**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NOs: G 52 OF 2021**
**G 81 OF 2021**

**IN THE MATTER OF SECTION 23 (2) OF THE IMMIGRATION (TRANSITION) ACT (2021 REVISION)**

**IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES**

**AND IN THE MATTER OF AN APPLICATION FOR A RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE PURSUANT TO SECTION 30 (1) IMMIGRATION ACT (2015 REVISION).**

**BETWEEN:**

**JOEY DELOSA BURAY**

**First Appellant**

**AND**

**LEON SUNIL CARMO D'SOUZA**

**Second Appellant**

**AND**

**THE IMMIGRATION APPEALS TRIBUNAL**

**First Respondent**

**THE ATTORNEY GENERAL**

**Second Respondent**

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| **Appearances:** | **Mr Alastair David of HSM Chambers for the Appellants**<br>**Ms Claire Allen and Ms Carolyn Forster of Attorney General's Chambers for the Respondents** |
| **Heard:** | **12 April 2022** |
| **Draft Circulated:** | **18 May 2022** |
| **Judgment Delivered:** | **8 June 2022** |

## HEADNOTE

**Whether permanent residency application process under Immigration Act 2022 is incompatible with section 9 of the Bill of the Rights and the protection of private and family lives - Whether the refusal of the Caymanian Status and Permanent Residency Board or the Immigration Appeals Tribunal to provide appellants with copies of the actual questions and answers from their history and culture tests is unreasonable and amounts to a breach of the principles of natural justice.**

## JUDGMENT

### Summary of background

1. These proceedings relate to appeals by the First and Second Appellants against refusals by the Caymanian Status and Permanent Residency Board (the "Board") to grant them permanent residency ("PR") and consequential Residency and Employment Rights Certificates ("RERC") pursuant to section 30 (1) of the Immigration Act (2015 Revision) (the "2015 Act")[1].

2. Both appealed to the Immigration Appeals Tribunal (the "IAT" or "First Respondent") and both appeals were rejected.

3. Pursuant to GCR O.55, r.1, the First Appellant's amended notice of motion was filed on 19 May 2021. The Second Appellant's notice of originating motion was filed on 14 May 2021.

4. It is claimed by the Appellants:

   4.1 that the decisions of the IAT to refuse to grant PR and RERC's should be set aside and the applications be remitted to the First Respondent to be reconsidered;

   4.2 in the case of the Second Appellant that the decision of the IAT refusing to grant a RERC is unreasonable and amounts to a breach of natural justice;

   4.3 in the case of both Appellants, that they are entitled to a declaration that the First Respondent and any decision maker, when considering an application for PR must consider an applicant's right to family and private life pursuant to section 9 of the Bill of Rights[2] ("Section 9" and "BOR") when considering whether or not to grant or reject an application for PR; or,

   4.4 that section 37 (1) of the 2022 Act is incompatible with Section 9.

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[1] The current law is the Immigration (Transition) Act 2022 (the "2022 Act").
[2] Part 1 of Schedule 2 to the Cayman Islands Constitution Order 2009.

5. The Attorney General is an intervenor for the purposes of the claim that there may be an incompatibility with the BOR.

6. Section 9 reads as follows:

*"Private and family life*

*9. (1) Government shall respect every person's private and family life, his or her home and his or her correspondence.*

*(2) Except with his or her own consent or as permitted under subsection (3), no person shall be subjected to the search of his or her person or his or her property or the entry of persons on his or her premises.*

*(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."*

**Background to the PR application process and the Points System**

7. Before considering in detail the grounds of appeal that each appellant is advancing and the response of the Respondents, it is probably helpful to review the PR application process as well as the context within which it was and is intended to operate. Madam Justice Ramsay-Hale also considered the system in some detail in the case of *Alejandro Ruiz Ambriz v the Attorney General and the Immigration Appeals Tribunal*[3]

8. The Appellants both applied for PR on the basis of having been legally and ordinarily resident in the Islands for a continuous period of at least 8 years. The relevant law at the time each of them applied

[3] Unreported, Grand Court Cause No 207 of 2020, 25 October 2021

was the 2015 Act, with their respective applications having been made under section 30(1) of that Act. The relevant law at the time of appeal to the IAT was section 37 of the Immigration (Transition) Act, 2018 ("2018 Act"). Pursuant to section 21(4) of the 2022 Act, whilst the IAT is to apply the law that is, or was, in force at the time of the decision of the Board or Director of the Workforce, Opportunities and Residency Cayman Office ("WORC") or Chief Immigration Officer ("CIO"), it is the law in force at the time of the rehearing by the IAT that governs the proceedings under section 22(5) of the 2022 Act.

9. Section 37 of the 2018 Act provides as follows:

> *"37. (1) Any person who has been, and is legally and ordinarily resident in the Islands for a period of at least eight years other than -*
>
> *(a) the holder of a Residency Certificate for Persons of Independent Means;*
> *(b) the holder of a Residency Certificate for Retirees;*
> *(c) the holder of a Certificate of Direct Investment or a Direct Investment Holder's (Dependant's) Certificate;*
> *(d) the holder of a Residency Holders (Dependant's) Certificate;*
> *(e) the holder of a Certificate of Permanent Residence for Persons of Independent Means; or*
> *(f) a person who was granted permanent residence under any earlier law in circumstances analogous to paragraphs (a) or (b),*
>
> *may apply in the prescribed form and manner to the Board or the Director of WORC for reside permanently in the Islands and such application shall be accompanied by the prescribed application fee, issue fee, dependant fee and the annual fee with respect to the first year.*
>
> *(2) For the purpose of assessing the suitability of an applicant for permanent residence, a points system shall be prescribed by the Cabinet.*
>
> *(3) In considering an application for permanent residence under subsection (1), the Board or the Director of WORC upon applying the criteria set out in the points system shall only grant permanent residence to all applicants attaining one hundred and ten points or more."*

10. It is the last sub-section limiting the power of the IAT to only grant PR based on points allocated by the Points System (defined below) and thereby excluding the exercise of any discretion (and therefore a proportionality review under Section 9) that is at the heart of the issues in this case.

11. The "*points system (...) prescribed by the Cabinet*" the ("Points System") is found in Regulations made under the 2018 Act. In the case of the Appellants the relevant Points System is found at Schedule 2 of the Immigration Regulations (2019 Revision) (the "2019 Regulations"). The Points System is divided into nine factors and a deductible component. The nine factors award points for:

Factor 1 – Occupation

Factor 2 – Education, Training and Experience

Factor 3 – Local Investments

Factor 4 – Financial Stability

Factor 5 – Community Minded / Integration into the Caymanian Community

Factor 6 – History and Culture Test

Factor 7 – Possessing Close Caymanian Connections

Factor 8 – Demographic and Cultural Diversity

Factor 9 – Age Distribution

12. The deductible component allows the decision maker to deduct points for reasons of character and/or health.

13. An applicant for PR can live and work in the Cayman Islands, while their application is pending or while any appeal is being considered.[4] However, this is a limited right and once an applicant's PR application has been rejected and the applicant has chosen not to appeal or has extinguished his appeal rights, that applicant is only entitled to a final 90 day permission to remain in the country.[5]

14. Once the final 90 day permission to remain has ended, if they have no other ability to remain in the Cayman Islands[6] an unsuccessful applicant "*shall leave the Cayman Islands and neither the Board nor the Director of WORC shall grant or renew a work permit for the worker until the worker has ceased to hold a work permit for not less than one year after the worked has left the Islands*"[7]. If

[4] Section 66 (4) of the 2022 Act.
[5] Section 66 (8) of the 2022 Act.
[6] Section 37 (4) of the 2022 Act.
[7] Section 66 (1) of the 2022 Act.

they reapply for a work permit after one year and it is granted, they will have to wait a further 8 years before they can reapply for PR.[8]

15. It is not in dispute that the Appellants do not have the ability to obtain any other permission to remain in the Cayman Islands and, therefore, if their appeals are dismissed they will have to leave the Cayman Islands.

16. Applications for PR and RERC are made on form R30 which has numerous sections which are required to be completed. Counsel for the Appellants has highlighted that nowhere in the form does it require the applicant to detail their private life in the Cayman Islands. He also goes further and states that at no stage in any of the Appellants' applications/appeals has the Director of WORC the Board or the First Respondent asked either of the Appellants to address them as to their private life in the Cayman Islands.

**Evidence at the hearing**

17. At the hearing there were affidavits sworn by each Appellant and also an affidavit sworn on 2 July 2021 by Mr Christopher Eakin on behalf of the Second Respondent. Mr Eakin's affidavit sets out in some detail the background to the Points System which I review below.

18. Mr Eakin is employed by the Ministry of Border Control and Labour of the Cayman Islands Government. He began work as a consultant for the then Immigration Department in 2000. He was permanently employed by the Immigration Department from 2004 and for the latter part of that employment he held the position of Director of Policy and Strategic Management. Mr Eakin was admitted as an attorney at law of the Cayman Islands in 2012. In 2019 he was moved to what is now the Ministry of Border Control and Labour. Mr Eakin states that he has extensive experience in connection with Cayman Islands immigration law[9].

19. Mr Eakin explains that the Points System was first introduced in 2004. Prior to that, applications for PR were made without any prescribed criteria to be taken into account. The goal of the Points System was to create a system that is transparent and fair to applicants (to the extent that intending permanent residence applicants can largely self-assess their likelihood of success via an online self-assessment)

[8] Section 37 (4) of the 2022 Act.
[9] Eakin affidavit paragraphs 2 and 4.

and which selects future permanent residents more closely in line with the economic and social needs of the Cayman Islands.

20. In 2013, a committee was established to formulate the Points System with the intention that it would contain a number of criteria; namely,

> "*a. takes the applicant's character into account;*
>
> *b. reflects the Government's economic and social policy objectives;*
>
> *c. take into account the absence of the former key employee filter;*
>
> *d. does not have the effect of excluding any particular class of residents from the possibility of becoming a permanent resident;*
>
> *e. ensures that future permanent residents –*
>
> *(i) have particular qualifications and/or expertise that the Islands need to attract and retain;*
>
> *(ii) are directly involved in the training, mentoring and development of Caymanians and recognize the importance of the continuation of such training and development;*
>
> *(iii) have skill sets and expertise that is not already available in adequate measure un the Islands and will not be in the foreseeable future, so as to prevent positions form being permanently blocked for Caymanians who are currently in the workforce or will shortly qualify to take such jobs; and*
>
> *(iv) are of long term social and economic benefit to the Islands and who have shown a clear willingness to accept and embrace Caymanian values and culture."*[10]

21. Mr Eakin explains that, as a starting point, the committee identified six attributes that it considered a permanent resident should possess:

> "*a. Financially stable;*
>
> *b. Ethical and law abiding;*
>
> *c. Integrated into the Caymanian community;*
>
> *d. Has invested appropriately and adequately in the Cayman Islands;*
>
> *e. Community minded; and*
>
> *f. Possesses skills and experience that will benefit the Islands."*[11]

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[10] Eakin affidavit paragraph 10.
[11] Eakin affidavit paragraph 11.

22. Mr Eakin then reviews the various factors that are taken into account as part of the Points System. They appear to have been reviewed and amended since 2013 with a view, as Mr Eakin says, to clarifying the Points System and making it easier for applicants to understand the requirements for becoming a permanent resident.

23. Mr Eakin considers each of the factors. In relation to factor 1, occupation, he explains that initially points were awarded in accordance with current market conditions taking into account the number of qualified Caymanians in the relevant field. Points allocated to particular occupations would be reviewed and adjusted periodically to reflect changing needs. It was the applicant's occupation at the time that the application is made which is assessed[12]. This has now been revised and all applicants who are employed receive maximum points for their current occupation to avoid applicants being disadvantaged through the use of empirical data.

24. Factor 2, education, training and experience considers an applicant's academic/formal education and skills/vocational training with points being allocated based on the level of academic or technical training received, length of the education or training and its degree of difficulty[13].

25. Local investments under factor 3 are now clearly defined so that applicants can self-assess with points being awarded based on the actual amount of personal funds invested[14]. The current Points System allocates a potentially higher number of points to this factor than previously because it was seen as a key indicator of the applicant's long term commitment to the Islands.

26. Under factor 4, having sufficient regular income to provide for the applicant and their dependants' healthcare, education, accommodation and maintenance is regarded as of paramount importance[15].

27. In relation to factor 5, "*Community minded/integration into the Caymanian Community*" Mr Eakin confirms that although the intention is to allow as much self-assessment by applicants as possible, the Board is looking at the extent to which applicants have successfully settled and integrated into the Caymanian community. Up to 20 points can be awarded for this factor[16].

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[12] Eakin affidavit paragraphs 15 – 18.
[13] Eakin affidavit paragraph 19.
[14] Eakin affidavit paragraphs 20 – 23.
[15] Eakin affidavit paragraphs 24 – 28.
[16] Eakin affidavit paragraphs 29 – 33.

28. Integration is also assessed by way of factor 6, the history and culture test which he explains is intended to reward those applicants who have made a greater effort to integrate themselves into Caymanian history and heritage. Mr Eakin stresses the importance that is attached to the bank of 300-400 questions that are used to generate the 40 questions that applicants have to answer, each correct answer scoring ½ a point towards the 110 required to obtain PR[17]. Mr Eakin explains that only certain individuals at the Board and WORC have access to the questions and answers to ensure:

> "*a. consistency in scoring;*
> *b. To limit the number of people with access to the tests so as to ensure confidentiality or the questions and answers so that no future applicants have an advantage having seen a previous test; and*
> *c. To maintain the integrity of the testing process."*

29. He confirmed that after a test has been sat, the Board and IAT (if there is an appeal) only see the scores not the questions or answers. Furthermore, if a Freedom of Information request[18] ("FOI") is made regarding the test only the test score will be released, not the questions and answers.[19]

30. Factor 7, "*possessing close Caymanian connections*" is intended to reflect a policy intention that an applicant should receive recognition for a close Caymanian family connection. A maximum of 100 points is available under this factor[20].

31. Mr Eakin explains that in order to maintain a vibrant and diverse community it was seen as desirable to ensure that the permanent population of the Islands was made up of a balance of nationalities rather than dominated by a few. Under factor 8, points are awarded where the applicant is of a nationality that is less well represented in the Islands[21].

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[17] Meaning that a maximum of 20 points is available from the test.
[18] Pursuant to the Freedom of Information Act (2021 Revision).
[19] Indeed, as discussed in more detail below, exhibited to the affidavit of the Second Appellant dated 14 May 2021 is a copy of a decision of Cayman Islands Ombudsman dated 6 December 2019, rejecting FOI requests made by two PR applicants to WORC for copies of their tests. WORC claimed an exemption from disclosure of those records on the basis that "*[their] disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*" The Ombudsman agreed with WORC and found that the public interest in disclosure did not override the exemption in relation to the test questions and answer.
[20] Eakin affidavit paragraph 35.
[21] Eakin affidavit paragraphs 36 – 37.

32. Under factor 9, it was considered important that there was an appropriate balance in the labour market with respect to age so that the long term sustainability of labour supply to the Islands was assured. Points are therefore allocated based on the number of working years that an applicant has remaining before retirement[22].

