



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

**CICA (Civil) Appeal No 15 of 2021  
(Formerly G 155 of 2017)**

**BETWEEN:**

**Osbourne Douglas**

**Appellant**

-and-

(1) The Governor of the Cayman Islands  
(2) The Director of Prisons

**Respondents**

**AND**

**CICA (Civil) No. 16 of 2021  
(Formerly G 164 of 2017)**

**Justin Ramoon**

**Appellant**

-and-

(1) The Governor of the Cayman Islands  
(2) The Director of Prisons

**Respondents**

**BEFORE:**

**THE HON SIR RICHARD FIELD  
THE RT. HON SIR ALAN MOSES  
THE HON SIR MICHAEL BIRT**

**Appearances:**

**Hugh Southey QC jointly instructed by Laurence Aiolfi of Mourant for Mr Douglas and Prathna Bodden of Samson Law for Mr Ramoon.**

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

**Date of Hearing: 25 – 27 January 2022**

**Draft circulated: 4 April 2022**

**Judgment delivered: 27 April 2022**

## JUDGMENT

### **Moses JA:**

1. On 26 May 2016, Osbourne Douglas and Justin Ramoon, the Appellants, were convicted after a trial of the murder of Jason Powery. On 19 December 2016 they were sentenced to life imprisonment, Mr Douglas with a minimum of 34 years, and Mr Ramoon with a minimum of 35 years; they were sent to HMP Northward. Following Warrants of Reception signed by the Lord Chancellor in the United Kingdom, Orders of Removal were signed by the Secretary of State for Foreign and Commonwealth Affairs and Notices of Concurrence were signed by the Governor of the Cayman Islands, pursuant to powers conferred by the Colonial Prisoners Removal Act 1884 (the 1884 Act). These appeals are concerned with a challenge, by way of judicial review, to the Governor's concurrence in the removal of these Appellants. On 22 June 2017 Mr Douglas was transferred to the United Kingdom. Mr Ramoon was transferred on 28 June 2017. Neither prisoner was given any notice before their removal nor given any opportunity to make representations until after they had been confined to prisons in the United Kingdom.
2. The 1884 Act has been used in the past on rare occasions. The last time was in 2009 when a Jamaican national was removed following an escape attempt. In 2015, his judicial review in the United Kingdom of the refusal of the Foreign Secretary to return him was dismissed.
3. These appeals concern the lawfulness of their removal. In form the Appellants are appealing a decision of Wood J (ag) dated 28 May 2021, giving his reasons on 29 November 2021, whereby he dismissed the Appellants' application for judicial review of the removal decisions. While the Respondents do not seek to overturn the result of this decision, they do not seek to defend it. The judge failed to deal with the question as to whether the Bill of Rights applied to decisions under the 1884 Act, whether the decision-making process was unfair and whether the legal framework of the 1884 Act was lawful. All these issues were raised by the Appellants and the Respondents had themselves asked that the question of the application of the Bill of Rights be determined as a preliminary issue. The Respondents also accept that the Judge's reasons for dismissing the applications for judicial review were inadequate. There is no need to make any further reference to this judgment. This Court will itself deal with those issues which need to be determined at this stage.
4. There are further decisions of the Grand Court to which it is necessary to refer by way of introduction. They preceded the decision of Wood J (ag). On 11 June 2019, Carter J (ag)

determined that the Cayman Islands were the appropriate forum for the hearing of the Judicial Review, contrary to the submissions of the Respondents. This decision was not appealed. In July 2019, on the Appellants' application for disclosure, the Respondents sought a ruling that most of the documents and information on which the decisions had been based were subject to Public Interest Immunity (PII), and a ruling as to whether a closed material procedure (CMP) was available.

5. On 2 July 2019 Carter J (ag), accepting the submissions of the Appellants, ruled that no CMP was available. The Respondents, by a Notice of Intention, seek to appeal that ruling. On 19 October 2019 Carter J ruled that most of the documents relied upon by those making the impugned decisions were subject to PII. The withheld material comprised 185 separate documents and filled three lever arch files (4th affidavit of the Governor, HE Martyn Roper, para.6). This judgment has not been appealed.
6. I shall identify the issues which fall to be decided by this Court after I have outlined the facts and context in which they arise.

*The Decisions to Remove the Appellants*

7. The facts of the murders to which the appellants pleaded not guilty are set out in full in the judgment of the Court of Appeal (Criminal Appeal 34 of 2016). The Appellants, who are half-brothers, approached a gathering in the vicinity of the Globe Bar, George Town. Osbourne Douglas had a firearm in his waistband which he handed to Justin Ramoon before he left the scene. Justin Ramoon fired a shot to the head of the victim at close range, and attempted to shoot another man, Jerome Hurlston, but the gun did not fire. He then walked away to a car where Osbourne Douglas was waiting for him.
8. The relevance of these facts to the decisions to remove the prisoners from the Island may be demonstrated in the description of the trial judge Quinn J of the murder as “*a very public execution of the most evil nature...chillingly clinical in its planning and execution*” ([47] cited at [78] of the CA Judgment) and that given by the Court of Appeal:

*“The appellants wore no disguise. They openly had with them a gun. They were not unknown to some (if not most) of those present in the area of the Globe Bar. They plainly did not believe that anyone would dare to give evidence against them...”* [118].

9. The facts of the murder bear all the hallmarks of what is described in an anonymous Prison Service affidavit as “*a notorious local gang known as the Central Military Killers (CMK)*”. Mr Douglas is described as the leader and Mr Ramoon as a senior and influential leader (Affidavit 30 September 2019). Both Appellants persist in denying their membership, despite a tattoo with the initials ‘CMK’ on Mr Ramoon’s back. The blatant way in which the murder was committed goes to re-inforce the dangers feared by those who made the decision to remove the Appellants. Those fears, exacerbated by the prisoners’ behaviour and influence whilst imprisoned in HMP Northward, are expressed in affidavits sworn after the decisions to remove. These recount the facts and considerations leading to the removal of the prisoners.
10. It is important, at this stage, to emphasise two features of the evidence. The first is that most of the material on which the decisions were based has not been disclosed following the decision of Carter J. She upheld the claims to PII in respect of the 185 documents on the grounds, to a substantial extent, of national security and danger to Third Party informants (see the Schedule to her judgment which identifies the grounds in respect of itemised documents and paragraphs redacted in affidavits). Accordingly, the vast majority of the material on which the Governor, Foreign Secretary and Justice Secretary based their decisions have not been seen by the court reviewing the decisions to remove.
11. Second, there is little contemporary evidence of the reasons for the decisions. This, Mr Bowen QC for the Respondents was disposed to acknowledge, is unfortunate and unnecessary. It would have been preferable if the Governor who took the decision to concur had recorded her reasons, and the factors, if any, which she took into account telling against such decisions. A clear, contemporaneous indication of the reasons on which a decision was taken and of the factors taken into account disciplines the decision-maker to reason to a conclusion, rather than making a decision and then seeking to justify it, and avoids ex post facto reasoning, which may be open to the objection that it contains factors which did not play any part in the making of the decision at the time it was made. (see e.g. *R (Balajigari) v Home Secretary* [2019] 1 W.L.R 4647 per Singh LJ at [60].)
12. There is some evidence contained in the submissions made to the Foreign Secretary and to the Justice Secretary. In a submission to the latter dated 15 June 2017, it was asserted:

*“Douglas is the leader of Cayman’s Central Gang and his brother, Ramoon, is a senior and influential member of the same group. They are considered to be highly dangerous in the local community. Clear intelligence in the Cayman Islands shows that they have been involved in the orchestration of*

*serious gun crime and the importation of guns and drugs from within prison. They have also attempted to intimidate staff at HMP Northward.”[4].*

13. Annex A contains what is called “*Additional Background*”:

*“It is anticipated that Douglas’ relocation to the UK would help to break his grip over his criminal network and lower the risk to national security in the Cayman Islands. It is considered inevitable that Ramoon would take his place at the head of the gang if Douglas was removed on his own.”*

14. The submission goes on to conclude that HMP Northward was not a fit place in which to confine the prisoners. This submission was disclosed to those acting for the Appellants on 30 September 2019 with substantial passages redacted. There are two features of this submission which are relevant to issues in the appeal: first, the submission says that the removal will provide time for improvements to Northward and says “*once security is considered adequate the return of the prisoners could be considered*”; second, there is no reference in this submission to the prisoners’ families or as to what effect removal might have on maintaining a relationship with their families.
15. A similar submission, subsequently disclosed with redacted passages was made to the Foreign Secretary dated 16 June, 2017.
16. Apart from those submissions leading up to the removal, the basis for the decisions must be culled from affidavits sworn thereafter and the letters sent to the Appellants’ lawyers by the Attorney General’s Chambers dated 26th and 27th September 2017. Those letters relied on the fact that the Appellants had “*continued to control serious, organised criminal activity in the Cayman Islands*”.
17. The letters also referred to the prisoners’ families, asserted that interference with their rights was proportionate and hoped for regular calls with members of their families and consideration of financial assistance for close family members’ visits.
18. A series of affidavits elaborates how the concerns of the police and prison services led to requests to the Governor for the removal of the prisoners. A Prison Service affidavit (30th September 2019) exhibits the prison records of both prisoners. No-one suggested they were of particular significance, though it is of note that there were a number of instances relating to the possession and use of mobile ‘phones, despite the fact that the prisoners were retained in the High Risk Unit. It is of note that on 9 December 2016, while awaiting sentence following his conviction, Osbourne Douglas, assaulted another prisoner who had been a witness at the trial

in May 2016. The affidavit comments that the records are typical of high-risk and high-profile offenders and continues:

*“From my personal experience, it is not uncommon for offenders who are known to present significant risk to the public and/or who are perceived to undermine authority to behave in what appear to be very compliant ways whilst they are in prison....However those same individuals can, and in many cases do, manage to continue their criminal activities within the prison community. This they do in many ways including through the use of mobile telephones, letters and through third parties who visit them in prison.”*  
(Para.4)

19. The affidavit comments on the vulnerabilities of Grand Cayman where in “*fairly small communities*” staff suffer when intimidated by certain offenders (para. 7) and continues that both the Appellants:

*“..according to intelligence were known to exert considerable negative influence on younger impressionable prisoners and to use this negative influence for personal advantage.”* (para.12).

