



IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**CICA Civil Appeal No. 15 of 2020
Civil Cause Nos: G 209/2016 & G 216/2018**

BETWEEN:

**THE CHIEF IMMIGRATION OFFICER
OF THE CAYMAN ISLANDS**

Appellant

-AND-

IAN FERNANDO ELLINGTON

Respondent

BEFORE

**The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon. C Dennis Morrison, Justice of Appeal**

**Appearances: Mr. Michael Smith Crown Counsel, AG's Chambers for the Appellant
Mr. Alastair David of HSM Chambers for the Respondent**

Heard: Tuesday 15th September 2020

Draft circulate: 23rd September 2020

Judgment Delivered: 8th October 2020

JUDGMENT

Rt. Hon Sir John Goldring, President:

Introduction

1. This is an appeal from the decision of the Honourable Mr Justice Williams, in which he:
 - (1) Declared that section 82 of the *Immigration Law (2015 Revision)* and section 109 of the *Customs and Border Control Law 2018* were incompatible with the Cayman Islands Bill of Rights;
 - (2) Ordered that the Respondent's application for a Residency and Employment Rights Certificate ("RERC") be remitted to the Immigration Appeals Tribunal for reconsideration in line with the guidance of the Court;

- (3) Ordered that the temporary injunction preventing the removal of the Respondent from the jurisdiction be extended until the conclusion of the reconsideration of the RERC application by the Immigration Appeals Tribunal (“IAT”) and any subsequent appeal therefrom.
2. The appeal is only in respect of the declaration of incompatibility. The judge found that the provisions of section 82(h) of the *Immigration Law (2015 Revision)*, and section 109(h) of the *Customs and Border Control Law 2018*, by which a person sentenced to a minimum term of 12 months’ imprisonment, is a prohibited immigrant, were incompatible with the obligation upon government to respect private and family life under section 9 of the Bill of Rights of the Cayman Islands. Mr Michael Smith, on behalf of the Appellant submits, firstly that designation as a prohibited immigrant does not give rise to a breach of the obligation under section 9 of the Bill of Rights, as the judge found (Grounds 2 and 3 of his grounds of appeal) and, secondly, if it does, the judge should have interpreted the provisions in such a way as to make them compatible with the Bill of Rights, as he was required to under section 25 (Ground 1).
3. Mr Ellington’s case was considered under the *Immigration Law (2015 Revision)*. Leave to argue incompatibility was granted in respect of section 82(h) of that Law. The *Customs and Border Control Law 2018*, which replaced the *Immigration Law (2015 Revision)* established a government department called the Customs and Border Control Service, with a Director of Customs and Border Control as the officer in charge. The Director replaced the Chief Immigration Officer. By section 6, customs and border control officers were appointed instead of immigration officers. The provisions as far as the issues in this case are concerned are otherwise identical as between the two Laws. In the circumstances, I shall only refer to the *Immigration Law (2015 Revision)* and not the equivalent, but materially identical provisions, in the *Customs and Border Control Law, 2018*.

The background facts

4. Mr Ellington, the Respondent, was born in Jamaica. At the time of the hearing, he was 35. He has been a resident of the Cayman Islands since 2007. He was the holder of a work permit. On 31 August 2013 he married Saneta Johnson (“SJ”). SJ had Caymanian status. On 11 December 2013, their son was born. He too had Caymanian status. On 23 September 2013 Mr Ellington was arrested for robbery. On 27 March 2014 he was sentenced to two years imprisonment as accessory after the fact in respect of robbery. The judge made no recommendation for deportation. During his imprisonment, Mr Ellington applied to the Caymanian Status and

Permanent Residence Board (“the Board”) for a Residency and Employment Rights Certificate (“RERC”) on the basis he was the spouse of a Caymanian, namely SJ. On 4 February 2015 Mr Ellington was released from prison. The Department of Immigration granted him a tourist visa, ostensibly to enable him to reside in the Cayman Islands. On 23 April 2015 the Board deferred consideration of the Respondent’s RERC application in the light of some burglary charges he was facing, which ultimately were not proceeded with.

5. Mr Ellington’s marriage to SJ broke down. On 13 January 2016, SJ notified the Board of the marriage breakdown. She indicated Mr Ellington was living with someone else. On 14 April 2016 the Board again deferred consideration of the RERC application in the light of the burglary charges. On 30 April 2016, the Board rejected Mr Ellington’s claim for a RERC on the basis that his marriage to SJ was no longer subsisting.
6. On 21 September 2016, following approval of the ancillary arrangements, McMillan J granted a decree of dissolution of the marriage between Mr Ellington and SJ. He made a residence order in favour of SJ, with liberal contact to Mr Ellington in respect of their son. Mr Ellington was ordered to pay CI\$200.00 per month child maintenance and to share educational and medical costs for the child.
7. At some time in September 2016 an officer at the Immigration Department informed Mr Ellington he was a prohibited immigrant (“PI”) under section 82(h) of the *Immigration Law (2015 Revision)*. He was told his leave to remain (under the tourist visa) was to cease on 11 November 2016. That was the first time Mr Ellington became aware that he was a PI.
8. On 1 October 2016 Mr Ellington married his second wife. She too has Caymanian status. On 14 October 2016, Mr Ellington made a fresh, second, application for RERC.
9. Although on 13 January 2017, someone from the Board told Mr Ellington his application had been approved, he was later (on 16 January 2017) informed by email that the approval had been made in error: that at the time the Board did not know of his criminal history, that he was a prohibited immigrant and about his “*deportation issues.*” His approval was therefore “*rescinded.*”
10. On 19 January 2017 the Board deferred its decision in respect of the second application for RERC pending a marriage check. That took place in March 2017. The Board subsequently informed Mr Ellington that his second marriage was genuine and subsisting.