33. Although Mr Eakin did not go into such detail, I think that it is also important to review more carefully the Regulations that set out the Points System. They confirm how points are allocated in relation to each factor and also provide some additional explanations as to the rationale behind the various factors. Although, as discussed below, Section 9 rights are broad, I believe that the process by which, in particular factors 5, 6 and 7 are considered is of particular relevance. In relation to each of those factors, the Regulations read as follows:

> *"FACTOR 5*
> *Community Minded/Integration into the Caymanian* *Maximum 20 [points]*
>
> *Community Points will be awarded up to a maximum of twenty (20) points for activities falling under the categories as follows.*
>
> *I. Two (2) points will be awarded for each year that the applicant has provided a minimum of 35 hours of service annually for up to eight years;*
>
> *a. Training and mentoring of Caymanians outside of normal work hours or related employer sponsored activities*
> *b. Personal sponsorship towards a Caymanian's tertiary training, with a minimum of CI$3,500 per annum*
> *c. Actively assist in the rehabilitation and mentoring of offenders*
>
> *II. One and one half (1.5) points will be awarded for each year that the applicant has provided a minimum of 35 hours of service annually for up to eight years;*
>
> *a. Participation and assistance in a youth programme*
> *b. Training and mentoring of Caymanians within normal work related/sponsored activities*
> *c. Participation and assistance in a sports programme*
> *d. Participation and assistance in an arts programme*
> *e. Participation and assistance in a local service club*
> *f. Participation and assistance in local church programme*
> *g. Personal donations to community minded activities of a minimum of CI$2,000 per annum*
> *h. Volunteering for non-profit, charitable or voluntary organisations.*

[22] Eakin affidavit paragraphs 38 – 39.

*Explanation*

1. *The extent to which the applicant has successfully settled and integrated into Cayman society is assessed by reference to such qualities as adaptability, motivation, involvement in the community and initiative.*
2. *Applicants who demonstrate an active involvement in the training and mentoring of Caymanians and the rehabilitation and mentoring of offenders will be given higher points.*
3. *Letters confirming an applicant's participation or contribution in any of the activities referred to in this factor will only be accepted from the head of the organisation or an executive member of the Board and the Caymanian beneficiary in cases of training or mentoring and must provide the required details of those activities and the amount of time the applicant was involved."*

*"FACTOR 6*

*History and Culture Test* *Maximum 20 [points]*

*An applicant's integration into the Caymanian society will be measured by reference to his knowledge of local history, tradition, customs and current events. One half-point (1/2) shall be awarded for each question answered correctly.*

*Explanation*

*An applicant will be given an appointment to sit a History and Culture Test. This date may be rescheduled by the applicant once only and the Test must have been undertaken within thirty days from the original date unless there are exceptional circumstances. Where an applicant fails to sit the Test within thirty days of the original date the application will proceed for determination and a score of zero points will be awarded under this Factor."*

*"FACTOR 7*

*Possessing Close Caymanian Connections* *Maximum 100 [points]*

*Applicant's relationship to a person who is Caymanian.*

*(a) an applicant who is a Cuban national and who by virtue of a close Caymanian family connection was granted permission to reside in the Cayman Islands by the Governor in Executive Council (as it then was), and who applies for permanent residence. 100 points*

*(b) an applicant who is a Cuban national and who is the brother, sister or grandparent of a Caymanian and who was granted permission to reside in the Cayman Islands by the Governor in Executive Council (as it then was), and who applies for permanent residence. 80 points*

*(c) an applicant who is the parent, son or daughter of a Caymanian. 40 points*

*(d) an applicant who is the brother, sister or grandparent of a Caymanian.20 points*

*Explanation*

*1. An applicant is allocated the most points (100 points) if-*

*(a) the applicant is the parent, son or daughter of a Caymanian; and*

*(b) the applicant is a Cuban national granted permission to reside in the Cayman Islands by the Governor in Executive Council (as it then was).*

*2. An applicant is allocated 80 points if-*

*(a) the applicant is the brother, sister or grandparent of a Caymanian; and*

*(b) the applicant is a Cuban national granted permission to reside in the Cayman Islands by the Governor in Executive Council (as it then was).*

*3. An applicant who is the parent, son or daughter of a Caymanian but who is not a Cuban national granted permission to reside in the Cayman Islands by the Governor in Executive Council (as it then was) is allocated 40 points.*

*4. An applicant who is the brother, sister or grandparent of a Caymanian but who is not a Cuban national granted permission to reside in the Cayman Islands by the Governor in Executive Council (as it then was), and who has not already received 40 points by virtue of being the parent, son or daughter of a Caymanian, is allocated 20 points.*

*Note: The points available to persons who are Cuban nationals shall be awarded only in respect of applications received within six months from the date of commencement of the Immigration (Amendment) Regulations, 2013."*

34. For reasons that I will come back to, I think that it is also relevant to consider how it is that an individual might get to a point at which they have resided in the Cayman Islands long enough to apply for PR. Generally, they will have to have been offered a job in the Cayman Islands and an application made by their employer for the grant of a work permit under the relevant immigration law. Sections 56 – 66 of the 2022 Act set out the current process by which an employer can apply for the grant and subsequent renewal of a work permit for an employee. Applications are made under section 56 and the approach to be taken to the consideration of those applications is set out in section 58 which reads as follows:

*"Consideration of application for work permit by Board etc*

*58.(1) The Work Permit Board, the Business Staffing Plan Board, the Cayman Brac and Little Cayman Immigration Board or the Director of WORC in considering an application under section 56 —*

*(a) shall, in respect of an application for a grant; or*

*(b) may, in respect of an application for a renewal,*

*subject to any general directions which the Cabinet may, from time to time, give in respect of the consideration of such application, take into account the matters listed in subsections (2) to (4).*

*(2) In relation to the prospective employer, that —*

*(a) the prospective employer has demonstrated the prospective employer's genuine need to engage the services of the prospective worker;*

*(b) the prospective employer, unless the prospective employer has been exempted by the Cabinet, the Board or by the Director, has registered the vacancy to which the application relates in an electronic portal established and managed by WORC for fourteen days before the submission of the application in order to ascertain the availability of any one or more of the following in the order in which they are listed —*

*(i) a Caymanian;*

*(ii) the holder of a Residency and Employment Rights Certificate issued under section 37(5) or (16) or section 38; and*

*(iii) a person legally and ordinarily resident in the Islands who is qualified and willing to fill the position; and*

*(c) in the case of an application in respect of a professional, managerial or skilled occupation, the Board or the Director of WORC, as the case may be, is satisfied as to the extent to which the prospective employer has established adequate training or scholarship programmes for Caymanians.*

*(2A) The Cabinet shall, by notice published in the Gazette, in any other official Government website or official means of communication or any other government media, provide details of the electronic portal specified in accordance with subsection (2)(b) which will deal with available jobs in the Islands.*

*(2B) A prospective employer, in addition to registering an application under subsection (2), may also at the same time as registration advertise the vacancy in a local newspaper or other prescribed media.*

*(3) In relation to the worker —*

*(a) the worker's character, reputation and health, and where relevant, the character, reputation and health of that person's dependants;*

*(b) the worker's professional and technical qualifications and that person's experience and competence to undertake the position applied for;*

*(c) the economic and social benefits which the worker may bring to the Islands;*

*(d) the sufficiency of the resources or the proposed salary of the worker and, where the worker's spouse or civil partner is employed within the Islands, those of the worker's spouse or civil partner, and that person's ability to adequately maintain that person's dependants;*