20. The affidavit records that HMP Northward lacks the “*physical and dynamic security*” to meet the requirements of Category A prisoners, though options are to be explored for a new prison estate (I deal later with the Appellants’ criticism of the delay in introducing new facilities). In consequence there was no means of separating the Appellants so as to mitigate internal and social threats. It also points out that the problems cannot be met solely by building a new prison or new prison wing:

*“Moreover, the critical risks in this particular case are not only about the capability that these two men to cause significant harm (sic) to those working and living in the prison system and also to those members of the community who would/could be affected by their presence.”* (para. 25).

21. This affidavit concludes by recording that the cost of family visits once a year will be met by the Cayman Prison Service.

22. The sequence of events leading to the warrants for removal is described in an affidavit from the Governor’s Office dated 30 September 2019. It records “*compelling*” intelligence that the Appellants “*had continued to orchestrate gang-related activities while in prison including conspiracy to murder, the smuggling of drugs, firearms and hitmen into Cayman, the smuggling of drugs into HMP Northward and the making of threats against prison staff and assaults on other inmates.*” (Para.9)

23. On 27 April 2017 the Police Service asked the Acting Governor urgently to explore the transfer of the prisoners under the 1884 Act. The Acting Governor accepted that there was a grave risk to national security and advice was sought from the FCO in the UK. It advised that consideration would have to be given to the Appellants' right to family life (Para.15).

24. Means of avoiding the removal of the appellants to the UK, such as imprisonment in Bermuda or bringing in staff from the UK, were considered but rejected. The need for removal became pressing after an apparent gang-related attack on the Appellants' mother's house in June 2017. There were also concerns that if Mr Ramoon was left on the Island he would take over his brother's criminal operations within the prison. It was at that stage, on 16 June 2017, that submissions were sent to the Minister of State for the Overseas Territories. leading to the submissions in the UK to which I have already referred. In part (they are heavily redacted), they read:

*“The Cayman Islands’ prison authorities are finding it increasingly difficult to accommodate Douglas and Ramoon securely. HMP Northward was designed as a category C detention facility. The prison has a single fence and is located by the side of a public road. As a result, there are significant difficulties in preventing contraband, including mobile phones, reaching prisoners. (redactions) The consequences would be severe for Cayman’s national security (for which the UK Government retains responsibility) and its reputation as a safe and secure tourist destination and place to do business.”*

25. Further evidence as to the grounds for the decision and the process leading to them is given, again long after the events, by the current Governor, HE Martyn Roper. He says (affidavit 4 December 2019, only disclosed to the Special Advocate and later to the Appellants following Carter J's ruling on PII):

*“Despite their conviction and imprisonment, the Plaintiffs had continued to engage in serious criminal activity. Intelligence revealed that they had, or were seeking to obtain high-powered automatic weapons, they had criminal associates with the knowledge and propensity to use them, including professional ‘hitmen’ brought by boat from Jamaica: a track record of murdering and attempting to murder gang rivals and witnesses and making threats of harm, including to a senior prison officer. There was intelligence that they exercised control over other inmates and might be able to influence prison officers through threats. A series of tit for tat killings and shootings involving the Plaintiffs was threatening to escalate, including an incident in which the Plaintiffs’ mother’s house was shot up by a rival gang using automatic weapons. There was credible intelligence they were planning an escape (Passage redacted) In those circumstances it is reasonable to conclude that, had the Plaintiffs remained in the Cayman Islands and had continued with their criminal activities on the same scale they represented an actual or potential threat to the peace and security of this small island nation. For example, there could have been an escape attempt involving*

*smuggling of firearms into the prison, perhaps supported from outside by gang associates armed with automatic weapons, or a retaliatory or other gang-related incident involving the use of automatic weapons on both sides, that could temporarily have overwhelmed the resources of the RCIPS and led to significant loss of life.”*

26. In a later affidavit the Governor relates the plans to prepare a case for rebuilding a prison but points out that even a secure prison estate would not eliminate the risks entirely:

*“The critical risks in this particular case are not only about physical and dynamic security deficits of HMCIPS but also about the capacity of the Plaintiffs to cause significant harm to those working and living in the prison system and also those members of the community who would/could be affected by their presence. A re-build of Northward does not eliminate these risks.”*

27. Carter J’s judgment upholding the claim to PII on grounds of public safety and national security also underlines the danger these Appellants posed:

*“The risk to third parties and informants in this matter is high.....The risk to those persons outweighs the need for disclosure especially in those instances when, as this court has concluded, the information that will be withheld as a result will not advance the Plaintiffs’ case in any material way.”* (Carter J Judgment at [83])

28. The evidence clearly established the reasons for the decision to remove the Appellants. But none of the material on which the reasons were based was available to either of them. They were removed suddenly and without any notice. It is, necessary, therefore, to recall their evidence as to the impact it had on them.

#### *The Impact on the Appellants*

29. The Appellant Osbourne Douglas, born on 11 October 1986, was 31 when he was removed. In an unsworn statement dated November 2019, he describes his close relationship with his child, then aged 7 and telephone contact with the child and his own mother, with whom he had lived, with his siblings, before his removal. They are resident in the Cayman Islands. Telephone contact was, on his first arrival in the United Kingdom, rare and difficult, and there are continuing problems due to his being transferred from prison to prison.

30. By far the greatest impact is the difference between the contact with his family when in prison in HMP Northward and since his removal. It is obvious that the “*purple visits*” (referred to in a second statement of 2021), video conference calls of 30 minutes once a month, are no substitute for face- to- face meetings, mainly with his mother, and daughter.

31. Justin Ramoon, born on 28 September 1991 and 25 when he was removed, describes, in an unsworn statement dated 25 September 2017, his family, all of whom reside in the Cayman Islands. In particular he speaks of a close relationship with his partner and their young son (aged two when he was removed) and of his wish to be part of his life as a father, as he grows up. He speaks of his mother, brothers and step-father to whom he says he is very close.
32. There is, in addition, evidence of difficulties in obtaining legal advice.
33. Detailed records draw a contrast between the telephone calls and visits when the Appellants were in HMP Northward and since their removal. Some of those details are in dispute. It is also a matter of controversy as to the extent to which evidence as to what has happened more recently, since their imprisonment in the UK, is relevant to the issue of the impact on the prisoners' ability to retain family ties, once they had been removed.
34. In my view it is unnecessary to set out the detail of what has happened before and after removal, or to determine the issue of how much the later history of visits is relevant to the justification and proportionality of the decisions to remove. The reason I need not do so is because the Respondents, although they disputed whether there had been any interference with the prisoners' family life up to the hearing, no longer so contend. They rightly accept that the decisions to remove the prisoners did interfere with the prisoners' rights enshrined in the Bill of Rights and therefore must be justified by the Respondents and must be proportionate.
35. There is ample authority as to the right of prisoners' to retain family ties, as to the importance of the maintenance of such ties to the rehabilitation of prisoners and, accordingly, as to the duty of penal authorities to take steps to enable such relationships to continue (see e.g. *Polyakova v Russia* (2017) ECHR 7 March 2017 [88]).
36. I accept that resolution of the question whether such interference was justified and was proportionate will turn, at least in part, on the extent and impact of that interference. The extent of the effect of removal on the prisoners' ability to retain family ties, and the adverse effect on the interests of the Appellants' children are questions which have to be weighed in the balancing exercise to be undertaken when decisions as to proportionality must be made. But in the instant case the issue which falls to be determined is whether the Respondents can make out their case that the risks to national security and public safety were such as to compel a decision to remove the Appellants from the Islands, and if they can, whether there was any less drastic alternative which might have afforded greater protection to the prisoners' rights and the interests of their children.