11. Also in March 2017, Mr Ellington was fined for using a motor vehicle without a certificate and with expired registration.

12. On 27 April 2017, the Board considered the second RERC application. By a letter dated 12 May 2017, and served on 31 May 2017, it rejected the application. It stated in the letter:

“...The Board considered in depth the history of Mr. Ellington in the Islands and noted his current immigration designation as a Prohibited Immigrant in the light of his criminal history. While the Board noted that Mr Ellington is the parent of a Caymanian child, it is troubling to see that he continues to run a-foul [sic] of the Laws of the Islands, having recently been arrested again. The Board has serious concerns with the character of the applicant and is of the opinion that his continued presence in the Islands is not in the best interests of the community as a whole.”

13. On 2nd June 2017 Mr Ellington appealed the Board’s decision to the IAT.

14. On 14 September 2017 Acting Judge Carter granted Mr Ellington permission to apply for judicial review of the decision of the officer at the Immigration Department (taken in September 2016) by which Mr Ellington was designated a ‘Prohibited Immigrant’ (“PI”) under section 82(h) of the *Immigration Law (2015 Revision)*. She said that he had permission to argue that section 82(h) was incompatible with the Constitution of the Cayman Islands.

15. On 22 October 2017, the Board provided a copy of its appeal statement outlining why it had refused the RERC application. It repeated what it had set out in its letter of 12 May 2017. It went on to state, under the heading “Reasons,” that:

“With regard to the aspect of family life, it was observed that Mr. Ellington’s recidivism demonstrates his inability or lack of interest to provide a positive example for his Caymanian child and family. It would appear that he has not considered the impact of his criminal actions might possible [sic] have on his standing in the Islands or the welfare of his family.

The refusal of Mr Ellington’s application has its basis in the Immigration Law, and such immigration controls serve legitimate aims of “public safety, public order and public morality.”

Mr. Ellington’s conduct since coming to the Islands has not been one of good morals, good citizenship or a positive example for his family. The Board assessed the circumstances to strike a fair balance between Mr. Ellington’s right to family life and the interests of public safety and the prevention of disorder and crime.

As a result of his wanton disregard of the Laws of these Islands, the Board has serious concerns with the character of the applicant and is of the opinion that his continued presence in the Islands is not in the best interests of the community as a whole. As such, the application was therefore refused... Pursuant to Section 82(h) [of the] Immigration Law, having been sentenced to more than 12 months' imprisonment, [he] became a Prohibited Immigrant. As a prohibited Immigration [sic], the Appellant was no longer legally allowed to reside on island and as such was subject to Deportation Order."

16. On 10 October 2017 Mr Ellington submitted written grounds of appeal of the Board's decision to the IAT. He submitted there should be a fresh hearing "*which is procedurally fair, is based on admissible and relevant evidence only and which leads to a reasonable decision made with due regard to the correct statutory and human rights considerations properly and correctly applied.*"
17. On 19 April 2018 the IAT agreed to a fresh hearing. That took place on 23 August 2018 on the papers. On 10 October 2018 Mr Ellington was informed "*that the grounds of his appeal had not been established.*" In a letter of 22 October the Board stated (quoting from a letter of 10 October 2018):

"By unanimous vote the Tribunal refused to grant RERC as a result of consideration of the appellant's character under section 31(3) (c) of the Immigration Law (2015 Revision), namely his conviction and sentence to 2 years imprisonment. His wife stated that her husband, Mr. Ellington served 14 months in prison. The Tribunal accepted that the marriage was stable and accepted that the CS/PR Board acted improperly in referencing/relying on the ex-wife (Saneta Johnson) letter without giving the appellant an opportunity to address the allegations, but the one allegation that remains is the conviction."

18. On 8 November 2018 Mr Ellington filed a statutory appeal in respect of the Board's decision. The applications in respect of that decision and the designation of Mr Ellington a PI were subsequently consolidated.

The legal provisions

The Immigration Law (2015) Revision ("the Law")

19. Part II of the Law concerns "*Administration.*" By section 3:

"(1) There shall be a Chief Immigration Officer and such other immigration officers as are necessary to the purposes of carrying out this Law, who shall be public officers.