*(e) the worker's facility in the use of the English language; and*

*(f) the location, type and suitability of the accommodation available for the worker and that person's dependants, if any, throughout the term of the work permit.*

*(4) Generally —*

*(a) the protection of local interests and in particular of Caymanians, including without limitation and where applicable, the provisions set out in section 58(2)(c);*

*(b) the availability of the services of a suitable person already legally and ordinarily in the Islands; and*

*(c) the requirements of the community as a whole, the demographics referred to in section 30(j) and such other matters that may arise from the application.*

*(5) A person who, when making an application under section 56 to the Board or the Director of WORC, 70 —*

*(a) withholds information that a Caymanian, the spouse or civil partner of a Caymanian or the holder of a Residency and Employment Rights Certificate has applied for the position for which a work permit is sought; or*

*(b) provides inaccurate or incomplete information with respect to paragraph (a) in an attempt to deceive the Board or Director of WORC either by act or omission, commits an offence and is liable on summary conviction in respect of the first offence to a fine of twenty thousand dollars and to imprisonment for one year; and in respect of a second or subsequent offence to a fine of thirty thousand dollars and imprisonment for two years.*

*(6) General directions given under this section shall be published in the Gazette."*

35. Section 63 provides as follows:

*"Grant or refusal of work permit*

*63. (1) Subject to section 66[23], the Board or the Director of WORC in considering an application under section 56 may —*

*(a) refuse an application for a work permit; or*

[23] Which sets a limit of 9 years for holders of work permits at which point they must either leave the Cayman Islands for a period of 1 year or apply for PR.

*(b) grant such an application with or without limitations or conditions.*

*(2) Subject to section 66, on the grant or renewal of an application under section 56, the work permit applied for shall be issued in the prescribed form for such period of up to three years generally, as the Board or the Director of WORC may determine, save that the Board or the Director of WORC, may grant a work permit for a period of up to —*

*(a) one year for temporary workers or seasonal workers;*

*(b) five years to domestic helpers, teachers, doctors, nurses and ministers of religion;*

*(c) five years to workers for positions authorised by the Board in a Business Staffing Plan Certificate; and*

*(d) five years to a director, officer or employee of a special economic zone developer or special economic zone enterprise operating in a special economic zone for which a career development bureau has been established,*

*and the work permit shall be endorsed with particulars of the conditions and limitations, if any, imposed by the Board or the Director of WORC on the grant or renewal."*

36. When an ex-patriate is considering moving to the Cayman Islands to live and work, generally, they can only do so if they are granted a work permit and they can only remain in the Cayman Islands whilst they hold a work permit. Neither the grant nor the periodic renewal of a work permit is guaranteed and, as set out above, work permits can only be granted for limited periods of time on the expiry of which an application must be made to renew them. As can be seen, a wide variety of factors are considered when an application for a work permit is considered.

**The positions of the First and Second Appellants in relation to their applications for PR**

**The First Appellant**

37. On 24 January 2017, the First Appellant applied for PR and on 15 January 2018, the First Appellant's application for PR was rejected by the CIO.

38. The law in force on 15 January 2018, was the 2015 Act. Section 30 (4) of 2015 Act stated:

*"(4) In considering an application for permanent residence under subsection (1), the Board or the Chief Immigration Officer upon applying the criteria set out in the points system*

*shall grant permanent residence to all applicants attaining one hundred and ten points or more."*

39. The First Appellant's application was considered pursuant to schedule 2 of the Immigration Regulations (2017 Revision) ("the 2017 Regulations")[24].

40. On 6 February 2018, the First Appellant appealed against the decision of the CIO.

41. On 28 February 2018, the CIO served upon the First Appellant a document entitled "*Appeal Statement*". This document set out the rationale behind the decision to reject the First Appellant's PR application. Mr David makes the point that no reference was made to considering the Appellant's constitutional rights in the Appeal Statement. In particular, he says, Section 9 of the BOR was not mentioned nor seemingly considered.

42. In an affidavit in support of his claim for PR, dated 19 August 2020, the First Appellant provided further information to the First Respondent.

43. In a decision dated 11 December 2020, the First Respondent upon considering matters *de novo* rejected the First Appellant's application for PR due to the fact that it only awarded him 74 points.

44. The First Respondent did go on to say in its decision that it had considered the Appellant's constitutional rights:

> *"The Tribunal further considered the Cayman Islands Constitution Order 2009 and the Cayman Islands Bill of Rights and the Appellant's Rights under* "Section 9 – Private and family life [2] Nothing in any law or done under its authority shall be held to be contravene this section to the extent that it is reasonably justifiable in a democratic society -" *and* "(e) to regulate the right to enter and remain in the Cayman Islands." *There is no indication that the Appellant has established a family unit within the Islands in accordance with the Court Ruling of* "Ian Fernando Ellington V The Chief Immigration Officer 29th April 2020". *Therefore, the Tribunal determined having reviewed all the correspondence before it from the Applicant, his agent and WORC that there is nothing which indicated that his right is engaged".*

[24] The current version is the 2019 Revision but the relevant provisions do not vary from the 2017 Regulations.

45. On 15 January 2021, the First Appellant requested that the First Respondent reconsider its decision. In a letter dated 16 February 2021, the First Respondent notified the First Appellant that his reconsideration request was denied. The rationale given was that the Tribunal "*...did consider the Appellant's Right to a Private and Family Life and determined that its decision does not in any way adversely affect his Private Life.*" The First Appellant appeals against that decision[25].

**The Second Appellant**

46. On 7 November 2018, the Second Appellant applied for PR and on the 25 January 2019, the Second Appellant sat the history and culture test.

47. On 12 March 2019, the Board rejected the Second Appellant's application for PR. The relevant law which was in force as of 12 March 2019, was the the 2018 Act. The relevant regulations were the 2017 Regulations. Section 37 (3) of the 2018 Act stated:

> *"(3) In considering an application for permanent residence under subsection (1), the Board or the Director of WORC upon applying the criteria set out in the points system shall only grant permanent residence to all applicants attaining one hundred and ten points or more."*

48. On 29 March 2019, a notice of appeal was filed on behalf of the Second Appellant. In that notice, it was requested that the Board/Director of WORC disclose the history and culture test questions and answers the Appellant sat/gave.

49. On 15 April 2019, an Appeal Statement was provided to the Second Appellant. The history and culture test questions and answers were not provided. On 10 May 2019, grounds of appeal were submitted setting out why it was believed that the Board had erred in law.

50. By letter dated 9 June 2020 the IAT confirmed that the appeal was dismissed and therefore did not rehear the matter. The Second Appellant was awarded 99.5 points by the Board and that decision stands.

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[25] When the First Appellant filed his Originating Motion, the relevant law was the Immigration (Transition) Act (2021 Revision) ("the Act").

51. The IAT also stated:

> *"Cayman Islands Construction Order 2009 – Section 9 – the Tribunal determined that the CS/PR Board's decision does not infringe on the Appellant's rights as the decision was not in breach of procedural fairness, or at variance with the Regulations; nor acted unreasonably or contrary to the principles of natural justice."*

52. The Second Appellant appeals that decision.

53. In relation to the Appellants' claims pursuant to Section 9, their position is put as follows:

53.1 The Director of WORC, the Board, or the First Respondent are required to carry out an assessment as to whether or not their decision to reject an applicant's PR application breaches Section 9.

53.2 A failure to consider an applicants' Section 9 rights renders the decision unlawful/unreasonable or amounts to a breach of the BOR.

53.3 The First Appellant had established a right to a private life by the time the CIO had considered and rejected his application.

