. Finally, the Appellant has not indicated in argument how his right to respect for his private life outweighs the interests of immigration control within the Islands. It does not seem to me that there is

any reason to move the balance that Parliament has indicated should be applied in determining how immigration into the Islands is to be permitted.

E. The appropriate parties to immigration appeals

39. Finally, by way of postscript, Mr Smith invites me to provide some guidance on the correct parties to appeals of this type. He raises two matters. First, he says, it is procedurally wrong to name as a respondent, the Immigration Appeals Tribunal. He says that the correct respondent should be the director of WORC, or the Board, or possibly the Chief Immigration Officer, depending on who made the relevant decision. His submission to me is that where an appellate tribunal's decision is subject to further appeal, it is still the original decision maker who should be the respondent to such an appeal, not the appellant tribunal. I agree with Mr Smith on this.

40. In support of that submission, he says it is implicit in GCR O.55, dealing with appeals of this kind that that is the correct approach. He relies in particular on GCR O.55, r.8, essentially saying that the original decision maker is entitled to appear and be heard in the proceedings on the appeal.

41. Mr Smith's second point in relation to the persons to be joined to an appeal is that it is also procedurally wrong formally to join the Attorney General as a respondent, since an appeal of this kind does not fall within the definition of civil proceedings within the Crown Proceedings Act.

42. I agree with Mr Smith on this point, too, although I do record that notice of any proceedings or any appeal should, of course, continue to be given to the Attorney General, although the Attorney General should not formally be made a party to the appeal proceedings.

43. Ms Facey Clark graciously did not disagree with Mr Smith's submissions on this point and agreed that the appropriate way to deal with it in this particular case was that I should order the deletion of both of the respondents, i.e the Immigration Appeals Tribunal and the Attorney General and substitute the Director of WORC as the respondent to the appeal. So, formally, I will make that order deleting the two respondents, substituting the director of WORC and then I will dismiss the appeal.

44. The Appellant shall pay the Respondent's costs, to be taxed on the standard basis, if not agreed.

Dated 9 October 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT