IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G0386 OF 2013
CAUSE NO. G0387 OF 2013

IN THE MATTER OF SECTION 17(2) OF THE IMMIGRATION LAW (2013 REVISION)

AND

IN THE MATTER OF AN APPLICATION FOR PERMANENT RESIDENCE AND EMPLOYMENT RIGHTS BY MICHELLE JEAN HUTCHINSON-GREEN

AND

IN THE MATTER OF AN APPLICATION FOR PERMANENT RESIDENCE AND EMPLOYMENT RIGHTS BY ALISHA MYRIAH RACZ

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 3RD JUNE 2014, 21ST JULY 2014 AND 28TH AUGUST 2015

APPEARANCES: Mr. Robin McMillan of HSM Chambers for the Applicants in both Causes

Mrs. Suzanne Bothwell, Senior Crown Counsel for the Respondent in both Causes

Appeals against refusal of grants of permanent residence and employment rights – duty of Immigration Appeals Tribunal to observe the rules of natural justice and the duty of full and frank disclosure – duty of heightened scrutiny of the Court when considering such issues – whether Tribunal acted in breach of the principle of doubtful penalization – Tribunal directed to rehear the matter – whether Tribunal required to do so by application of the current Law or the Law in place at time of the application.

JUDGMENT
IN CAUSE NO. G0386 OF 2013

1. In Cause 0386 of 2013, Mrs. Hutchinson-Green ("the Applicant") appeals against a decision of the Immigration Appeals Tribunal ("the IAT") delivered on 17th October

2013, by which the IAT refused the Applicant's application for permanent residence and employment rights ("PR").

2. The Applicant is a citizen of Jamaica and a resident in the Cayman Islands since 19th February 1996. She is married to Mr. Garfield Green, who is also a citizen of Jamaica. They live in a home on Grand Cayman which is jointly owned by them. They have a son, born on 21 October 2001 in the Cayman Islands and a daughter born on 21 November 2007, in the United States of America.

3. The Applicant is employed as assistant supervisor and propagator with Growing Beauty Wholesale Nursery Ltd., a business company in which she owns 40% of the shareholding ("the business").

4. The decision of 17 October 2013 of the IAT, against which she appeals, was arrived at upon the rehearing on 4th April 2013 of the Applicant's earlier application to the Caymanian Status and Permanent Residency Board ("the Board") for a grant of PR.

5. Upon the rehearing, the IAT in refusing her application for PR, awarded the Applicant 92 points while the Board (in its decision of 1st May 2009) had awarded her 81 points. An award of a minimum 100 points by reference to the Points System promulgated in the Second Schedule to the Immigration Regulations issued under the Immigration Law, was required for a grant.

6. The IAT had conducted its proceedings in two stages. First, by determining on 1st November 2012 by oral decision, that valid grounds of appeal had been made out against the decision of the Board and later by way of a rehearing *de novo* of the Applicant's application, on 4th April 2013.

7. The Applicant takes no issue with the IAT's conduct of the proceedings in that manner in two stages and accepts that, in keeping with the applicable case law[1], the IAT was entitled to proceed in that way.

8. The gravamen of the Applicant's complaint is that the IAT determined to reduce the number of points awarded to her on three crucial factors and did so without first notifying her of its intention to do so and therefore without affording her the opportunity to persuade the IAT otherwise.

9. The three crucial factors – Occupation, Skills and Funds and Salary - with the points first awarded by the Board juxtaposed with those awarded by the IAT, are highlighted as follows:

		Board	Tribunal
1.	**Occupation**	18	16
2.	Knowledge and Experience	15	25
3.	**Skills**	17	14
4.	Financial Assessment	0	5
5.	**Funds and Salary**	10	6
6.	Contribution to the Community	4	9
7.	History/Culture Test	17	17
8.	Close Caymanian Connection	0	0
9.	General	0	0
		81	92

10. The resultant reduction in the three crucial factors by 9 points meant that the Applicant's award of 92 points would have otherwise satisfied the minimum of 100

[1] *Ford v Immigration Appeals Tribunal 2007 CILR 258; Aitken v Immigration Appeals Tribunal, Judgment of the Grand Court, Cause No. 471 of 2013, delivered on 9th February 2015; Chowtee v Immigration Appeals Tribunal Judgment of the Grand Court , Cause No. G423 of 2013, delivered on 6 March 2015.*

points required. Thus, notwithstanding that the IAT had increased the award of points in other factors to raise the total from the Board's award of 81 to 92 points, the effect of the reduction of the 9 points without first hearing from the Applicant, was to deny her application for PR. The Applicant complains that this was a breach of the rules of natural justice; more specifically that the IAT failed to observe and apply the *audi alteram partem* rule.