37. I do not see how those questions can possibly turn on the detail of how many calls were made before or after removal or of how many family visits took place before or after. It is clear that, after removal, steps have been taken for annual visits, although these were disrupted by the Covid pandemic. The Appellants, like other foreign national prisoners, have been allowed free telephone calls once a month, unlimited cash and flexible hours for those calls, according to the Respondents. But the hardship cannot be and should not be gainsaid. It is not enough to say that the Appellants have brought this additional hardship on themselves. It is an additional hardship acknowledged, mitigated but not removed in the decision of Williams J to reduce their minimum term by three years. (see *Re Douglas (Minimum Term)* 2019 EWHC 3018)
38. It is sufficient, therefore, at this stage to acknowledge that the evidence shows there has been a significant impact on the Appellants' rights, which, for reasons to which I shall later turn, requires to be justified by the Respondents.

*Issues At This Stage of the Appeal*

39. Central to the arguments at the hearing of this appeal was the question as to whether it was permissible for the Grand Court to conduct a closed material procedure (CMP), in other words resolution of the Respondents' 'appeal' against the ruling of Carter J (ag). If this court does rule that a CMP is available then a number of the issues relation to justification for removal must await a hearing with a CMP. There are, however, issues which can be resolved at this stage, whether a CMP is deployed or not. Accordingly, the issues I propose to deal with are:
- (i) Whether the Bill of Rights applies to the Governor's decisions pursuant to the 1884 Act;
  - (ii) Whether the 1884 Act was 'in accordance with the law';
  - (iii) The options available to the court, should a CMP not be available;
  - (iv) Whether a CMP is available;
  - (v) Whether the Respondents took into account the appellants' family ties when making the decisions as to removal;
  - (vi) The extent to which the Appellants can rely on a failure to build or rebuild a prison on the Cayman Islands.

*Colonial Prisoners Removal Act 1884*

40. The decision to remove the Appellants was made under Section 2 of the 1884 Act:

*“Where as regards a prisoner undergoing sentence of imprisonment in any British possession for any offence it appears to the removing authority and herein-after mentioned either-*

*....*

*(d) that by reason of there being no prison in the said British possession in which the prisoner can properly undergo his sentence or otherwise the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect; or, in any such case the removing authority may, subject nevertheless to the regulations in force under this Act, order such prisoner to be removed to any British possession or to the United Kingdom to undergo his sentence or the residue thereof.”*

41. The “removing authority” is defined by Section 5:

*“The removing authority for the purposes of this Act shall be a Secretary of State acting with the concurrence of the Government of every British possession concerned.”*

42. It is worth noting, at this stage, that the Secretary of State may order the return of a prisoner under section 3:

*“(1) Where a prisoner has been removed in pursuance of this Act, a Secretary of State or the Government of a British possession to which the prisoner has been so removed, may order the prisoner, for the purpose of undergoing the residue of his sentence, to be returned to the British possession from which he was removed.”*

By virtue of Section 6 of the 1884 Act concurrence may be given by the Governor and by 7 he is empowered to direct removal by warrant. The Governor is, accordingly the Government for the purposes of Section 3 and Section 5.

43. There has been no dispute but that the 1884 Act applies to the Cayman Islands. Its application is maintained by Section 5(1) of the West Indies Act 1962 which empowers the Crown by Order in Council to:

*“make such provision as appears to Her expedient for the government of any of the colonies to which this section applies.....subject, however, to the reservation to herself of power to make laws for the colony for such.”*

44. This power to make laws for the “*peace, order and good government of the Cayman Islands*” is preserved in the Cayman Islands Constitution Order 2009.

45. The terms in which the power of the “*removing authority*” to remove a prisoner is conferred in the 1884 Act are significant in the instant appeal because they provoke the Appellants’ challenge that the statutory framework was such that it gave no protection to a prisoners’ rights. Interference with those rights was not, so it is argued, “*in accordance with the law*”. In order to consider this submission it is first necessary to consider the statutory context in which the 1884 Act falls to be assessed; in particular, whether the Bill of Rights, set out in Part 1 of Schedule 2 to the Constitution Order 2009 applies to the power conferred by the 1884 Act.

*(i) Application of the Bill of Rights*

46. Until the final day of the hearing, the Respondents had contended that neither this court nor the Grand Court had jurisdiction to consider the lawfulness of the decision to remove under the Bill of Rights, contrary to the submission of the Appellants. This was not a submission which the Respondents advanced with any degree of enthusiasm; it depended, rather, on the hierarchy of the Cayman Islands’ Constitution when compared to the 1884 Act. The Constitution was made by Order in Council, in a lower legislative category than the 1884 Act passed, as it was, by the Westminster Parliament.

47. The submission was proffered with even greater reluctance in light of the Respondents’ acceptance that the Court can and should consider the lawfulness of the decisions on what they described as “*orthodox*” public law grounds including the “*principle of legality*”, leaving the possibility that the inability to invoke the Bill of Rights would not make much difference in the result.

48. However, it was, with perhaps some relief, that by the last day of the hearing and with the apparent encouragement of this court, the Respondents had accepted that it was open to this court to find that the Bill of Rights did apply to the decisions impugned in this case.

49. Under Section 28 (d) of the Bill of Rights the Governor is a “*public official*” when “*carrying out (the) public function or duty*” of considering whether to concur in the decision to remove a prisoner.

50. By Section 24 of the Bill of Rights:

*“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.”*

51. A difficulty arises because the 1884 Act is not “*primary legislation*” within the meaning of section 28 of the Bill of Rights because it is not a “*Law enacted by the Legislature*” (see Part IV of the Bill of Rights).

52. There are two provisions within the Constitution and the Bill of Rights which impose obligations to construe Cayman Islands legislation in conformity with the Bill of Rights; but neither of them apply to the 1884 Act. First, by Section 5(1) of the Constitution:

*“(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.”*

53. The 1884 Act is not an “*existing law*” (see Section 5(3) of the Constitution).

54. Second, by Section 25 of the Bill of Rights:

*“In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part.”*

55. Thus the problem arises as to how the Cayman Islands’ Grand Court and Court of Appeal should review the decisions of the Governor, plainly acting in “*right of*” the Cayman Islands and plainly required to act in conformity with the Bill of Rights, when he has exercised a power under the 1884 Act in respect of which there is no express obligation to interpret it in accordance with the Bill of Rights.

56. On any review of a decision to remove by the Foreign Secretary in the United Kingdom, the courts in the Cayman Islands and the United Kingdom courts would be bound to apply the interpretative obligation under section 3 of the Human Rights Act 1998 to the 1884 Act and to interpret the Secretary of State’s powers consistently with the rights enshrined in the European Convention of Human Rights. The United Kingdom extended the jurisdiction of the European Court of Human Rights to the Cayman Islands as from 23 February 2006.

57. The 1884 Act applies both to the United Kingdom and to the Cayman Islands; it must, therefore, be interpreted and applied in the same way both in the Cayman Islands and in the United Kingdom.

*“The third situation concerns the extension to an overseas territory of an Act of the United Kingdom Parliament by virtue of its own terms. The position here is fundamentally different, because the Act forms part of the law both of the United Kingdom and of the territory or territories to which it extends. As legislation applying principally to the United Kingdom, the decisions of the United Kingdom courts interpreting and applying such an Act must be treated as authoritative throughout the territories to which it extends. It would make no sense, for example, if the British Nationality Act 1981—which extends to the United Kingdom, the Channel Islands, the Isle of Man and all British Overseas Territories—were to be interpreted and applied differently in each jurisdiction to which it extends.”* (Hendry and Dickinson, *British Overseas Territories Law* (2011).

58. Since the 1884 Act is designed to be applied in the Cayman Islands and the UK, it is to be interpreted by the courts of the Cayman Islands in a manner which is compatible with the Human Rights Act 1998.
59. Reverting, then, to the terms of Section 24 of the Bill of Rights, it is not possible to contemplate anything within the 1884 Act as authorizing or requiring the Governor to act in a way incompatible with the Bill of Rights, and thus the exception in Section 24 could never apply to the 1884 Act. The Governor’s power to make a decision under the 1884 Act, must be construed compatibly with rights enshrined under the Human Rights Act 1998. Those rights are consistent and compatible with rights under the Bill of Rights. For example, nothing in the Human Rights Act could authorize a decision which infringes a prisoners’ rights under Section 6 (Treatment of Prisoners) or Section 9 (Respect for Private and Family Life).
60. The consequence of the need to apply the 1884 Act in a manner compatible with the Human Rights Act and in the same way in both jurisdictions is that, by virtue of Section 24, the Governor must exercise his powers as a member of the removing authority in a way that is compatible with the Bill of Rights. This is a result which accords with what the Islanders are entitled to expect. As Mr Southey QC, pointed out, the Bill of Rights reflects the character of Caymanian society. It was promulgated following a referendum. It is described as the *“cornerstone of democracy in the Cayman Islands”* (s.1(1)); it recognises the *“distinct history, culture, Christian values and socio-economic framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity equality and freedom”* (s.2(a)).