53.4 The Second Appellant had established a right to a private life by the time that the Board rejected his application.

53.5 A consideration of an applicant's position in the Cayman Islands with reference to the Points System as set out in the Regulations does not amount to a proportionality consideration and therefore the decision cannot be regarded as being "reasonably justifiable".

53.6 Section 30(4) of the 2015 Act, Section 37 (3) of the 2018 Act, Section 37 (3) of the Act, and Section 37 (3) of the 2022 Act are incompatible with Section 9 of the BOR.

54. In relation to the Second Appellant's claim of a breach of procedural fairness it is claimed that:

54.1 The Board or its members hold or have access to a copy of the Second Appellant's history and culture test.

54.2 The Board/Director of WORC are required to act in a procedurally fair manner and compliant with natural justice when submitting documents to the First Respondent and the Appellants with the Appeal Statement.

54.3 The First Respondent has the power to order the Board/Director of WORC to disclose an applicant's history and culture test to the applicant.

54.4 The First Respondent is required to ensure that the appeal process which they are responsible for is procedurally fair.

**Position of the Respondents**

55. In summary, the position of the Respondents is that the Appellants cannot be granted sufficient points to be awarded permanent residence and, on that basis, their appeals should be dismissed. They say:

55.1 Although the Appellants raise issues with the history and culture test, even if they each received full points under this factor, they would still have insufficient points to be granted permanent residence.

55.2 The statutory scheme for the grant of permanent residence does not contemplate or allow for any separate assessment by the decision maker of matters under Section 9.

55.3 If the Court accepts that proposition, it can consider whether section 37 of the 2018 Act is incompatible with the BOR. It is suggested that the starting point for the Court's analysis will be whether the circumstances of these appeals fall within the ambit of Section 9. The Respondents submit that they do not and as such, the appeals should be dismissed.

55.4 If the Court does not accept that submission and finds that the appeals do fall within the ambit of section 9, the Respondents submit that the Appellants' rights to private and family life have not been violated. Any interference with that right is justified and no issue of incompatibility arises.

55.5 If, contrary to the above, the Court considers that there has been a violation of Section 9 and makes a declaration of incompatibility in relation to section 37 of the 2018 Act, the incompatible provision will still stand pursuant to section 23(2) of the BOR which states:

> *"(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question".*

Therefore, in making any new decision in relation to the Appellants the IAT would still be bound by section 37 and the prescribed Points System (unless/until such time as it is amended by Parliament or the Points System is amended by Cabinet).

55.6 Even if a declaration of incompatibility is made, section 24 of the BOR confirms that the decisions made by the IAT will nevertheless stand. Section 24 provides that:

> *"24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is 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."*

**Relevant law relating to the Board and IAT**

56. On an appeal to the IAT, section 21(1) of the Act provides as follows:

> *"(1) Save as otherwise provided in this Act, any person aggrieved by, or dissatisfied with, any decision of the Director of WORC or the Director's designate under section 37, 49 or 56(5) or of a Board other than a decision under section 20 may, within —*
>
> *(a) twenty-eight days of the communication of the decision to the person; or*
>
> *(b) such longer period as the chairperson of the Appeals Tribunal may, for good reason shown, allow, serve notice on the Immigration Appeals Tribunal of the person's intention to appeal such decision."*

57. As set out in section 21 (8) of the 2022 Act, an appeal under section 21 may be lodged on the ground, or grounds, and no other, that the decision in question is erroneous in law; unreasonable; contrary to the principles of natural justice; or at variance with regulations made under section 72 of the 2022 Act[26].

58. Upon receipt of detailed grounds and any subsequent information requested, the IAT may:

58.1 if it is satisfied that the appellant has complied with the procedural requirements of section 21, proceed with a hearing on the grounds; or,

58.2 if it is satisfied that the appellant has failed to comply with any of the requirements of section 21, quash the appeal without a hearing on the grounds[27].

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[26] Section 21(8) of the 2022 Act.
[27] Section 21(9) of the 2022 Act.

59. Section 22(1) of the 2022 Act provides that a hearing on the grounds is to take into account:

59.1 the reasons provided by the Board and all the information that was submitted by the appellant at the time of the appellant's original application; and,

59.2 the written detailed grounds filed by the appellant.

60. Where, at a hearing, the IAT determines that at least one of the grounds contained in section 21(8) has been made out, the IAT is to proceed to a rehearing of the original application or decision[28] which was the subject of the appeal[29].

61. Finally, pursuant to section 22(10) of the Act:

> *"An appeal to the Immigration Appeals Tribunal and matters referred to the Immigration Appeals Tribunal may not be remitted to the pertinent Board or to the Director of WORC."*

62. An appeal may be made to the Grand Court from a decision of the Respondent on a point of law only[30].

63. Pursuant to GCR O. 55, r. 7(5) the Grand Court may give any judgment or decision, or make any order, which ought to have been given or made by the tribunal and make such further or other orders as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by the tribunal.

**Submissions of the parties and relevant human rights law**

**Section 9 of the BOR**

64. Section 9 of the BOR protects both the right to a family life and a right to a private life.

65. Section 9 is based on Article 8 ("Article 8") of the European Convention on Human Rights ("ECHR")[31]. Article 8 states:

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[28] See my decision in *Alan Lawrems Taylor Dominguez v Immigration Appeals Tribunal* unreported 29 April 2022.
[29] Section 22(4) of the Act.
[30] Section 23(2) of the Act.
[31] The treaty obligations under which will serve as a guide to the interpretation of domestic legislation Honourable Chief Justice in *R v Whorms* [2008 CILR 188] paragraph 14.

***"Right to respect for private and family life***

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

66. "Private" and "family" lives are separate and distinct considerations and should not be considered as one test[32].

67. Private life "*is a broad term not susceptible to exhaustive definition*".[33] It has been held to protect "*a right to personal development, and the right to establish and develop relationships with other human beings and the outside world*". [34]

68. By way of example, in the case of *Volkov v Ukraine*[35], the ECtHR held that the applicant's dismissal from his role as a judge had constituted interference with his right to respect for private and family life. In particular the Court held;

> *"The notion of "private life" does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world. Therefore, restrictions imposed on access to a profession have been found to affect "private life".*
>
> *Likewise, dismissal from office has been found to interfere with the right to respect for private life. Finally, Article 8 deals with the issues of protection of honour and reputation as part of the right to respect for private life."*

69. The Appellants accept that Section 9 of the BOR is not an absolute right, i.e. it can be interfered with if "reasonably justifiable". For example, in *Bensaid v UK* the ECtHR considered the argument that it

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[32] Paragraph 37 of *Ambriz* and *Jasarevic v Secretary of State for the Home Department* [2005] EWCA Civ 1784.
[33] Paragraph 47, *Bensaid v UK* [2001] 33 EHRR 10
[34] Paragraph 61, *Pretty v United Kingdom* (2002) 35 EHRR 1
[35] 25 May 2013

would violate the Article 8 rights of an Algerian national living in England and married to an English national to remove him on the basis that his marriage was one of convenience. The complicating factor was that he was a schizophrenic suffering from a psychotic illness. The court found that his removal would not breach Article 8 and said:

> *"48. Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure "in accordance with the law", pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being "necessary in a democratic society" for those aims."*

70. The Appellants also rely on the case of *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27. *Razgar* was a case in which the appellant, an Iraqi asylum seeker, entered the UK from Germany and claimed asylum. In accordance with international treaty obligations, the Secretary of State, without considering the merits of the claim, directed the appellant's removal to Germany as a safe third country. The appellant resisted removal on the grounds that it would infringe his rights under, in particular, Article 8. The Secretary of State certified the appellant's challenge as manifestly unfounded pursuant to the relevant English immigration law. The appellant suffered from psychiatric illness and adduced evidence that there was a real risk that he would not receive appropriate treatment in Germany. Without evidence to the contrary the judge held that the Secretary of State could not discount that evidence and the case could not be regarded as manifestly unfounded. In judicial review proceedings the court at first instance quashed the Secretary of State's certificate and that was upheld on appeal.