(2) *Subject to subsection (3), immigration officers shall have all the rights, powers, privileges and immunities of a constable when discharging their duties under this Law and may, for that purpose, board and search any vessel.*

20. Part VI of *the Law* relates to “*Entry and Landing*.” However, by section 2, “*land*” (and therefore “*landing*”) has a wide meaning. That provides:

“*land*” means to go to, to be, to remain or reside in any place in the islands other than-

(a) *on board a vessel; or*

(b) *in a place under the control of an immigration officer...*”

Prohibited immigrant (“PI”)

21. By section 2 of *the Law*, a “*prohibited immigrant, has the meaning ascribed to it in section 82.*”

22. By section 82:

“*The following persons, not being Caymanian or permanent residents, are prohibited immigrants-*

...*(h) a person who...has been convicted in any country of an offence for which a sentence of imprisonment of or exceeding twelve months has been passed otherwise than for non-payment of a fine.*”

23. It is agreed that by reason of section 82(h) and his conviction and sentence for being an accessory after the fact, Mr Ellington became a PI.

Loss of permanent residency

24. By section 38:

“*The [Immigration] Board or the Chief Immigration Officer may, in respect of any person who has been granted permission to reside permanently in the Islands, revoke such permission where-*

...*(c) he has been convicted of an offence against the laws of the Islands...*”

25. As presently drafted, section 38 cannot apply to Mr Ellington. He had no permission permanently to reside in the Cayman Islands.

Cabinet entry permits

26. Section 63 (the marginal note to which states, “*Cabinet may issue entry permit*”) provides:

“*Notwithstanding anything contained in the Part, the Cabinet may issue a permit for the landing of any person to the Islands, and such person shall be admitted accordingly upon such terms as may be specified in the said permit.*”

27. It is Mr Smith’s contention that Mr Ellington, from within the Cayman Islands, could apply, or could have applied, to the Cabinet for an entry permit under this provision.

Position of a PI in the Cayman Islands

28. By section 66:

“Without prejudice to any of the succeeding provisions of this Law, it is an offence for any person other than a person -
(a) who is Caymanian; or
(b) who is not a prohibited immigrant and satisfies an immigration officer that he is-
(i) authorised to carry on a gainful occupation...;
(ii) a person named in a work permit as a dependant of the licensee;
(iii) a person who is exempted under section 40 or a dependant of such a person; or
(iv) a person who has permission to reside or to remain permanently in the Islands under Part IV,
to land in the Islands, without, in each case, specific permission, with or without the imposition of conditions or limitations, being given by an immigration officer.” (My emphasis)

29. As is agreed, by reason of being a PI, Mr Ellington commits an offence by being in the Cayman Islands.

Visitors to the Cayman Islands

30. By section 67(1) of the Law:

“Persons other than those referred to in section 66, and who are not prohibited immigrants, may be granted permission to land in the Islands as visitors for a period of up to six months, subject to extension, from time to time, for further periods not exceeding six months on each occasion upon application.” (My emphasis)

31. As presently drafted, as is agreed, Mr Ellington may not be granted permission under section 67.

Removal

32. By section 74:

“(1) A person who is not, in accordance with the relevant provisions of the Immigration (Transitional) Law 2018, a Caymanian, a permanent resident, a work permit holder, nor the holder of a [RERC]...may be removed from the Islands in accordance with directions given under this section by an officer not below the rank of Assistant Chief Immigration Officer, if-
(a) having been granted permission to enter or remain, the person does not observe a condition attached to the permission or remains beyond the time limited by the permission;

- (b) *the person has obtained permission to enter or remain by deception;*
- (c) *the person is a dependant of a person who is being or has been removed from the Islands under the provisions of this section.*
- (2) *Directions may not be given under subsection (1)(a) if the person concerned has made an application for an extension of the person's permission to remain in the Islands in accordance with this Law.*
- (3) *Where a person has overstayed the person's time in the Islands or is otherwise in the Islands illegally, the Chief Immigration Officer shall cause to be served upon the person concerned written notice in which shall be specified a time, not being more than fourteen days, within which that person shall be removed from the Islands."*

33. Section 74(1) does not apply to Mr Ellington. He is not someone to whom subsections (a), (b) or (c) applies. As a PI, however, he is someone illegally in the Cayman Islands in accordance with section 74(3).

Deportation

34. By section 88:

"(1) No deportation order shall be made under this Law, otherwise than in the case of-

- (a) a convicted and deportable person;*
- (b) a person who has been convicted of an offence contrary to section 56 [engaging in gainful employment or employing persons in contravention of Part V of the Law] or section 78(1)(c) [remaining or residing in the Islands where such remaining or residing is or would be in contravention of the Law];*
- (c) a person who has been sentenced in the Islands to imprisonment for not less than six months,*

unless a magistrate shall have reported on the case and the Cabinet, having had regard to the findings of fact and conclusions of law and any recommendation contained in such report, is satisfied that such order may properly be made.