61. Although the scope of the ECHR was extended by treaty to the Cayman Island in 2006, the Islands adopted their own model of the 1998 Act, although not in an identical form, echoing a process to which Baroness Hale DPSC referred in *R (Barclay) v Lord Chancellor (No 2)* [2015] AC 276 [2014] UKSC 54 [37].
62. It would be startling if in relation to action taken affecting Cayman residents and Cayman society as a whole, with the concurrence of the Governor of the Islands, such a cornerstone of Caymanian democracy should be swept aside. That is, fortunately, not the result. The Bill of Rights forms the framework according to which the decision of the Governor falls to be judged.

*The Relevant Provisions of the Bill of Rights*

63. Section 6(1) provides:

*“All persons deprived of their liberty (in this section referred to as “prisoners”) have the right to be treated with humanity and with respect for the inherent dignity of the human person.”*

64. Section 9 provides:

*“Government shall respect every person's private and family life, his or her home and his or her correspondence. ...*

*(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; ... “*

65. Section 17 provides:

*“(1) In addition to the provisions of this Part which afford protection to children, the Legislature shall enact laws to provide every child and young person under the age of eighteen (referred to in this section as a “child”) with such facilities as would aid their growth and development, and to ensure that every child has the right –*

*.....*

*(2) In implementing subsection (1), the Legislature shall proceed on the basis that a child's best interests are of paramount importance in every matter concerning the child.”*

66. This imposes a target duty on the Legislature that has no application to the decision of the Governor to concur. But the Respondents do accept that by virtue of Article 3(1) of the UN Convention on the Rights of a Child, the Appellants' children's interests must be taken into account when balancing the prisoners' rights under Section 9.

67. Section 19 provides:

*“All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.*

*(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.”*

68. I have already noted the important provisions at sections 24 and 25 relating to the duties of public officials and the interpretative obligation.

69. Section 26(1) provides:

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

*(ii) Was the Interference with the Appellants' Rights in accordance with the Law?*

70. The Appellants' essential argument under this head is that the discretion conferred on the Governor by Section 2 of the 1884 Act is so broad that it fails to provide adequate legal protection against abuse. Section 2 requires no more than that it “*appears*” to the Governor to be “*expedient....*”

71. The submission is founded on the principles re-iterated by the European Court of Human Rights in *Gillan and Quinton v UK* (2010) 50 EHRR 45. The expression “*in accordance with the law*” requires that the law must be adequately accessible and foreseeable [76]. To meet those requirements the law must:

*“....afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and*

*the manner of its exercise. The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.” [77]*

72. The measure impugned in that case was power conferred on a police officer to stop and search, unfettered by any need even for subjective suspicion and requiring only that the purpose of the search was for articles which could be used in connection with terrorism [83].

73. The test of legality was explained by Lord Sumption in *R(P) v Justice Secretary* [2020] AC 185 at [17]:

*“A measure is not “in accordance with the law” if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree.”*

74. Later he distinguished it from the test of proportionality [39]:

*“Secondly, in distinguishing between the legality test and the proportionality test, Lord Reed JSC pointed out at para 114 that “in order for the interference to be in accordance with the law, there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined.” I agree. The point which he is making is that the principle of legality is concerned with the quality of the domestic measure whereas the proportionality test is usually concerned with its application in particular cases. Unless the domestic measure has sufficient clarity and precision for its effect to be foreseeable from its terms, it is impossible for the court to assess its proportionality as applied to particular cases. But if*

*the effect of the measure in particular cases is clear from its terms, there is no problem in assessing its proportionality.*”

75. But clarity should avoid “*excessive rigidity*” (see *Kafkaris v Cyprus* (2008) 49 EHRR 877 at [142] (cited in *A v HM Treasury* [2010] AC 534 at [233]):

*“...while certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances”.*

Judicial interpretation may be necessary, “*provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*”.

76. In essence, what is required is protection, under the legislation conferring the power, against the exercise of an arbitrary discretion. Absent an identifiable legal framework there are no means of measuring whether the exercise of that power is proportionate. Lord Sumption summarises how proportionality should be tested in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [20]:

*“(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.*

77. If the objective is not sufficiently identified it is not possible to determine any of these questions as to proportionality.

78. In the instant appeal Mr Southey QC emphasises that Section 2 of the 1884 Act, does not impose any duty on the removing authority to be satisfied that it is necessary to remove the prisoner. In light of the prisoner’s important rights, the test of apparent expediency is far too vague and feeble a threshold. Absent necessity, there can be no justification for removal when, as is accepted, it interferes with a prisoners’ rights.

79. I do not agree. The objective identified in Section 2 is whether it appears that removal is “*expedient for (the prisoner’s) safer custody*”. The objective, therefore requires an assessment of risk of danger were the prisoner not to be removed when compared with alleviation of that risk on removal. That seems to me a legitimate and justifiable objective. It is difficult to see how that objective could be achieved by any greater precision as to the circumstances in which the risk would justify removal and as to those in which it would not. The terms of Section 2 do

not obviate the need for any court scrutinising the decisions of the removing authority from being satisfied that interference with the prisoners' rights was necessary, and therefore requiring an assessment of proportionality.

80. The ECtHR pointed out both the inevitability of imprecision in cases concerning national security, and the need to provide protection against abuse in *CG v Bulgaria* (2008) 47 EHRR 51 at [40]:

*“The Court is naturally mindful of the fact that in the particular context of measures concerning national security, the requirement of foreseeability cannot be the same as in many other fields. In particular, the requirement of ‘foreseeability’ of the law does not go so far as to compel states to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive’s assertion that national security is at stake. While the executive’s assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of ‘national security’ that is unlawful or contrary to common sense and arbitrary.”*

81. The executive’s assertion that the prisoner represented a risk to national security must be subjected to “*meaningful scrutiny*” [44].
82. It is plain that a measure which interferes with a prisoners’ rights cannot be “*in accordance with the law*” unless there are safeguards against abuse:

*“As I have explained, the court’s focus tends to be on whether there were adequate safeguards against abuse, since the existence of such safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, in order for the interference to be “in accordance with the law”, there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately*

*examined. (Lord Reed JSC in R (T) v Chief Constable Greater Manchester Police [2015] AC 49 [114].*

83. The question then arises as to whether, within the legal framework under the 1884 Act and the Bill of Rights, the decisions are capable of being challenged and assessed in a fair way and that framework is capable of producing a fair and proportionate result. The question relates to the operation of those provisions not its application in the case of these two Appellants; in short, it relates to the capacity of the legislation to produce a fair result by a fair process. In *Christian Institute v Lord Advocate* (SC (Sc)) [2016] SLT 805 Baroness Hale DP explained this in relation to Scottish legislation:

*“This court has explained that an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with art.8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights: R (Bibi) v Secretary of State for the Home Department, [2015] 1 W.L.R., p.5059–5060 and 5076, paras 2 and 60 per Lady Hale, p.5078, para.69 per Lord Hodge.”*  
[88]

84. There is a useful identification of the features which a fair process entails in *Polyakova v Russia* (supra) relating to a prisoner sent to a remote penal colony thousands of miles from his family without any consideration of his personal circumstances and with no effective means of challenge.
- (i) The law must provide a “*realistic opportunity to challenge allocation to a particular prison*” [100]. “*An individual’s circumstances must be assessed*” [101].
  - (ii) The prisoner is entitled to reasons subject to review by an independent body and where the impact on family life is likely to be long-lasting “*particularly searching review by an independent judicial authority*” [108-109].
  - (iii) The system must enable the prisoner “*to obtain a judicial review of the proportionality of the (Russian penal authority)’s decision to his or her vested interest in maintaining family and social ties*” [116].

85. Other cases where a prisoner’s incarceration far from home has been condemned by the ECtHR have involved automatic decisions, without individual assessment, without objective justification and without opportunity for an effective challenge (see e.g. *Khorkdovskiy v Russia* (2014) 59 E.H.R.R. and *Vintman v Ukraine* (2014) (ECHR 23 October 2014).

86. The Appellants, by way of contrast to these cases against Russia, have, subject to restrictions imposed by the ruling as to PII, received reasons. The PII claim was assessed by an independent

judge, namely Carter J. The ECtHR has acknowledged that there may have to be “*appropriate procedural limitations on the use of classified material*” when reviewing the evidence. (see CG (supra) at [40]). They have been entitled to bring judicial review proceedings, to legal representation and to consideration of their rights to maintain their family relationships under Sections 6 and 9 of the Bill of Rights.

87. Accordingly, contrary to My Southey QC’s submissions, there was no need to introduce any policy as to the criteria to be applied to decisions to remove or as to the process for challenging such decisions. *Lumba v Home Secretary* [2012] 1 AC 245 is no authority for the proposition that in a case such as this, where statute sufficiently identifies its objective and where the law provides a fair opportunity for challenge, such a policy must be devised and published.
88. There is one aspect which is understandably the subject of complaint by the Appellants. They were not given any advance warning of the decision and thus had no opportunity to challenge it in advance. This is of significance because it is obviously more effective to challenge a proposed decision before a settled view has been reached. Moreover, it is more likely that the removing authority will properly consider the nature and strength of family ties and the prisoner may be more confident that such considerations have been properly weighed before a final decision has been reached.
89. As I have recalled no such opportunity was given. But as Singh LJ acknowledged in *R (Balajigari) v Home Secretary* (supra) and in *R (Citizens UK) v Home Secretary* [2018] 4 W.L.R. 123 [85] there may be a need to maintain confidentiality before the decision is taken and put into effect.
90. The Respondents’ explanation was that the danger to national security would have been exacerbated by advance warning (see letter to the Appellants’ lawyers from Attorney General’s Chambers 17 September 2017). If the grounds for the Respondents’ assessment of the risk to national security are well-founded, then to give advance warning would have been absurd.
91. For reasons that will become apparent later, it is not possible to give more than a provisional view as to whether there was justification for the failure to give advance warning. Any view I give must be qualified by the fact that this Court has seen a very small proportion of the material and evidence which underlay the decision not to give advance warning, following Carter J’s judgment upholding the claim to PII. That decision is at the heart of the problem this Court faces in determining the justification and proportionality of the decision to remove and the decision to remove them without advance notice and it is to that problem I now turn.