71. Lord Bingham said as follows:

> *"16. The parties to this appeal accepted that "manifestly unfounded" bore the meaning given to it by the House in* R (Yogathas) v Secretary of State for the Home Department; R (Thangarasa) v Secretary of State for the Home Department *[2002] UKHL 36, [2003] 1 AC 920, paragraphs 14, 34 and 72 and accepted the Court of Appeal's opinion (in paragraph 30 of its judgment) that those paragraphs called for no gloss or amplification. It was also, inevitably, accepted that on an application for judicial review of the Secretary of State's decision to certify, the court is exercising a supervisory jurisdiction, although one involving such careful scrutiny as is called for where an irrevocable step, potentially involving a breach of fundamental human rights, is in contemplation.*
>
> *17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:*
>
> > *(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> >
> > *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*
> >
> > *(3) If so, is such interference in accordance with the law?*
> >
> > *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
> >
> > *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?*
>
> *18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, Costello-Roberts v United Kingdom (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no*

*ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.*

19. *Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see Ullah and Do, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.*

20. *The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In Secretary of State for the Home Department v Kacaj [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:*

> *"although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."*

*In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.*

72. In *R (Balajigari) v SSHD* [2019] EWCA 673, the Secretary of State had tried to argue that Article 8 of the EHCR was not engaged when an individual had applied for indefinite leave to remain in the UK after 5 years. The case involved a number of individuals who had been permitted to enter or remain in the UK based on a points system and who then after five years had the right to apply for indefinite leave to remain ("ILR" or "Settlement"). It was a condition of any such application that the applicants demonstrate a minimum level of earnings in the previous year. The Home Office became concerned that there was a widespread practice of applicants for leave to remain claiming falsely inflated earnings, particularly from self-employment, in order to appear to meet the required minimum. Having started to obtain information from Her Majesty's Revenue and Customs to compare against applications, it became clear that there were significant discrepancies in a large

number of cases. It subsequently became Home Office practice to refuse applications for ILR in the great majority of cases where a discrepancy relying on a general grounds for refusal or misconduct as the reason.

73. Many applicants whose applications were refused, complained that they had not been dishonest and that any discrepancies were the result or mistakes or ignorance and that they were wrongly treated as dishonest where there was insufficient evidence or a fair procedure for doing so. The particular ground for refusal with which the court of appeal was concerned was non-mandatory and involved an element of discretion in relation to which guidance had been given by the Secretary of State. Counsel for the appellants in that case argued that the first two stages of the "*Razgar*" test were satisfied.

74. The court found that a decision to refuse leave to remain, with the consequence that the applicant had to leave or was removed from the UK, engaged the applicants' rights under Article 8.

75. The Appellants say that these cases make it clear that there is a positive obligation upon the Government of the Cayman Islands to respect the Appellants private and family life but that despite this positive obligation, the WORC and the Board do not consider an applicant's rights pursuant to Section 9 of the BOR after they have concluded that the individual does not obtain 110 point under the Points System. There is no disagreement between the parties that the Points System does not provide for a separate consideration of Section 9 or the exercise of any discretion to award additional points for Section 9 reasons.

76. The Appellants rely on the fact that in *Balajigari* the court was satisfied that in the case before them that those individuals who had had their ILR applications rejected will typically engage Article 8.[36] It is the Appellant's case that they have established a private life in the Cayman Islands due to their length of residence and their connections to the Cayman Islands, their Section 9 rights are engaged by the decision to reject their PR application because the consequence of that decision is that they will have to leave the Cayman Islands and that they are effectively being removed.

77. The Appellants say that their position is supported by the case of *Ellington v Chief Immigration Officer of the Cayman Islands*. At paragraph 45 of that judgment, Mr Justice Williams considered

[36] Paragraph 91.

the effect of the automatic designation of Prohibited Immigrant Status ("PI Status") on an individual[37]. In particular, he noted that the automatic designation of PI Status rendered the individual liable to be in the Cayman Islands unlawfully without a consideration of his constitutional rights and that the designation was inconsistent with Section 9[38]. Due to the issues with the automatic designation of PI Status Williams J held that *"in the absence of any provision enabling a review to be conducted taking into account BOR considerations in particular the right to Family Life"* the relevant sections of the law were incompatible with the BOR.

78. The case of *Ambriz* to which I referred earlier is closer to the facts of these appeals. Madam Justice Ramsay-Hale heard an appeal against the decision of the IAT rejecting an appeal by Mr Ruiz, the appellant, against the refusal of his application for PR on the basis that he had only attained 74 points. In rejecting Mr Ruiz's appeal, the IAT said that it had considered his submissions under Section 9 but that there was no indication that Mr Ruiz had established a family unit within the Cayman Islands as considered in the case of *Ellington*[39] and that it could not therefore "invoke" Mr Ruiz's claim under Section 9. Mr Ruiz argued that the IAT had misconstrued *Ellington* and that Section 9 extended beyond family life and that the IAT had not asked him to provide any information relevant to his Section 9 rights.

79. The judge noted the submission made by Ms Allen on behalf of the IAT (and who also appears for the Respondents in this case) that the IAT's reference to the BOR was "... *mistaken, as the decision maker under the statutory scheme exercises no discretion. Rather, the decision-maker is required to scrutinize the evidence provided by the applicant, assign the requisite number of points and grant the application if the applicant achieves 110 points. The decision maker cannot apply different weights to any of the factors or consider any extraneous factors such as an applicant's rights to have his private and family life be respected."*

80. The judge went on to consider the case of *Ellington* which she found was readily distinguishable from the case before her. *Ellington* dealt with the entitlement of an applicant to PR and a RERC as the spouse of a Caymanian. Such an application is made under different section to an application for PR under the Points System. The application in *Ellington* involved the exercise of discretion and the

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[37] In that case the Appellant had pled guilty to being an accessory after the fact to a robbery and was subsequently declared to be a prohibited immigrant.
[38] Paragraph 45.
[39] Unreported Grand Court 29 April 2020 and Court of Appeal 8 October 2020.

Court held that when considering matters such as bad character[40] and whether to exclude the applicant from the community on that ground, the IAT must consider the applicant's Section 9 rights.

81. In *Ambriz*, the judge said[41]:

> "*35 There was no warrant for the IAT to extend the decision in* Ellington *to a consideration of an application for permanent residency under section 30. Those applications are governed by an entirely different statutory framework which does not allow for the exercise of discretion by the decision maker. ....*
>
> *36. Section 9 is simply not engaged. There is no discretion to give lesser or greater weight to any particular factor or to consider any matter which are not set out in Schedule 2. The decision maker must apply the criteria set out in the points system and grant permanent residence if the applicants has 110 points. A failure by any to apply the law is contrary to section 19(1) of the BOR which provides that,*
>
> "19. – (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair."
>
> ....
>
> *37 .... To put it another way, even had the IAT decided that dismissing the appeal would breach Mr Ruiz's section 9 rights, it could not have granted him permanent residence unless he had the requisite 110 points as it is bound by the statute.*
>
> *38 The broader challenge made by Mr Ruiz to the unconstitutionality of the points system, as being incompatible with section 9 of the BoR, is outside the scope of this appeal. I would note here for completion only and without comment on an issue which is not before me for resolution, Ms. Allen's submission that the points system is compatible with the BoR, having been designed to take account of an applicant's private and family life, allowing points,* inter alia, *for their*

[40] The appellant in Ellington has been convicted of an offence.
[41] Paragraph 5.