- (2) Where it is intended to take proceedings against any person for the purpose of obtaining a report under subsection (1), a notice shall be served upon such a person giving him reasonable information as to the nature of the facts alleged against him and the grounds upon which it is alleged that a deportation order should be made, requiring him to show cause why such an order should not be made and naming the time and place for his appearance before a summary court in that behalf...*
- (3)...the court shall take such evidence on oath...and, after considering the evidence adduced before it and making any further investigations which it may consider desirable, shall report to the Cabinet, setting out its findings of fact and conclusions of law, if any, and making such recommendation as he [sic] thinks fit." (My emphasis)*

35. Section 89 (the marginal note to which states "*Power of the Governor to make, revoke, vary or modify a deportation order and duty to report to the Secretary of State*") provides:

“(1) Subject to...section 88, the Governor may, if he thinks fit, make a deportation order in respect of any person who is-

(a) a convicted and deportable person...

...(d) a person whose permission to land and to remain or reside in these islands...has expired or has been revoked and who fails to leave the Islands...”

Appeals from decisions of immigration officer and the Immigration Board

36. Sections 14 and 15 concern appeals. In short, there is set out in those sections a detailed process of appeal. It is inapplicable to a PI.

The Bill of Rights (“the BoR”)

37. The Cayman Islands are part of the United Kingdom for the purposes of international law. The European Convention on Human Rights (“the ECHR”) has been extended to them. The BoR is based on the ECHR. Its form and content substantially follow the Convention. By section 9 of the BoR (which reflects Article 8 of the ECHR):

“(1) Government shall respect every person’s private and family life...

...

(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...

...

(e) to regulate the right to enter or remain in the Cayman Islands.”

Movement

38. By section 13:

“(1) No person shall be hindered by government in the enjoyment of his or her freedom of movement, that is to say, the right to move freely throughout the Cayman Islands, the right to enter the Cayman Islands, the right to leave the Cayman Islands and immunity of expulsion from the Cayman Islands.

(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision-

...(d) for the imposition of restrictions on any person who is not a Caymanian or permanent resident; but-

...

(iii) no such person shall be liable, by virtue only of this paragraph, to be expelled from the Cayman Islands unless the requirements specified in subsection (3) are satisfied;

...*(3) The requirements to be satisfied for the purposes of subsection (2)(d)(iii) are as follows-*

- (a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;*
- (b) that person has the right to submit reasons against his or her expulsion to a competent authority prescribed by law; and*
- (c) that person has the right, save where a court has recommended his or her deportation, to have his or her case reviewed by a competent authority prescribed by law; and*
- (d) that person has the right to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority;*

but paragraphs (b), (c) and (d) shall not apply where the interests of defence, public safety or public order so require..."

39. By section 19:

- "(1) All decisions and acts of public servants 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."*

Incompatibility

40. By section 23:

- "(1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.*
- (2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.*
- (3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility."*

41. By section 25 of the BoR (the "Interpretive obligation"):

"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 to in a way which is compatible with the rights set out in this Part."

42. By section 26 of the BoR:

"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."

The judgment below

The remission to the IAT for a re-hearing

43. In remitting the Respondent's application for a RERC to the IAT for a re-hearing, the judge found, among other things, a failure by the tribunal to balance its requirement under section 9 of the BoR to consider the right to family life against the interests of public safety: see paragraph 26 of the judgment. Given there is no appeal in respect of this aspect of the judgment, it is unnecessary to say any more about it.

The designation of the Respondent as a PI

44. The judge found that on being sentenced to two years imprisonment the Respondent "...[was] automatically designated as a PI pursuant to s.82(h) of the Law." In other words, he became a PI by operation of law. It is agreed the judge was correct in that respect.
45. The judge said that "*Having regard to sections 66 and 67 [of the Law], the Plaintiff rightly submits that the designation as a PI pursuant to s.82(h) of the Law removes from that person any right to reside in the jurisdiction after his release from custody. This proposition was accepted by counsel for the Respondent...he conceded that, as the RERC had not been granted...the Plaintiff had no right to work or permission to reside in the Cayman Islands. This means that a person in the Plaintiff's position...who is in the jurisdiction and who has been convicted of an offence and been sentenced to over 12 months custody is in effect required to leave the jurisdiction immediately upon release from Her Majesty's Prison, as he cannot lawfully remain. In the absence of an appropriately worded injunction order, if he decides to remain to try and challenge his removal or to make an application to regularise his immigration status, he can only do so by being here illegally as permission to remain...cannot be given...by an Immigration Officer under the Law.*" (paragraph 43)
46. The judge went on state that the permission to remain given without knowledge of the fact Mr Ellington was a PI, could not in the circumstances have been lawfully granted. "*The designation of PI in effect means that a person is compelled to leave without having being [sic] able to go through the procedures in s.88 and s.89 of the Law, unless he chooses to remain unlawfully.*" (paragraph 45)
47. The judge referred to the equivalent provisions in the United Kingdom under sections 32 and 33 of the Borders Act 2007. Section 32 provides that a foreign national sentence to imprisonment for 12 months or more may be subject to "*automatic deportation.*" However, section 33(2)(a), provides an exception where removal would breach that person's Convention

Rights. As the judge observed, the Immigration Directorate Instructions in respect of deporting non-EAA foreign nationals stated:

*“If deportation would breach the person’s rights under the...ECHR...then the exception at section 33(2) applies.
Where deportation is pursuant to section 32...claims must be considered in full before a deportation order can be signed.
If there is found to be a breach of the UK’s obligations...of ECHR then deportation...will not be possible.”*