*(iii) The Consequences of the PII Decision: Closed Material Procedure (CMP)*

92. Much of the focus on this appeal was directed at the problem of how this court could and should exercise its obligation to review the decisions of the Governor when it was not permitted to examine the vast majority of the material on which those decisions were based. Carter J upheld the claims to PII on grounds which included national security and the protection of the identity of informers.
93. The Appellants' submission is orthodox and straightforward: absent express or implied statutory authority there is no warrant for a court to depart from fundamental principles of open justice. To permit a court to see material which only one of the parties has seen, without disclosure to the other party is so basic a breach of natural justice that it cannot be permitted, unless endorsed by the legislature. Carter J ruled that there was no statutory authority and no inherent jurisdiction to entertain such a procedure (Judgment in *Osbourne v The Governor of the Cayman Islands and the Director of Prisons and Ramoon v The Governor of the Cayman Islands and the Director of Prisons* given 2.07.20). The Respondents by Notice seek to vary that decision, in effect it is their cross-appeal.
94. At the heart of the rival submissions lay a trilogy of cases, *Al Rawi v Security Service* [2012] 1 AC 531, *Bank Mellat v HM Treasury (No 2)* [2014 AC 700, and *R (Haralambous) v Crown Court at St Albans and another* [2019] AC 236. These demonstrate the caution the courts have exercised when considering what, at first blush, seems an expedient solution to the difficulty which flows when material lying at the heart of the litigation in question is not disclosable.
95. The starting point is consideration of the possible outcomes, if the court does not adopt a CMP. This was the approach adopted in *Bank Mellat*, and *Haralambous*. In *Bank Mellat* Lord Neuberger considered five possible outcomes [37-42], all of which he considered unsatisfactory. Lord Mance DPSC adopted a similar approach in *Haralambous*. Accordingly, before answering the question as to whether a CMP is legitimate, I need to consider the options for this court, were it to reject the adoption of a CMP.
96. There was no dispute as to the three options available in such a circumstance:
- (i) To allow the Appellants' appeal;
  - (ii) To dismiss their appeal;
  - (iii) To order a strike out or stay of these proceedings.

*Allowing the Appeal and Quashing the Decisions*

97. The Appellants' opposition to a CMP is explained by their contention that the consequence must be to allow their appeal. Mr Southey QC argues that since, absent a CMP, the court is unable properly to assess the justification and proportionality of the decisions, and since the burden is on the Respondents to establish that the undisputed interference with their rights was justified and proportionate, the consequence must be that without the material which formed the basis of the decisions, they must fail to discharge their burden. The Appellants, so Mr Southey QC submits, cannot and should not be expected to bear the consequences of the failure of the legislature to make provision for a CMP.
98. This submission seems to me to be open to a number of objections. First, a decision in favour of the Appellants deprives the Respondents of the opportunity of reliance on material which it is known would support the Respondents' case. The Respondents' case is already in the public arena and has been disclosed: that the Appellants as leaders of the CMK gang continue to pose a threat to national security and public order on the Islands. Moreover, there was an immediate danger of escape and the use of weapons. It would be contrary to what is already known to proceed on the basis that there was no evidence to support this case. Carter J's judgment (at [83] cited above) as to the claims to PII make this clear.
99. Second, there is plainly a conflict between the interests of the public in the Islands and the interests of these Appellants. In such a conflict, it is clear that the protection of the public should prevail, all the more so where national security is at risk. The Appellants have suggested that that is putting the matter too high; the case concerns public order and criminality, no more, they say. But that is not an acceptable submission. There is evidence as to the risk to national security, given by the Governor and endorsed in Carter J's judgment. In any event, in an island community such as the Caymans, the threat to national security presented by a murderous gang requires no emphasis.
100. If authority is needed for the proposition that national security and the protection of the public must prevail over the interests of the individual in a case where the individual's liberty is not at stake it may be found in *R (Roberts) v Parole Board* 2 AC 738. In that case where a life prisoner sought parole, the majority of the House of Lords, held that a CMP could be adopted without express statutory authority. But I do not refer to it as authority for a CMP in the instant case. *Roberts* has been overtaken by the more recent trilogy of cases which I have identified above.

101. *Roberts* is, however of significance as to the proposition that the interests of the public outweighed the prisoner's rights enshrined in Art 5(4) (the right to take proceedings as to the lawfulness of detention). Lord Rodger said:

*“In addressing the question, (as to whether the Parole Board could use material not disclosed to the prisoner) however, a court would have to contemplate the two possible alternative solutions, each of which gives decisive weight to the interests of the prisoner. One solution would be to disclose the information to the prisoner's representative and, if possible, to require the informant to give evidence, even though this would risk putting his life or health in jeopardy. That solution would be, to say the least, unattractive and might well give rise to significant issues under articles 2 and 3 of the European Convention. The other solution would be for the board to exclude from their consideration any evidence which could not be safely disclosed to the prisoner or his representative. In other words, the board should close their eyes to evidence, even though it would be relevant to the decision which Parliament has charged them to take for the protection of the public.” [111]*

Lords Bingham [14], Steyn [94] and Lord Carswell [144] expressed similar views.

102. This case is a fortiori: the appellants' liberty is not at stake. It would be startling if this court was compelled to close its eyes to evidence which it knows speaks of the danger which removal is designed to obviate. To decide now in favour of the Appellants would be to ignore the need to safeguard national security and to protect the Islanders.

103. Third, were the decision to be quashed the decisions would have to be remitted to the Governor and to the Secretary of State who would, so Mr Bowen QC on behalf of the Respondents submits, inevitably reach the same conclusion. In *AHK v Home Secretary (No 1)* [2012] EWHC 1117) Ouseley J held that there could be no CMP in a case where naturalisation had been refused on grounds of a failure to meet the 'good character' requirement. Disclosure of detailed reasons had been refused in the public interest:

*“Third, the Court might decide that it would review the decision, albeit knowing that not all the material relied on had been disclosed, not knowing what it was. I accept Mr Eadie's submission that this third possibility would very probably result in an inextricable circle. If the Defendant lost, and the Court held that the decision was unfair or insufficiently reasoned, or that material considerations had been ignored, the SSHD would have to take the decision again. The same process would be repeated. The SSHD would still be required to have regard to all material factors. The Court would rule that the material should not be disclosed. The Court would then rule again in the same way. It is impossible to see that the decision could be held to be irrational by a court which knew it did not have all the evidence, or that the Court could then hold that only one decision, namely to grant naturalisation, was lawful. The inextricable circle would bring the law into disrepute, and advance neither side.” [62]*

104. Mr Southey QC seeks to meet this argument by suggesting that were the decisions to be quashed the matter could be sent back for further consideration as to whether more documents might be disclosed, in the light of the conclusion that without further disclosure the decisions would be quashed. If the consequence of Carter J’s judgment is that the Appellants’ claims are untriable then the Governor would, in fulfilment of his or her duty to act fairly, have to bear that in mind when re-considering his decision as to what should be disclosed.
105. The argument is based on the proposition that in cases where disclosure is contrary to the public interest the decision maker must ask the question whether it would really be unfair not to tell the claimant. As Lord Hoffman put it in *Home Secretary v AF (No 3)* [2010] 2 AC 269 [72]:

*“The particular procedures which have to be followed to make a hearing fair cannot in my opinion be stated in rigid rules. Ordinarily it is true that fairness requires that an accused person should be informed of all the allegations against him and the material tendered to the tribunal in support. The purpose of the rule is not merely to improve the chances of the tribunal reaching the right decision (by giving the accused an opportunity to explain or contradict any such allegations or material) but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told. Seventeenth century lawyers were fond of quoting the example of Genesis 3.11, in which God, though omniscient, said to Adam ‘‘ hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?’’. In such a case, however, there is no cost in compliance with the general rule. God suffered no disadvantage by revealing to Adam what he knew. The same is true in most cases in which there is a failure to disclose material. But when disclosure is contrary to the public interest, it is necessary to think more carefully and ask whether in all the circumstances it would really be unfair not to tell the applicant or accused. There may well be cases in which, from the point of view of reaching the right decision, it is clear to the tribunal that it would be highly unlikely to make any difference. If that is the case, the procedure may be fair even though a subjective feeling of injustice is unavoidable. ‘‘*