*familial ties to Caymanians, the extent of their civic engagement and integration in the community and the business relationships they have developed."*

82. The Appellants argue that the judge, was incorrect when she said that Section 9 is not engaged. This, they say, is evident by the lack of reference in the judgment to section 37 (4) of the Act and section 66 (1) of the Act which when considered together mean that, if unsuccessful, the Appellants will be required to leave the Cayman Islands. If they choose to remain they will be either required to leave or forced to leave.

83. I disagree with the suggestion by the Appellants that the judge in *Ambriz* was incorrect on this point. In my view, the judge was observing that there is no exercise of discretion under the Points System which permits a separate consideration of Section 9 factors and, therefore, no basis for the Board or IAT to award any additional points for those factors. For those reasons, Section 9 is not engaged. The judge did not and did not need to consider the matter further than that.

84. The Respondents take issue with the approach of the Appellants. Their position is that the effect of a decision to decline an application for permanent residence under section 37(3) is not to be equated with removal or deportation from the Cayman Islands and that the authorities relied on by the Appellants do not assist them.

85. I think that it is important to draw a distinction between the Points System in the Cayman Islands and many of the relevant Article 8 cases. The English and ECtHR cases are generally dealing with situations in which an individual is facing forced removal or deportation from England or the relevant European country, in circumstances where there is an element of discretion being exercised as to whether such action is warranted, to the extent that it interferes with that person's rights, whether it infringes them and, if so, whether that is reasonably justifiable. Cases such as *Ellington* deal with situations in which an individual's continued residence in a county becomes unlawful in circumstances in which they have not had any opportunity to challenge that decision or have their Article 8 or Section 9 rights considered.

86. In my view, those are very different situations to an application for PR and the working of Points System in the Cayman Islands. In my view, that process can only be reached after successive work permits have been granted during which period, as Mr Eakin explains, a prospective applicant for PR

will have been able to self-assess whether or not they are likely to qualify for PR. Some will chose not to apply at all. Some will not be able to afford to purchase property or invest in a business, others may not have a high level of education. These are all predictable factors which will enable those on work permits to manage their private and family lives accordingly, just as they will have had to have done whilst on periodic work permits. In my view, that is a far cry from a situation where an individual is being removed or deported, the consequence of which may be the interference by a state with their private or family lives.

76. In the ECtHR case of *Jeunesse v The Netherlands*[42] the applicant had lived in the Netherlands for over a decade. Periods of her presence in the Netherlands were lawful, whilst other periods were without lawful immigration status. At no point did the applicant have permanent residence. The applicant's appeal was based upon a refusal of the state to grant her a residence permit. Even though she had been in the relevant state for many years, the ECtHR held that her stay "*cannot be equated with a lawful stay where the authorities have granted an alien permission to settle in their country*".[43]

77. The ECtHR went on at paragraphs 103 to 105 to state:

> *"103. Where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. (...)*
>
> *104. The instant case may be distinguished from cases concerning "settled migrants" as this notion has been used in the Court's case-law, namely, persons who have already been granted formally a right of residence in a host country. A subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right*

[42] Application no. 12738/00, 3 October 2014.
[43] Paragraph 102.

*to respect for private and/or family life within the meaning of Article 8. In such cases, the Court will examine whether the interference is justified under the second paragraph of Article 8. In this connection, it will have regard to the various criteria which it has identified in its case-law in order to determine whether a fair balance has been struck between the grounds underlying the authorities' decision to withdraw the right of residence and the Article 8 rights of the individual concerned (...)*

*105. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to Article 8 to grant her a residence permit, thus enabling her to exercise family life on their territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (...)*

78. Further, at paragraph 108 the ECtHR held:

*"108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (...)"*

87. *Jeunesse* helps illustrate the situation that arises in the Cayman Islands when an individual applies for PR. At that point, they are not aliens applying to enter the country, they are not individuals whose

presence is tolerated or has become undesirable raising the question of their removal or deportation. They are closest to being settled migrants but subject to the time limit prescribed by the 2022 Act. If they choose to apply for PR and their application is unsuccessful, the state is not interfering with their Section 9 rights because their right to reside in the country is not being withdrawn; rather, it is coming to an end in accordance with the law in a way that is transparent and largely predictable.

88. As the Respondents also point out, failing to be granted PR does not necessarily prevent an unsuccessful applicant from visiting the Cayman Islands during the subsequent one year period. The Respondents also suggest that the decision does not necessarily require the individual to leave the Islands but in reality their rights are likely to be limited to remaining as anything other a visitor for a limited period.

89. In this sense the Respondents say that the decisions must be distinguished from that in *Ellington*[44].

90. The Respondents argue that if the Court is not minded to accept that a decision to decline an application for permanent residence under the Points System does not amount to a removal from the Islands, the Points System adequately considers section 9 factors.

91. For the reasons set out above, I do not think that a decision to decline an application for PR equates to removal or deportation.

92. The Respondents argue that the Points System reflects Cabinet's policy as to how individual rights (including those under section 9) should be balanced against the competing public interest.[45] In carrying out this balancing exercise they say that Cabinet has determined that certain factors associated with section 9 have more weight than others.

93. They say that, amongst other things, the Points System takes into account an individual's occupation, investment in local business, connection with the Cayman community through charity and mentoring efforts and Caymanian close family connections. It captures the most logical and reasonable factors associated with section 9 in the context of what, citing *Jeunesse,* they describe as an "*immigration privilege (to which an individual has no entitlement as of right)*". Whilst the Points System does not

[44] See also the Court of Appeal judgment *Chief Immigration Officer v Ellington* (CICA Civil Appeal No. 15 of 2020, 8 October 2020)
[45] See paragraphs 46 and 47 of *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11

consider all possible aspects of a person's private or family life, they submit that those factors which form part of the Points System are those which are sufficiently important to identify applicants with strong private or family life ties to the Cayman Islands.

94. I agree with the Respondents. In my view, based on the evidence from Mr Eakin, the Points System has been designed and operated in a way that incorporates consideration of individuals' Section 9 rights. Mr Eakin has explained in detail how the Government approached the review and implementation of the Points System and the Regulations set out, in my view, a clear system for how points are allocated taking into account the characteristics and circumstances of each applicant in a way that, as Mr Eakin explains, is fair and transparent. In turn, this means that applicants can self asses the likelihood of being granted PR if they apply and obviate the need for the exercise of any discretion by the Government in that regard. A failure of an applicant to obtain 110 points and the rejection of their application does not, in my view, compare to the withdrawal by the state of an individual's existing rights to remain in a country or their removal or deportation. The examples of explanations from the Regulations that I set out above in relation to factors 5, 6 and 7 in my view support the fact that the Government has ensured that due and reasonable consideration is given to applicants' Section 9 rights by way of the Points System. This means that there is no need or room for the exercise of any additional discretion in that regard and no need or room for a separate Section 9 review.

95. In my opinion there has been no error of law by the Board or the IAT in relation to the consideration of the Appellants' rights under Section 9.

**Disclosure of the History and Culture Tests**

96. The Appellants say that upon an appeal being filed, the First Respondent notifies "Immigration Appeals" (which is an individual who is employed by the Department of WORC) that a notice of appeal has been filed. In their notice the First Respondent states:

*Please provide the Tribunal the reasoning along with the complete application that was submitted to the Board, including all letters, police records, travel history logs and any other documents.*

97. In both of the Appellants' cases an Appeal Statement was provided and in both cases the Appellants were not provided with the history and culture test questions and answers they sat.