48. The judge said that *“Regrettably, I note there is no human rights provision similar to s.32 of the Act or at all in the Law or the Customs Law.”* (paragraph 46)

49. Mr. Smith argued before the judge that there was no provision providing for or permitting automatic removal or deportation. There had to be a process (under section 74 of *the Law*, paragraph 32 above). That process involved consideration of removal by at least an Assistant Chief Immigration Officer). That consideration had to be in accordance with the law and take account of Mr Ellington’s constitutional rights. The resulting decision would be amenable to judicial review. The judge said:

“This would all have merit if one was not dealing with an unsuccessful RERC application made by an individual like the Plaintiff who is designated as a PI. It fails to recognise that the effect of s.66 and s.67 [paragraphs 28 and 30 above] of the Law for a PI is that “leave to remain” cannot be granted by the Immigration Department and that a criminal offence would, unless there is a court order preventing his removal, be immediately committed if he remained after his release from custody.” (paragraph 53)

50. The judge also rejected Mr Smith’s submission that the designation of a PI did not amount to effective deportation as the Cabinet could issue an entry permit under section 63 (paragraph 26 above) of *the Law*. The judge said (among other things) there was no evidence as to the practicality of such an application, what the likely procedure was and that the Cabinet may feel less weight should be given to family life or relationships when the Cabinet was considering an entry permit if the applicant was in the Cayman Islands unlawfully.

51. The judge saw force in the submission that the reality was that designation as a PI meant that someone in Mr Ellington’s position was left with the choice of either leaving irrespective of his family unit or remaining unlawfully and possibly being arrested. As I read the judgment, it was his view that automatic designation as a PI with those consequences failed to take account of the requirement under section 9 of the BoR to have regard to a person’s private and family life when deciding how to regulate the right to remain in the Cayman Islands.

52. The judge finally said (on this aspect);

“62. Although it is understandable why the Legislature might legislate, for the public good, that foreign nationals should be subject to automatic deportation if they have been convicted of any offence in the Cayman Islands and sentenced to a period of imprisonment of 12 months or more to, for example, protect the public, there still should be in the legislation provision for an appropriate avenue for consideration to be given as to whether the effect of a PI designation might be reviewable if it amounts to a contravention of rights under the BOR.

63. The automatic designation of PI, with a consequence of what is in effect an automatic deportation, in the absence of any provision enabling a review to be conducted taking into account BOR considerations in particular the right to Family Life, makes s.82 of the Law [paragraph 22 above] ...incompatible with the BOR. This is even more so because, even if there existed a realistic avenue for review, if the PI remains in the Cayman Islands after his release from custody provisions in the Law mean that he would be committing a criminal offence.

64. The contentions put forward by Respondent, initially based on an inaccurate interpretation of the word “land” and of the consequences of s.66 and s.67 of the Law and based on the suggested unrealistic avenue for considerations by means of an application to Cabinet for an entry permit, do not have force or adequately address the lack of opportunity for consideration of a PI and his family’s rights under the BOR.”

53. Although (in paragraph 60) the judge referred to his duty under section 25 of the BoR (paragraph 41 above), it was not something with which he dealt in any detail. That is something to which I shall return.

Mr Smith’s submissions

Grounds 2 and 3

54. Mr Smith accepted that while designation as a PI was, as the judge put it, automatic, deportation in consequence was not. The judge, submitted Mr Smith, had wrongly conflated two different things. There was in the circumstances no breach of Mr Ellington’s section 9 rights.

Section 74 (paragraph 32 above)

55. Mr Smith firstly relied upon section 74(3), which he submitted had to be read alongside section 74(1). He submitted, as he put it in his skeleton argument, that the subsection ‘conferred a discretionary power’ on the Chief Immigration Officer in respect of removal. In exercising that power, submitted Mr Smith, the Chief Immigration Officer was required to act lawfully, as required by section 19 of the BoR (paragraph 39 above). He was therefore obliged to respect Mr Ellington’s section 9 rights. The decision of the Chief Immigration Officer would be amenable to judicial review. The Chief Immigration Officer was obliged to act compliantly

with section 19 of the BoR. Review by a court of the Chief Immigration Officer's decision would sufficiently comply with Mr Ellington's rights under section 13(3)(c) of the BoR (paragraph 38 above).

Section 89 (paragraph 35 above)

56. Secondly, Mr Smith submitted (in his skeleton argument) that section 89 gave rise to a discretionary power in the Governor (the Cabinet under section 120 of the Customs and Border Control Law) in respect of a deportation of someone in Mr Ellington's position. The Governor was obliged to act in accordance with his obligations under section 19. Any decision by the Governor was subject to judicial review which would sufficiently comply with Mr Ellington's rights under section 13(3)(c) of the BoR.

Section 63 (paragraph 26 above)

57. Thirdly, Mr Smith submitted that someone in Mr Ellington's position could apply to the Cabinet under section 63. He submitted that although the section speaks in terms of landing permits, given the wide definition of 'land' in section 2, referring as it does to 'remain or reside,' Mr Ellington may apply under the section. Any decision by the Cabinet had to have regard to the Mr Ellington's section 9 rights. It too would have a duty to act compliantly under section 19 of the BoR. If in any decision it takes it failed to do so, that decision is amenable to judicial review. That too would sufficiently comply with Mr Ellington's rights under section 13(3)(c).