106. Pitchford LJ adopted this approach in *BX v Home Secretary v Home Secretary* [2010] 1 WLR 2463, in which a claimant sought to challenge the Home Secretary’s modification of a control order, by relocating the claimant to a specific address which, it was said, interfered with his Article 8 rights:

*“Where, however, the modification decision will cause a significant interference with the controlled person’s home life and employment, it seems to me to be obvious that the Secretary of State will have in mind his disclosure obligations in the event of challenge. Should the Secretary of State embark on a without notice modification while harbouring an intention not to make such disclosure as will render the section 10 procedure compliant with article 6, he will be open to an accusation of the arbitrary use or misuse of the section 7(2)(b) power. I would not expect the Secretary of State to be able to measure precisely the nature and degree of disclosure which he will have to consider*

*after a fully argued disclosure hearing, but I would expect him to ensure that the judgment whether to make the modification order is made conscientiously, with his likely disclosure obligations in mind.” [55]*

107. In the instant appeal there is no question of the Governor harbouring an intention to refuse disclosure when making her decision to concur. Such disclosure as Carter J ordered has been made. There is no basis for thinking that any different decision as to what may be disclosed without damaging the public interest might be reached were the decision quashed. Quashing the decisions now would, in my view, inevitably lead to the circularity predicted by Ouseley J in AHK. As he said in *AHK (No 2) v Home Secretary* [2013] EWHC 1426:

*“The Court could not require more to be disclosed since it has already been satisfied that the SSHD has disclosed all that she is required to disclose, and it is not for the Court to require her to breach national security in order to defend decisions taken in reliance on such material, which she is obliged to take into account.” [76]*

108. The decision for removal is for the removing authority, not for the court. The absence of disclosure cannot lead this court to exercise the power conferred on the Governor and Secretary of State; quashing the decisions now will merely lead to an impasse. For these reasons, the first option, allowing the appeal, is not open to the court.

#### *Dismissing the Appeal*

109. The Respondents have advanced numerous arguments as to why, if driven to the conclusion that a CMP is not permissible, the Court should dismiss the application. They contend that, even though they cannot support the decision of Wood J (ag) because of the lack of reasons in the judgment, he reached the right conclusion on the substantive grounds advanced against his decision. But I should emphasise that the question, at this stage of the argument is solely whether it is unsatisfactory for this court to dismiss the Appellants’ appeal when it has not seen most of the material on which the decisions were based.
110. The Respondents’ arguments as to the substance of the appeal should not be resolved unless and until this Court concludes that a CMP is not available. If this Court concludes that a CMP is available, then it would be wrong to pre-judge the outcome of such a hearing or to give some indication as to what the court dealing with such a process should decide.
111. To assess the justification and proportionality of the decisions without seeing most of the material on which the decisions were based constitutes a fundamental flaw in the process of judicial review; all the more so where the onus is on the Respondents to show the justification for and proportionality of their decisions. The human rights enshrined in, for example, sections

6 and 9 of the Bill of Rights cannot be vindicated without any meaningful scrutiny of the material which founded the decisions. The ECtHR required no less in *Polyakova* (supra [108-109])

112. Further, it is difficult to see how this Court could be said to have fulfilled its obligation under Section 26 of the Bill of Rights to “*determine such an application fairly*” when so much material is not open to any scrutiny at all.

113. Mr Bowen QC suggested that both the Appellants and the Court had seen sufficient to satisfy itself as to the justification and proportionality of the decisions. The process conducted by the Court is one of review and thus:

*“...it is important too to recognise that even in proportionality cases judicial review still remains a very different process from the sort of litigation in which disclosure orders are ordinarily made. The challenge by definition goes to the legality of the decision impugned. Generally no fact-finding will be necessary unless perhaps in procedural challenges where it may be necessary to establish what happened in the course of the decision-making process rather than what material was before the decision-maker. And it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the court all the relevant facts and reasoning underlying the decision under challenge. Even, moreover, where proportionality is an issue, as Lord Steyn remarks towards the end of the passage cited from his judgment in *Daly*: “This does not mean that there has been a shift to merits review. On the contrary . . . the respective roles of judges and administrators are fundamentally distinct and will remain so.” (per Lord Brown in *Tweed v Parades Commission for NI* (2007) 1 AC 650 at [54])*

114. The problem, of course, in the instant case is that the Respondents cannot lay all the relevant facts before the court.

115. Mr Bowen QC reminds us that as Lord Reed said in *R (Begum) v Home Secretary* [2021] 2 WLR 556:

*“Lord Hoffmann (in **Home Secretary v Rehman** [2003] 1 AC 153) rejected the concept of a standard of proof, stating at para 56 that the issue was not whether a given event happened but the extent of future risk. The question of whether the risk to national security was sufficient to justify the appellant’s deportation could not be answered by taking each allegation seriatim and deciding whether it had been established to some standard of proof:*

*“It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.”*  
[58]

116. This may be a substantial reason for concluding that, as in *Begum*, absent a CMP the appeal should be stayed but it does not mean that the result is satisfactory where much if not all of the underlying material is hidden from the court's examination.
117. Another basis for dismissing the appeal might be the presumption of regularity, on the maxim *omnia praesumuntur* as applied in the *Rossminster* case (1980) AC 952: the applicant for review must displace that presumption and in the absence of disclosure, for which there was good reason, he must fail.
118. Lord Mance fully considered that presumption in *Haralambous* [47-50] and pointed out that it dated from a time when judicial review was in its infancy, prior to the domestication of Convention rights and prior to more recent decisions relating to disclosure of information in relation to *ex parte* warrants [50]. The Supreme Court did not suggest that *Rossminster* was a satisfactory solution; it plainly is not.
119. It is important to underline that the Respondents themselves do not favour this option, unless this Court rules that a CMP is not available. For the reasons I have given it seems clear to me that to dismiss this application on the basis of the evidence which has been disclosed would not be satisfactory.

*Strike Out or Stay*

120. The third option, should a CMP be unavailable, may be the least unsatisfactory of the three but remains self-evidently an inadequate way of fulfilling the court's obligation under Section 26 of the Bill of Rights. This option relies on the principle that where a fair trial of an issue may require the disclosure of material which the public interest requires should remain confidential the trial should be stayed or struck out. That was the result, recently endorsed in *Begum* (supra), in *Carnduff v Rock* [2001] 1 WLR 1786, where the action of an informer to recover compensation could not be fairly tried at all. The decision of the Court of Appeal in *Carnduff* was held by the ECtHR to be proportionate and the applicant's complaint to be manifestly ill-founded (10 February 2004 18905/02).
121. In *Begum*, the appellant was not permitted to enter the United Kingdom in the interests of national security and could not, therefore, play an effective part in her appeal against the decision to deprive her of her citizenship. That did not mean, however, that her right to a fair hearing prevailed over the interests of national security so that the Home Secretary was bound

to allow her to enter the United Kingdom in order to participate in her appeal. Lord Reed PSC concluded:

*“Thirdly, the Court of Appeal mistakenly believed that, when an individual’s right to have a fair hearing of an appeal came into conflict with the requirements of national security, her right to a fair hearing must prevail. As I have explained, if a vital public interest in this case, the safety of the public makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it. The appropriate response to the problem in the present case is for the appeal to be stayed until Ms Begum is in a position to play an effective part in it without the safety of the public being compromised. That is not a perfect solution, as it is not known how long it may be before that is possible. But there is no perfect solution to a dilemma of the present kind.”*[135]

122. No-one could suggest that to stay or strike out this appeal would be a satisfactory conclusion, even if, absent a CMP it would be the inevitable result. In those circumstances all three options identified by all the parties lead to unsatisfactory results, leaving in stark form the question to which I now turn as to whether a CMP is available.

*(iv) Is a CMP available?*

123. Within the Cayman Islands there is no express statutory authority for a CMP. The issue before this court is whether there is any implied statutory authority or whether there are special reasons in the interests of justice to authorise a CMP. In order to determine whether it is open to this court so to order it is necessary to examine the trilogy of cases, to which I have referred; they do show some development beyond express statutory authority. But how far?

124. The orthodox position was expressed by Lord Dyson in *Al Rawi* (supra). A closed material procedure is so fundamental a breach of the rules of open and natural justice in the conduct of litigation that it should not be permitted unless Parliament has authorised it. Lord Dyson was prepared to admit of one particular exception where the very purpose of the litigation would be rendered futile without such a procedure. Caution dictated that he was not prepared to say there could never be other circumstances in which a CMP might be permitted but he did not speculate further.

125. Lord Dyson emphasised that a CMP involved a departure from open justice and natural justice principles because one party has adduced evidence of which the other is kept in ignorance [12] and [14]. The power of the court to regulate its own procedure did not permit it to do so in a way which denied parties their fundamental rights in respect of the litigation in which they were involved [22].