98. The Appellants argue that the First Respondent has wide discretionary powers as confirmed by Section 23 (1) of the Act to make any such order that it deems fit in relation to the appeal and suggest that, if it so wished, it could even call upon the Chairman of the Board, the Director of WORC or the Appellants to address it (Section 22 (3) of the 2022 Act).

99. It is the Appellants' position that the First Respondent could if it wished require the Board or the Director of WORC to provide disclosure of the test questions and answers. By the First Respondent not doing this, it is the Appellants' position that the Board acted unreasonably and has failed to ensure that the Appellants have received a fair hearing of their case.

100. The 2022 Act is silent as to what should be disclosed as part of the Appeal Statement, save for the fact that reasons have to be disclosed[46]. It is the Appellant's case that in the absence of policies or clear guidance, the common law principles of fairness and Section 19 of the BOR applies, requiring all decisions and acts of public officials to be lawful, rational, proportionate and procedurally fair.

101. In the case of *Streeter v IAT*[47] the Chief Justice held that:

> *"Since the main issue in this case was whether the Board's decision was unreasonable, the Board's duty would not be met merely by disclosing the record of its decision. All documents should be disclosed which related to the factors considered, including minutes of proceedings before it and before the Executive Council, any record of their reasoning and the material particulars of case law actually relied on or presented to them during the decision-making process."*

102. Whilst the Appellants accept that *Streeter* related to disclosure in the Grand Court, it is argued that a similar duty applies at the appeal stage before the First Respondent as a matter of procedural fairness[48], one of the statutory grounds of appeal being "reasonableness"[49].

103. The Appellants say that as recently as 2015 in the case of *Hutchison Green & Racz v IAT*[50] the Grand Court confirmed what was said in *Streeter* with the Chief Justice saying:

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[46] Section 26 (6) of the 2022 Act.
[47] [1998] CILR 357
[48] Section 19 (1) of the BOR.
[49] Which is a ground which can be advanced in the Grand Court on an appeal pursuant to GCR O.55.
[50] [2015 (2) CILR 75].

*"47. Equally, there can be no doubt, therefore, that to enable the court to investigate the actions of the I.A.T. and to subject those actions to the heightened scrutiny which the case law and the circumstances require, the parties (here especially the I.A.T.) have an obligation to present the facts in a full and transparent manner. Not only must all decisions and acts of public officials be lawful, rational, proportionate and procedurally fair, they must manifestly appear to be so.*

*48. Nor, moreover, can the I.A.T. be in any doubt that the duty of full and frank disclosure applies to an administrative body like itself—the duty was recognized and explained by this court as long ago as December 1998 in Streeter v. Immigration Bd. (15)."*

104. Equally, they say that it was conceded by the First Respondent in *Hutchison Green & Racz* that:

*"73. ... the policy document was never published and that if, not having been aware of the policy document, the applicant was denied an opportunity to make representations, then there has indeed been a breach of natural justice."*

105. They argue that it would appear to be irrational and contrary to the principles of "*heightened scrutiny*" that the Grand Court can fully investigate whether a decision of the First Respondent or a decision of the Board or the Director of WORC is reasonable but the First Respondent cannot do so.

106. Support for this position, the Appellants further argue, can be found in the UK case of *R v Secretary of State for the Home Department ex-parte Doody*[51], which was referenced in *Hutchison Green & Racz*, where Lord Mustil held[52]:

*"1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects."*

[51] [1994] 1 AC 531.
[52] Page 560 Section D-G.

107. The First Respondent's positon is that while the Appellant has raised queries about the history and culture test he has not asserted that the points he was assigned under this factor are incorrect. Further, even if he was to receive full points for the history and culture test he would not obtain the requisite 110 points for a grant of permanent residence.

108. The Second Appellant's position is that he merely has to make out that the Board's decision was:[53]

i. erroneous in law; or
ii. unreasonable; or
iii. contrary to the principles of natural justice; or
iv. was at variance with the regulations

and that if he satisfied the First Respondent of one of the above a *de novo* hearing would then take place in which new evidence would be considered.[54] He says that it is therefore incorrect to say that appellants at the same stage as the Second Appellant have to satisfy the 110 point test in order to establish grounds of appeal.

109. The Second Appellant also argues that it is unreasonable for the First Respondent to put forward an argument that he has not advanced a positive case that the questions that he were asked were incorrect, when they have not disclosed those questions and answers to him. Absent appropriate disclosure, it is argued that an appellant is highly unlikely in many cases to able to establish one of the statutory grounds of appeal and therefore the failure of the Board to disclose the test questions and answers and the failure of the First Respondent to require the disclosure of that information means that procedural fairness has not been maintained.

110. During the course of the hearing I was taken to some of the exhibits to the affidavits of the Appellants which included material which Mr David suggested showed that some of the questions and "correct" answers to the history and culture test might be out of date or incorrect. On that basis, his position was that an appellant should have a right to see the questions and answers to verify that they have been awarded the correct marks.

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[53] Section 22 (8) of the 2022 Act.
[54] Section 22 (4) & (5) of the 2022 Act.

111. The Respondents take the view that even if both Appellants achieved 20 points in the history and culture test neither would have reached 110 points so both appeals should be dismissed on that basis. They go further and reiterate what was said by Mr Eakin in his affidavit; namely, that completed tests with full questions and answers are not provided to applicants for PR to ensure the integrity of the testing process.

112. The Respondents add that the IAT does not administer the tests and does not receive the completed test from the Board so could not have erred in law in that regard.

113. As I mentioned above, the question of disclosure of completed history and culture tests was considered by the Ombudsman in response to a FOI request. Her decision is dated 6 December 2019. The Ombudsman agreed that the completed test were exempt from disclosure and that it was not in the public interest to disclose them. The issue was considered by the Ombudsman at some length and comparisons were drawn with the UK immigration exams, for which an official handbook is provided, but not lists of questions and answers, and the promotion exams and marking matrix for the Royal Cayman Islands Police Service, which were also found to be exempt from disclosure. *Hutchinson Green & Racz* was also referred to. The Ombudsman concluded by saying:

> *"In my opinion, it is in the public interest to keep the questions and the answers to the History and Culture Test confidential. This will help to ensure that applicants meet the requirement to demonstrate their integration into Caymanian society by showing their understanding of Caymanian history and culture in their test answers."*

114. I am conscious of the need for the Grand Court to be able to exercise heighted scrutiny of statutory tribunals as outlined by the Chief Justice in *Hutchison Green & Racz* and the manner in which they may exercise discretion and their decision making process. However, the history and culture test does not involve the exercise of any discretion by the Board. There is no evidence to suggest that this particular decision of the Ombudsman has been appealed by means of judicial review[55] and it is not for me in these proceedings to examine that decision.

115. On the basis of the above, I am satisfied that, in these cases, in view of the decision of the Ombudsman, the Board acted reasonably fairly in not providing the Appellants' completed test

[55] Section 47 Freedom of Information Act (2021 Revision).

results to the Appellants or to the IAT and, in turn, the IAT acted reasonably in not requesting them from the Board (assuming that it had power to do so). In my view, in these cases, neither the Board nor the IAT erred in law or acted unreasonably or unfairly in relation to the provision of the completed test results to the Appellants.

**Conclusion**

116. In my view, there are no grounds upon which to remit the two appeals in question back to the IAT; the only available course of action therefore is to dismiss both.

117. I should add that both counsel argued fully the issues raised by them in relation to the respective positions of their clients. Finding, as I do, means that I do not have to consider a number of those arguments but that is not to discount the work that was put into preparing them.

118. The parties are invited to file written submissions in relation to costs within 14 days after the date of this judgment.

**Hon Mr. Justice Alistair Walters**
**Acting Judge of the Grand Court**