Ground 1

The interpretive obligation under section 25 of the BoR (paragraph 41 above)

58. Mr Smith submitted that the judge, other than mentioning he had such a duty, failed to consider its applicability in his interpretation of the law. This was a case, he submitted, in which the compatibility of the provisions of *the Law* with Mr Ellington's rights under the BoR was unclear or ambiguous, and gave rise to the obligation of reading, or giving effect to them, in a way which was compatible with those rights. Although he did not do so before the judge, Mr Smith set out in some detail how he submitted that might be achieved.
59. In his submissions Mr Smith drew the court's attention to the judgment of Henderson J in the Cayman Islands case of *Re Canute Naire* CILR [2013] (1) 345. He also drew attention to various cases in England and Wales, in which the similar, but significantly broader, provision under section 3 of the Human Rights Act 1998 was considered. Section 3 does not require, as does section 25 of the BoR, that compatibility with the BoR be unclear or ambiguous. Section 3 of the Human Rights Act merely states:

“(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights...”

60. In *Re Canute Naire*, Henderson J, set out what is agreed to be the law in the Cayman Islands in the following way:

“22 The Bill of Rights includes a requirement in s.25 that legislation must be “read and given effect in a way which is compatible with the rights” guaranteed by it...”

This section ensures that the court will strive to align an impugned legislative provision with what the legislature may reasonably be taken to have intended and, by this process of “reading down,” will seek to avoid a formal declaration of incompatibility, although the obligation imposed by s.25 arises only in “unclear or ambiguous” cases. Since the section appears in the Bill of Rights, it has the effect of elevating both the rule of construction itself and the limitation upon it to constitutional status. Clear cases of incompatibility are to be left to the legislature for correction.

23 *The utility of reading down is not without limit. In de Freitas v. Agric. Ministry Perm. Secy. (4) ([1990] 1 A.C. at 79), the Privy Council observed that “an enactment construed by severing, reading down or making implications into what the legislature has actually said should take a form which it could reasonably be supposed that Parliament intended to enact.” The Privy Council in de Freitas quoted with approval (ibid., at 79–80) from Osborne v. Canada (Treasury Board) (10) (82 DLR (4th) at 347) to the effect that, after a “wholesale reading down,” a law may “bear little resemblance to the law that Parliament passed,” which gives rise to a “strong inference” that it is simply incompatible. In such cases, the task of bringing the legislation into conformity with constitutional guarantees is best left to the legislative branch of government as it will have access to relevant information and expertise not available to the court.*

24 *The obligation to attempt to read a challenged provision in a manner compatible with the UK Human Rights Act has been described there as a “strong ‘interpretative obligation’” (see The Law of Human Rights, op. cit., para. 4.05, at 176). I accept that the courts of the Cayman Islands must approach the interpretative obligation with equal vigour, but the occasion is unlikely to occur as often because the Human Rights Act provision is expressed in broader language than s.25; the former (in s.3(1)) sets down an obligation (“as far as it is possible to do so”) which is not limited to “unclear or ambiguous” cases.”*

61. Mr Smith submitted that where the issue of compatibility is unclear or ambiguous, then the duty is a strong one, far stronger than the duty to avoid absurdity. In so submitting, Mr Smith drew the court’s attention to the speech of Lord Steyn in *R v A* [2001] UKHL 25 at paragraph 44, in which he said:

“Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: s 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: s 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it; compare, for example, arts 31 to 33 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, TS 58 (1980); Cmnd 7964). Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that ‘in 99 per cent of the cases that will arise, there will be no need for judicial declarations of incompatibility’ (see 585 HL Official Report (5th series) col 840) and the Home Secretary said ‘We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention’ (see 306 HC Official Report (6th series) col 778). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of s3 of the 1998 Act against the executive (‘Pepper v Hart; A Re-examination’ (2001) 21 OJLS 59). In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. ...”

62. Mr Smith also emphasised the words of Lord Nichols in *Ghaidan v Mendoza* [2004] UKHL 30, a case, as Mr Smith rightly said, very different on its facts from the present. At paragraph 32 and following Lord Nichols said:

“[32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under §3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But §3 goes further than this. It is also apt to require a court to read words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in enacting §3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

[33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary §3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not convention-compliant. The meaning imported by application of §3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, ‘go with the grain of the legislation’. Nor can Parliament have intended that §3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision convention-compliant, and the choice may involve issues calling for legislative deliberation.”

63. Mr Smith firstly submitted that the judge should have interpreted section 63 (paragraph 26 above) as empowering the Cabinet to grant permission, thereby affording the Respondent an opportunity to have his (and his family members’) right to a family life under section 9 considered. That would accord with the grammatical meaning of section 63 and the definition of ‘land’ in section 2 of *the Law* (paragraph 20 above).