126. He rejected the suggestion that the procedure might be deployed in exceptional circumstances, as a matter of necessity, as being too vague, [39], and too complex to judge [43]. He said:

*“to allow a closed procedure in circumstances which are not clearly defined could easily be the thin end of the wedge. .... Mr Crow’s undefined exceptional circumstances in the interest of justice could develop into something more defined and exorbitant. So too could Lord Clarke JSC’s suggested approach. This would be a big step for the law to take in view of the fundamental principles at stake. In my view, this is a matter for Parliament and not the courts.”* [44]

127. He did not accept the views of Lord Mance and Lord Clarke, with whom Baroness Hale agreed, that there may be circumstances in which necessity dictated the adoption of such a procedure. Lord Mance thought that it would be permissible where a party was faced with the prospect of his claim being struck out and consented [120]-[121]. Lord Clarke thought that a judge might decide after he has determined the claim for PII [178]. Lord Dyson took the view that the very fact that judges could differ as to necessity showed that it was a matter for Parliament [46].

128. Lord Dyson did accept a departure from the rule of law in cases concerning children where the interests of the child are paramount and the proceedings would be rendered futile absent such a procedure:

*“But I agree that there are certain classes of case where a departure from the normal rule may be justified for special reasons in the interests of justice. Thus as Baroness Hale of Richmond said in Secretary of State for the Home Department v MB [2008] AC 440, para 58:*

*“If . . . the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child’s welfare as to defeat the object of the exercise.”*

*Wardship proceedings are an obvious example of such a case: see In re K (Infants) [1965] AC 201, 241A, per Lord Devlin. Cases involving children raise different considerations from those which arise in ordinary civil litigation. That is because the interests of children are paramount. It follows that where the interests of the child are served, so too are the interests of justice.”* [63]

129. Lord Dyson gave the further example of “confidentiality rings” at least in initial interlocutory stages [65]. But he took the view that neither exceptions applied to ordinary civil litigation [65]. He concluded:

*“As the Court of Appeal said at para 69 of their judgment, “never say never” is often an appropriate catchphrase to use in the context of the common law. Nobody can predict how the law will develop in the future. We are concerned with the position as it is now. But for the reasons that I have given, I agree with the Court of Appeal that the issues of principle raised by the closed*

*material procedure are so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so. No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Pts 76 and 79) to regulate the procedure.* “[69]

130. Lord Hope said that the balance between open justice and fairness and national security should be struck by Parliament [74]. In light of his later opinion in *Haralambous* I should recall that Lord Mance pointed out that the question was not whether the court had jurisdiction but whether it should be exercised [114-115]. But he did not think that the court could adopt a CMP unless, faced with his claim being struck out, a party consented [120-121].

131. It is important to note the observation of Lord Phillips [189-197]. He pointed out that the preliminary issue which had launched the appeals dealt with the question whether the CMP could be substituted for a hearing to determine PII. None of the members of the Court thought that it could; the difficulty arose because the Court of Appeal had widened the argument and decision to the question as to whether a CMP could be ordered after a decision on PII. As to that Lord Phillips said:

*“Whether the general principles applied by the Court of Appeal would necessarily preclude the use of a different closed material procedure, not as a substitute for the conventional PII exercise, but to mitigate the injustice that can occur when relevant evidence is excluded from disclosure because of PII, is a question that should be left open until it actually arises, just like the question left open by the last paragraph of the Court of Appeal’s judgment.”* [196]

132. The question has arisen since and the law has developed. In *Bank Mellat* (supra) a CMP was lawfully conducted at the first instance hearing at which the claimant challenged the Treasury’s imposition of financial restrictions pursuant to the Counter-Terrorism Act 2008. The question was whether the Supreme Court could adopt that procedure where the 2008 Act had not explicitly conferred such a power; as Lord Neuberger put it:

*“As the advocate to the court said in the course of his full and balanced argument, one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.”* [35].

133. He emphasised the close and critical scrutiny required as to whether a CMP is available [36]

134. Lord Neuberger then conducted an analysis of the possibilities, if the court could not conduct a CMP, all of which were “*self-evidently equally unsatisfactory*”. He reached the conclusion that it was necessary to conduct a CMP to dispose of the appeal pursuant to the provisions of Section 40(2) of the Constitutional Reform Act 2005:

*“the contention that this court has the power to have a closed material procedure is based on section 40(2) of the 2005 Act, supported by section 40(5). The argument proceeds as follows: (i) section 40(2) provides that an appeal lies to the Supreme Court against “any” judgment of the Court of Appeal; (ii) that must extend to a judgment which is wholly or partly closed; (iii) in order for an appeal against a wholly or partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure; (iv) such a conclusion is reinforced by the power accorded to the court by section 40(5) to “determine any question necessary . . . for the purposes of doing justice”, as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material.”*  
[37]

135. Later he said [43]:

*“In my view, subject to any arguments to the contrary, this analysis (the examination of the unsatisfactory possibilities) establishes that the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal. This conclusion is reinforced by section 40(5) of the 2005 Act. An appeal under section 40(2) is “an appeal . . . under any enactment”. Accordingly, where an appeal is brought against a decision under the 2008 Act, the Supreme Court has “power to determine any question necessary to be determined for the purposes of doing justice in” such an appeal. On any appeal where the judgment is wholly or partly closed, it seems to me that this court could not do justice, or at least would run a very serious risk of not doing justice, if it could not consider the closed material, and it could only do that if it adopted a closed material procedure.*

*[44] It might, I suppose, be said that adopting a closed material procedure on any appeal would involve the antithesis of “doing justice in” that appeal. In a case where Parliament and the CPR have lawfully provided for a closed material procedure at first instance and in the Court of Appeal, I am of the view that, on the contrary, for this court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal or in the sense of being seen fairly to determine the appeal, notwithstanding that the material will be considered in a closed hearing.”*

136. Thus *Bank Mellat* established the power to conduct a CMP on appeal in order to do justice where the court whose judgment was under appeal was expressly authorised by statute to undertake that process. The solution was derived from an express and implied statutory authority.

137. In *Haralambous* (supra) there was no express parliamentary authority to conduct a CMP “*at any stage*”. The claimant sought judicial review of the issue and execution of warrants issued ex parte by a justice of the peace and, after the warrants had been quashed by consent, review of the Crown Court’s decision that the Chief Constable was entitled to retain the seized property. Both the magistrate and the Crown Court had considered material which had, in the public interest been withheld from disclosure. The Supreme Court held that judicial review must accommodate a CMP where Parliament has authorised such a procedure in the lower court or tribunal.
138. Lord Mance (whose judgment was agreed by Lord Kerr, Lord Hughes, Lady Black and Lord Lloyd-Jones) began by analysing the power of a magistrate and the Crown Court to see and rely on information which in the public interest could not be disclosed [26] and [33]. He pointed out that there were a number of express and implied statutory protections where a warrant is issued on the basis of undisclosed information [34]. The Crown Court, when deciding (under section 59 of the Criminal Justice and Police Act 2001) whether to authorise retention of seized property had no express authority to conduct a CMP but:

*“The statutory scheme of PACE and the CJPA must have been intended to be coherent, and Parliament must be taken in these circumstances to have contemplated that the Crown Court would, so far as necessary, be able to operate a closed material procedure, to ensure that it could have regard to material which would have been put before the hypothetical magistrates’ court and withheld from disclosure there, without contravening the public interest by disclosing such material on the section 59 application.” [41]*

139. The argument was that if the lower courts could rely on withheld material the court on judicial review should be able to do so [46]. Lord Mance accepted that argument on the basis that “*judicial review should be effective and able to address the decision under review on the same basis that the decision was taken*” [52]. The role of judicial review was to “*ensure regularity in executive and subordinate legislative activity and so compliance with the rule of law*” [56]. The Senior Courts Act 1981 conferred a power on a court, on judicial review, to remit a decision or substitute its own decision or conclude that, despite an error, the result would have been the same. He continued:

*“These subsections (Section 31 (2A) and (3C)) again postulate that the High Court will be considering the outcome on the same basis as the lower court or tribunal.” [58]*

140. He concluded:

*“In the light of these statutory provisions and of an analysis of the alternative possibilities paralleling that undertaken in Bank Mellat, I consider that the only sensible conclusion is that judicial review can and must accommodate a closed material procedure, where that is the procedure which Parliament has*

*authorised in the lower court or tribunal whose decision is under review. The Supreme Court, when it referred in passing to judicial review in the Al Rawi case [2012] 1 AC 531, was not directing its attention to this very special situation. If it had done so, it might also have seen a similarity between this situation and the two exceptions which it did identify, where inability to adopt a closed material procedure would render the whole object of the proceedings futile and where the interests of third parties (such as informers) are potentially engaged. Be that as it may be, I consider that the scheme authorised by Parliament for use in the magistrates' court and Crown Court, combined with Parliament's evident understanding and intention as to the basis on which judicial review should operate, lead to a conclusion that the High Court can conduct a closed material procedure on judicial review of a magistrate's order for a warrant under section 8 of PACE or a magistrate's order for disclosure, or a Crown Court judge's order under section 59 of the CIPA. I add, for completeness, that, even before judicial review was regulated by statutory underpinning, I would also have considered that parallel considerations pointed strongly to a conclusion that the present situation falls outside the scope of the principle in the Al Rawi case and that a closed material procedure would have been permissible on a purely common law judicial review. "[59]*