11. The Applicant also complains about the irrationality of the award, a concern she had raised with the IAT itself prior to the bringing of this appeal. In an email dated 22 October 2013 addressed to the Secretary to the IAT and copied to the Chairman OF the IAT, the Applicant requested that the points recalculation be further considered. She also enquired how "Occupation" could have been reduced from 18 to 16 points when her occupation had not changed; how "Skills" had been reduced from 17 to 14 points when they had not changed except to increase by way of her further training and education, and how "Funds and Salary" had been reduced from 10 to 6 points when her salary had increased and her husband and herself had come to receive a dividend of 40% profit share in relation to their shares in the business every six months. She received no response from the IAT.

12. It is also emphasized by Mr. McMillan on the Applicant's behalf, that while no complaint is made about the IAT's decision to allow the appeal against the Board's decision, no reasons have been given by the IAT as a basis against which to understand the approach which it took at the second stage; that is: upon the ultimate rehearing *de novo* of her application. The IAT simply allowed the appeal in its appellate capacity – it gave no reasons why it thought the Board had made mistakes.

13. There is yet a further concern about procedural fairness of which the Applicant complains as follows.

14. The Applicant's appeal to the IAT was filed on 7th May 2009 and so some four and a half years had in fact transpired between that date and the ultimate rehearing of her appeal and decision of the IAT on 17th October 2013.

15. As a consequence, when the IAT came to consider *de novo* the Applicant's appeal, it appears to have done so by reference to the Law that was in place in October 2013 and by reference to certain materials – the then current Employment Relations Department database and report and the Board's points calculations chart. Provided that the appropriate versions were used and applied fairly, reference to the first two categories of materials – the database and report – was authorized by the Second Schedule to the Immigration Regulations but reference to the third – the Board's point calculation chart – was not. This was a chart which had been created by the Board subsequent to the Board's original decision upon the Applicant's application but was nonetheless relied upon by the IAT. These three categories of materials will together herein be referred to as the "logistical materials".

16. The Applicant complains that the reliance of the IAT upon later versions of the database and report which were not the same as those relied upon by the Board and upon the unauthorized points calculation chart of the Board, redounded to her prejudice and detriment in ways to be examined below.

17. The Applicant further contends through Mr. McMillan, that the adoption of the later or unauthorized versions of the logistical materials, without regard to the penalizing consequences of thereby reducing the points which were awardable to her, was itself

also an unlawful exercise of authority. Alternatively, even if this course was in principle open to and was being considered by the IAT, the IAT should at least have properly informed and alerted her to the facts and invited submissions as to the appropriateness of the logistical materials to be deployed. Hence, a further breach of the rules of natural justice, says Mr. McMillan.

18. From the foregoing, there are discernible three distinct grounds of appeal raised by the Applicant:

(i) The alleged breaches of the rules of natural justice in the IAT's determination to reduce the points awarded by the Board on the three crucial factors without first giving the application notice of that intention and an opportunity to respond.

(ii) The irrationality of the award of points in the face of and contrary to the objective evidence showing that she had enhanced her occupational position, increased her skills by way of further training and education and increased her funds and salary by way of her acquisition of 40 per cent equity in the business and the commensurate dividends paid (or to be paid) to her.

(iii) The IAT's reliance upon later versions of the logistical materials (only some of which were authorized and promulgated under the Regulations) to the detriment of the Applicant and all in breach of the principles of "doubtful penalization" and retrospectivity, as developed and explained in the case law.

19. I will come below to deal with each of these grounds of complaint in turn. Before doing so, I must set out the rest of the relevant factual background.

20. In her first affidavit dated 22 November 2013, the Applicant sets out her complaints which I have summarized above. The IAT responds by way of the first affidavit of 14 January 2014 of Mr. Buck Grizzel sworn in his capacity of Deputy Chairman of the IAT.