64. Secondly, Mr Smith submitted there was a conflict between the discretionary regime for removing residency on conviction of an offence as provided for in section 38((1)(c), and the regime under section 66, the effect of which is to bar a PI from remaining in the Cayman Islands (in the light of the expansive definition of “land” in section 2). That, submitted Mr Smith, amounts to sufficient lack of clarity and ambiguity as far as compatibility is concerned to engage the interpretive duty under section 25 of the BoR. He submitted that the judge could have adopted an interpretation whereby a PI outside the island and seeking entry would be subject to the entry regime set out in sections 66 and 67 of *the Law*, but a PI already residing in the Cayman Islands would be subject to the discretionary regime set out in section 38. This could be achieved by an interpretation of section 38 which deleted the word ‘permanently, so it read:

“38. (1) *The Board or the Chief Immigration Officer may, in respect of any person who has been granted permission to reside permanently in the Islands, revoke such permission where-*

...

(c) he has been convicted of an offence against the laws of the Islands; ...”

65. Mr Smith submitted that such an interpretation would ‘go with the grain’ of *the Law* and was permissible under the doctrine espoused by Lord Nichols in *Ghaidan*. By bringing the status of a resident PI within the discretionary power of the Board or Chief Immigration Officer this interpretation would facilitate the consideration of BoR issues in determining the ongoing residency status of the PI, and thus bring *the Law* into compatibility with the BoR.

66. Thirdly, interpretive modifications would be required to avoid a resident PI breaking the law by remaining in the Islands pending determination of status under section 38 or otherwise. That, submitted Mr Smith, could potentially be achieved by changing the word ‘land’ to ‘enter’ in section 66, so it read:

“66. Without prejudice to any of the succeeding provisions of this Law, it is an offence for any person other than a person-

(a) who is Caymanian; or

(b) who is not a prohibited immigrant and satisfies an immigration officer that he is-

(i) authorised to carry on a gainful occupation under section 48, 53, 54 or 54A;

(ii) a person named in a work permit as a dependant of the licensee;

(iii) a person who is exempted under section 40 or a dependant of such a person; or

(iv) a person who has permission to reside or to remain permanently in the Islands under Part IV,

to ~~land~~enter in the Islands, without, in each case, specific permission, with or without the imposition of conditions or limitations, being given by an immigration officer.”

67. Such an interpretation, submitted Mr Smith, would accord with the legislative intent, in that *the Law* has separate parts dealing with residency (Part IV), and entry and landing (Part VI) and would therefore ‘go with the grain’ of *the Law*.

68. Fourthly, Mr Smith submitted that the words ‘remain and reside’ be removed from the definition of ‘land’ in section 2 of *the Law*. That would have the effect of bringing *the Law*, at least partly, into compatibility with BoR.

69. Fifthly, as a yet further alternative, Mr Smith submitted that an appeal could lie from the decision of the Chief Immigration Officer under section 74 or of the Cabinet under section 63 by amending the appeal provisions under section 15 of the Law by adding section 74 to the list in section 15 so that it read:

“(1) Save as otherwise provided in this Law, any person aggrieved by, or dissatisfied with, any decision of the Chief Immigration Officer under section 37C [specialist caregiver] section 42(5) [work permit] or 49 [key employee] or section 74 or of a Board other than a decision under section 14 may...

...serve notice on the Immigration Appeals Tribunal of his intention to appeal such decision.”

70. Finally, Mr Smith submitted that as the case law makes clear, the interpretive duty can involve strained constructions and changes to the meaning and effect of primary legislation. The duty is bound only by what is possible within the underlying thrust of the legislation under consideration and the proper purview of the court. Lord Steyn made clear in *R v A*, a declaration of incompatibility should be the last resort. He submitted that in the present case, it was the judge’s first resort.

My conclusions

71. I start with a general observation. It is surprising that there was no evidence before the judge or before us as to what the practice is in the Cayman Islands as far as someone in Mr Ellington's position is concerned. Not only does the court not have any idea what the practice is, but also there are no directives or rules such as would one would expect (and is the case in England and Wales). All there is, is the legislation. That hardly seems a satisfactory situation on any view, as the judge pointed out.

Grounds 2 and 3

Section 74

72. It seems to me there are problems with Mr Smith's submissions on section 74. Section 74(3) requires the Chief Immigration Officer to serve a written notice. That notice will specify when, within the next 14 days, the person unlawfully in the Cayman Islands "*shall be removed.*" It is, in other words, in mandatory terms. It is, in substance, an order for removal within 14 days. That does not suggest a statutory intention to grant a discretionary power. Moreover, there is nothing to suggest any procedure which either the Chief Immigration Officer or the person unlawfully in the Cayman Islands is to follow within, at most, the 14 days. There is no appeal process from the Chief Immigration Officer's decision as might be expected if this section was intended to confer a discretionary power as Mr Smith submitted. That may be contrasted with other decisions of the Chief Immigration Officer, in respect of which detailed appeal provisions are specifically set out in sections 14 and 15 of *the Law*.
73. While in the light of my view of section 74, it is not necessary to consider the section 13(3)(c), having heard argument on the point, I shall do so.
74. It is clear that under section 13(3)(c) someone in Mr Ellington's position is entitled to have his case reviewed by a competent authority prescribed by law. As Mr David on behalf of the Respondent rightly pointed out, any review by way of judicial review would fall substantially short of the sort of procedure followed by the Immigration Board and or the Immigration Appeal Tribunal under sections 14 and 15 of *the Law*. However, that having been said, judicial review would amount to an independent review of any decision taken by the Immigration Officer and be bound to have regard to the Immigration Officer's respect, or otherwise, of Mr Ellington's section 9 rights. In my judgment, that would amount to a sufficient independent review by a competent authority as required by section 13(3)(c).