141. The Respondents seek to draw an analogy between the position of the Governor considering material which cannot, in the public interest be disclosed, and the lower courts in *Haralambous*. Since the original decision maker, in this case the Governor, is entitled to see undisclosed material, then the court, in order to conduct an effective judicial review must be able to do so, and can only fairly determine the review by conducting a CMP.
142. I think there is a danger in drawing an analogy between a Governor on whom a wide power to decide whether to concur in removal is conferred by the 1884 Act and the statutory procedures under which a magistrate and Crown Court must proceed when considering whether to issue a warrant or permit the retention of seized property. Lord Mance directed attention to the statutory safeguards within those procedures.
143. Further, the foundation for the development of the argument in *Haralambous* was the express statutory authority for ex parte hearings before a magistrate to which the power conferred on the removing authority bears no analogy. The process by which the executive reaches a decision as to whether to exercise a power conferred by statute seems to me far removed from an ex parte application to a court. Lord Mance was concerned to confine his decision to what he described as a "very special situation", similar to the two exceptions identified in *Al Rawi*. It must be said that to describe a situation as "very special" gives no guidance whatever as to the test to apply to determine whether the situation is special or not.
144. Lord Mance refers to cases where the failure to adopt a CMP would render the proceedings futile and where the interests of third parties such as informers are engaged. But I cannot resist

the impression, and it may only be an impression, that there is nothing particularly “*special*” about a member of an executive making a decision, particularly in relation to decisions concerning prisoners, such as categories of security, conditions of confinement and parole, based on material which will be undisclosed should those decisions be reviewed. The concern in all three of the cases to which I have referred is to confine the use of a CMP; there is a real risk that if it is applied in this case we will have opened the door too wide.

145. However, I am persuaded that in this case the considerations which drove Lord Mance to his conclusion have a sufficient echo in this case.

146. First, consideration of the unsatisfactory possibilities, if a CMP is unavailable, compels another solution. Although I have been concerned as to whether this court would be opening the door too wide, this case is concerned with decisions, which, if accepted, interfere with important rights concerning the prisoners’ ability to retain some form of family ties. Those decisions must therefore be justified and proportionate. The right of the prisoners to insist that the Governor must establish that they are justified and proportionate can only be vindicated by judicial review, and can only be justly and fairly vindicated by an effective judicial review. No judicial review of the Governor’s decision could be considered effective and just, unless the court considers the justification and proportionality of the decisions on the same basis and on the same information as that which was considered by the Governor.

147. Second, the right of the Appellants to challenge the decisions and to have their challenge determined by the court is enshrined in the Bill of Rights:

*“26. (1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time.”*

148. Whilst there may be cases where what the ECtHR called “*procedural limitations on the use of classified information*” (CG [40] *supra*) are inevitable, the courts should strive to allow a procedure which produces the fairest possible result. In a case such as this, when, because so much of the information is the subject of PII, there can be no effective judicial review, I would rule that a CMP is available so as to enable the court to fulfil its obligation under section 26(1).

149. I should add that an issue arose between the parties as to whether the provisions of the Senior Courts Act referred to by Lord Mance, namely subsections (2A) and (3C) of section 31, have

effect in the Cayman Islands by virtue of Section 11 of the Grand Court Act (2015 Revision). Section 11 provides:

*“1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*  
*(a) Her Majesty’s High Court of Justice; and*  
*(b) the Divisional Courts of that Court,*  
*as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.” (my emphasis)*

150. I do not need to consider this issue, upon which we heard little argument, for two reasons. First, section 11 is concerned with jurisdiction, as Mr Southey QC submitted, whereas subsections (2A) and (3C) are concerned with relief. The instant case is, as Lord Mance teaches, not concerned with whether this court has jurisdiction to order a CMP but with whether it should exercise that jurisdiction. Second, Lord Mance made clear in the final sentence of [59] (quoted above) that his decision would have been the same in the absence of those provisions. For the reasons I have given I would rule that the court should exercise that jurisdiction. I would order that the case be remitted for hearing by the Grand Court of the issues of justification and proportionality of the impugned decisions using a CMP.

*Disposal of Outstanding Issues Not Requiring Remittal*

151. There are however two issues which it is right to deal with at this stage, if only in the interests of expedition as to the future conduct of these proceedings.

*(v) The Appellants’ Family Ties*

152. The first relates to the question whether the Governor took into account the interests of their children when reaching the decision to concur in the prisoners’ removal. It is accepted that he was bound to do so. If those interests can be shown to have been ignored at the time the decisions were taken, as the Appellants contend, then, irrespective as to whether the balance between the prisoners’ rights and national security was correctly struck, the decisions were flawed.

153. I should recall that the original submissions as to the need to remove made no reference to the children or, indeed to the prisoners’ families. Nor does the fact that considerable efforts were made to see that the prisoners could maintain a relationship with their families and their children after removal, as explained in affidavits from the Governor, necessarily establish that the importance of family ties was considered at the time the decisions were made.

154. But it is clear, at this stage, that those interests were not ignored. The two letters sent from the Attorney General’s Chambers (26 September 2107 and 27 September 2017) made specific reference to the Appellants’ children. There is evidence in the affidavit from the Prison Service, dated 30 September 2019, (paras. 15-16) that the Overseas Territories Directorate made it clear that “consideration would need to be given to the Plaintiffs’ right to family life in any transfer”
155. Whether sufficient weight was given to maintaining a relationship with the children, of whom neither Appellant was primary carer, must await the court’s view after a CMP. The principles which must be applied are clear from *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338. The interests of children and their relationship with their father may be overridden by the public interest which flows from their father’s conviction and ongoing considerations of national security, or public safety.

*(vi) Failure to Build a Prison*

156. It is also possible to make some observations on the Appellants’ complaint as to the failure of the Respondents to provide adequate facilities for their secure custody within the Cayman Islands. The Appellants point to the clear references to the possibility of their return, when and if new facilities are constructed. They emphasise that the problem has been present for a long time. *R (Richards) v Home Secretary* [2015] EWHC 4280 concerned another prisoner removed from the Cayman Islands in 2009 for security reasons “while construction of suitably high security accommodation” was undertaken [9]. Thirteen years later nothing further has been done. Mr Southey submits that a failure to respect the prisoners’ rights under Sections 6 and 9 cannot be justified by financial or logistical difficulties.
157. In *Polyakova* (supra) the court re-iterated the importance of visits from family and friends as an effective means of ensuring rehabilitation and added:

*“The Court is mindful that the State authorities charged with geographic distribution of prisoners would inevitably face various difficulties when performing such a complex task. Nevertheless, as the Court repeatedly stressed, it is incumbent on the Government to organise its penal system in such a way that it ensures respect for the dignity of detainees, regardless of any financial or logistical difficulties (see Ananyev and Others, cited above, § 229).”* [113]

158. The Applicants’ challenge on this ground is, the Respondents contend, plainly misconceived and the pleading has been amended to withdraw it. Of course it is a matter for political decision

within the Cayman Islands as to how resources are allocated and as to how pressing the need is to improve accommodation for Category A life prisoners. Even in a case of alleged torture contrary to Article 3 the ECtHR said:

*“The wider questions raised by the case as to the background of assaults and the remedial measures apt to prevent any recurrence in a prison in the future are, in the court’s opinion, matters for public and political debate which fall outside the scope of article 3 of the Convention.”* (see *Banks v UK* (2007) 45 EHRR SE 2 (cited in *Smith v MOD* [2014] AC 52 at [145]).

159. But the Appellants’ argument that failure to deploy resources can be no defence to a failure to respect the prisoners’ rights is not a direct challenge to the decision not to build a different or more secure prison. It is open to them, on the pleadings, to make that argument. Their argument is not that the failure to build or rebuild a prison was unlawful but rather that if there was an unjustified and disproportionate interference with the prisoners’ rights then that failure would not afford a defence. I would, therefore, rule that it is open to them to make that argument on the pleadings.
160. It is not possible to go any further; resolution of the question will be for the Grand Court on remittal. However, I would make this further comment: there is clear evidence that, whatever is said in the initial submissions, the problems of security were not to be solved merely by fresh accommodation. The influence of these two gang leaders on the Island, whether in the existing prison or in new accommodation was such that it was open to the removing authority to reach the conclusion that the risk would persist unless they were removed from the Island. New secure accommodation would not solve the problem. Whether that view was open to the Governor and to the Foreign Secretary will be a matter for consideration on all the material.

#### *Conclusion*

161. I would rule as follows:
- (i) The Bill of Rights applies to the Governor’s decisions pursuant to the 1884 Act;
  - (ii) The 1884 Act is ‘*in accordance with the law*’;
  - (iii) A closed material procedure is available to the Grand Court and to the Court of Appeal;
  - (iv) The applications for judicial review should be remitted to the Grand Court for a fresh hearing using a closed material procedure, subject to the rulings this court has already made;
  - (v) The Respondents did take into account the interests of the Appellants’ families and children when considering whether to make removal orders;

162. I would await written submissions as to the form of Order this Court should make in the light of these conclusions.

**Birt JA**

163 I agree.

**Field JA**

164 I also agree.