21. Mr. Grizzel states in paragraph 4 of his first affidavit in response to the Applicant's arguments, that the IAT calculated the points awarded for "Occupation", "*with reference to the Employment Relations Departments' database as required by Schedule 2 of the Points System in the Immigration Regulations*". While he later confirms in his second affidavit that the Regulations relied upon were the 2010 Revision (in terms the same as the 2007 Revision relied upon by the Board), this does not confirm that the IAT relied upon the same logistical materials as did the Board. He simply states in this regard that the IAT calculated the points awarded for "Skills" based on the Employment Relations Department's report "*as required by Schedule 2 of the Points System in the Regulations*".

22. In his second affidavit at paragraph 8, Mr. Grizzel also states but without further elucidation as to which version was used that:

> *"As regards the use of the Employment Relations Database...in the calculation of such points the (Tribunal) utilizes an electronic database which the (Tribunal) would have access to via laptop computer at the time of the rehearing"*

23. The Regulations in force at the time of the Applicant's application to the Board were, in fact, the 2007 Revision. In both the 2007 and 2010 Revisions of the Regulations, the explanatory notes to the Second Schedule Points Systems read as follows, respectively in relation to the award of points under the heading "Occupation" and "Skills" :

"

"FACTOR 1	POINTS
1. Occupation a. Professional b. Skilled c. Unskilled and domestics	(Maximum 20)
Explanation (i) The points for occupations are compiled with reference to the Employment Relations Department's database. (ii) Points are allocated in accordance with the professions and skills needed in the Cayman Islands in any particular year. (iii) No points are given for occupations where there are enough qualified Caymanians to meet the demands of the labour market."	
3. Skills a. Professional b. Skilled c. Unskilled	(Maximum 20)
Explanation An applicant will be allocated points in accordance with the level of skills required for his occupation, based on the Employment Relations Department's report.	

"

24. Mr. McMillan, on behalf of the Applicant, complains that although authorized as shown above in the Regulations, neither the Employment Relations Department's database nor report relied upon by the IAT was shown to the Applicant by the IAT for her comment nor made available to this Court for its assessment.

25. Moreover, he points out that Mr. Grizzel admits in paragraph 5 of his First Affidavit that the IAT calculated points awarded for "Funds and Salary" based on the points calculation chart created by the Board in August 2009 (and so after the Board had

dealt with the Applicant's application in May 2009). According to Mr. Grizzel, this chart had been "*adopted by the (IAT) to ensure consistency of points awarded*".

26. But this chart too was never shown to the Applicant, nor has it been produced to this Court for its assessment.

27. Mr. McMillan also complains that the IAT had no authority under the Second Schedule of the Points System to take the Board's points calculation chart into account and therefore also clearly acted unreasonably in breach of the relevant principle in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*[2] and *ultra vires*.

28. As regards "Funds and Salary", the Points System of the Second Schedule to the 2010 Revision of the Regulations provides as follows:

"

5. Funds and salary a. Evidence of funds (cash and investments) b. Evidence of salary and income	(Maximum 20)
Explanation The Applicant must satisfy the Caymanian Status and Permanent Residency Board that he has sufficient resources through income or investments to support himself and any dependants accompanying him. Ability to provide sufficient funds for his and their healthcare, education, accommodation and maintenance is of paramount importance for prospective long term residents.	

"

29. It must be emphasized that no reference was there made in the Second Schedule to a points calculation chart created by the Board.

[2] [1948] 2 All E.R. 680

30. By asserting merely the identity and existence of logistical materials some of which – the Board's points calculation chart – had no basis in the Regulations and without producing the material itself, Mr. McMillan complains that the Tribunal is unable to prove the truth or reliability of the content of the logistical materials upon which it relied. Nor, moreover, he submits, does the Tribunal through Mr. Grizzel, purport to do so. Rather, in his second affidavit at paragraph 8, Mr. Grizzel states in relation to one aspect only of the logistical materials – the database – merely that the Tribunal had access to an electronic version by way of laptop computer.

31. Thus, all that Mr. Grizzel is saying here, is that the IAT utilized material as identified in the Second Schedule and which was available to it in electronic form. Taken at its best then, this was material respectively called databases, a report and a points calculation chart – the logistical materials – the reliance upon which can, as a matter of evidence for the purposes of this appeal, carry no probative or persuasive weight at all. I accept that this is the only reasonable conclusion if for no other reason, than the fact that the logistical materials had not been produced and if they still exist, may have changed as often as they were issued by the Employment Relations Department and the Board.