Section 89

75. Section 89 does not impose an obligation on the Governor (or the Cabinet under section 120 of the Customs and Border Control Law) to make a deportation order. The Governor may, if he ‘thinks fit’ make such an order. In this case, the Governor has not ‘thought fit’ to do so. No question of the Governor’s consideration of Mr Ellington’s section 9 rights therefore arises. Mr Ellington’s liability to deportation arises under section 82(h). What section 89 does not do is require the Governor to consider every case falling within section 89(1). If such were the intention, the section would clearly say so.
76. I accept that if the Governor were to exercise his power under section 89, he would have to do so having regard to a person’s section 9 rights. Any decision would be subject to judicial review. For the reasons I have already set out, that would in my judgment amount to sufficient review by a competent authority as required by section 13(3)(c).

Section 63

77. While I accept that under section 2 ‘land’ is widely defined, it seems to me that to interpret section 63 in the way Mr Smith submitted does not reflect the legislative intention in respect of the section. First, as the marginal note indicates, the section is said to relate to the Cabinet issuing permits to enter the Cayman Islands. Second, it refers to a person being ‘admitted’ on terms specified by the Cabinet. It does not refer to a person remaining or residing. Third, if it were the intention that the Cabinet had the power to consider the cases of everyone who overstayed or was illegally in the Cayman Islands (as would follow from Mr Smith’s submissions), it seems to me the provision would plainly say so. For it would greatly increase the role of the Cabinet in this area. Fourth, while I do not consider, as the judge suggested, that the Cabinet would not seek to respect the constitutional rights of someone in Mr Ellington’s position, there is nothing to suggest any procedure which either the Cabinet or the person unlawfully in the Cayman Islands is to follow.
78. I need not repeat my views in respect of the section 13(3)(c) issue.

My conclusion in respect of Grounds 2 and 3

79. Accordingly, there is in my judgment nothing in *the Law* (and consequently the *Customs and Border Control Law, 2018*) which provides for the family rights of someone in Mr Ellington’s position to be respected. Once, as a result of his sentence of imprisonment he became a PI, he was liable to immediate arrest and deportation, without consideration of his section 9 rights. That, as the judge found, is incompatible with the BoR.

Ground 1

The interpretive obligation under section 25 of the BoR

80. Given that he made no submissions to the judge as to the possible practical application of section 25, it seems to me Mr Smith's criticisms of the judge are misplaced.
81. I accept, for the reasons Mr Smith set out, a declaration of incompatibility should be the last resort. However, as Mr Smith's possible different interpretation of the provisions makes clear, what he is effectively inviting the court to do, is amend specific sections of what is a complex piece of legislation involving many different and interconnected provisions. When asked whether he had considered the possible implications of his different suggestions on other provisions in *the Law* (and it follows, the *Customs and Border Control Law, 2018*), and conceivably, other provisions in other pieces of legislation, Mr Smith, perhaps surprisingly, indicated he had not, although he said he would do so if the court so requested. What, as it seems to me, Mr Smith is in substance asking the court to do, is to don the mantle of statutory draftsman in respect of a piece and area of legislation which is notoriously difficult, namely that of immigration, without having a detailed understanding of the possible overall consequences and implications of the suggested changes. I am too bound to say, with respect, that I would not be confident that research by Mr Smith, who is not a parliamentary draftsman, would allay the concerns I have expressed. Even where the provisions are unclear or ambiguous (as to which I shall shortly come), it does not seem to me that section 25 of the BoR contemplates the court effectively becoming parliamentary draftsman in an area of considerable complexity with many possible unintended consequences.
82. As to Mr Smith's submission of a conflict between section 38(1)(c), and the regime under section 66, that seems to me to ignore a significant difference between the provisions, and the intention no doubt lying behind them. Section 38 concerns someone with permanent residence convicted of any offence against the laws of the Cayman Islands. Section 66 concerns someone who is not a permanent resident and has been convicted anywhere of an offence punishable by at least 12 months' imprisonment (see section 82(h)). I see no conflict between them giving rise to unclarity and ambiguity as far as compatibility is concerned.
83. In short, this is not a case in which, in my judgment, the court should embark upon re-writing *the Law* (and hence the *Customs and Border Control Law, 2018*) so as to seek to make it compliant. That is something best left to the Legislature.

84. In all the circumstances, I would dismiss this appeal with costs to be taxed on the standard basis if not agreed.

Hon. C Dennis Morrison, JA

85. I agree.

Hon. Sir Richard Field, JA

86. I also agree.