32. Mr. Grizzel goes on to confirm in paragraph 6 of his first affidavit, that a hearing *de novo* did in fact take place in respect of the Applicants' appeal and in which the IAT adjusted downward "*the points previously acquired*" in respect of the three crucially disputed factors. He then asserts but without further explanation the proposition that:

> *"The (Tribunal) has the ability to do so per the Immigration Law ("the Law") and precedent."*

33. In this regard, Mr. Grizzel goes on to assert that because there was a rehearing of the original application (which in legal principle the Applicant does not *per se* dispute[3]); all points are recalculated "*at the hearing de novo as the matter is considered afresh*". Thus, it is to be inferred that the IAT considered that because the matter was to be considered afresh, then only later versions of the logistical materials identified above were relevant to the rehearing.

34. This approach of the IAT is confirmed in paragraph 14 of Mr. Grizzel's first affidavit where he states further that the IAT is required to treat the appeal as a new application "*and apply the relevant provisions of the Law and Regulations*"; going on in paragraph 20 to submit that the IAT acted as any tribunal would in that it considered the appeal and accompanying materials before it "*against the Law in place at the time*".

35. In fact, says Mr. McMillan, it was not only against the Law in place at the time but also impermissibly, against the then current logistical materials (including the Board's points calculation chart created by the Board subsequent to the Board's original decision), that the IAT considered the appeal.

36. This is the factual background against which the Applicant complains not only that the IAT acted in breach of the rules of natural justice and irrationally, but also in breach of the principles of doubtful penalization and retrospectivity of legislation.

Heightened scrutiny and the Court's duty of protective oversight and irrationality

37. In this case, the fact of the matter is that the respondent IAT has not disclosed the logistical materials which appear to have been essential to its decision-making. The Court is therefore not placed in the position of being able to assess the reasonableness

[3] See Ford and other case citations at paragraph 7 above).

or otherwise of the IAT's use and application of the logistical materials, even while it is called upon to decide whether or not the IAT's decision is justified.

38. In the circumstances, the Applicant submits that in light of its concealment, the IAT cannot justify the actions which it has taken and fails to meet the heightened standard of scrutiny which both the Constitution and the case law now require of the Court.

39. The duty of the Court to investigate and scrutinize the circumstances under which an impugned administrative decision was taken has long been recognized.

40. In the *Wednesbury* case, Lord Green MR stated in this regard at page 685 G-C that:

> *"I do not wish to repeat what I have said, but it might be useful to summarise once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account."*

41. Propounding what has since come to be called a "heightened scrutiny test"[4], an even more stringent kind of judicial activism was encouraged by Lord Bingham M.R. in *R v Ministry of Defence, Ex parte Smith*[5], where, in relation to irrationality he stated at page 554 D-G:

> *"Mr. David Pannick who represented three of the Applicants, and whose arguments were adopted by the fourth, submitted that the court should adopt the following approach to the issue of irrationality:*
>
> > *'The Court may not interfere with the exercise of an administrative discretion on substantive grounds save*

[4] R (Daly) v Home Security [2001] 2 A.C. 532, 547 F, per Lord Steyn.
[5] [1996] Q B 517

> *where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'*
>
> *This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in Reg. v Secretary of State for the Home Department, Ex parte Bugdaycay [1987] A.C. 514 and Reg. v Secretary of State for the Home Department, Ex parte Brind [1997] 1 A.C. 696."*

42. This duty of "anxious"[6] or "heightened" scrutiny, or, as it is further described – the "Super-Wednesbury treatment"[7] – was recognized by this Court in Axis Intl. v Civil Aviation Auth.[8] It is a duty that will arise depending on the context of the case, so to place the focus more closely upon the details of the decision-making of the authority whose decision is brought into question. In such cases – which will more readily arise in the human rights context – the Court should not necessarily be looking for an extreme degree of unreasonableness, capriciousness or absurdity on the part of the decision-maker before intervening, something less will do[9].

43. As I understand the reasoning from this line of cases, the human rights context will especially require that the significant "margin of appreciation"[10] usually accorded to the administrative decision in question will be curtailed where the decision-maker has failed in its duty of full and frank disclosure owed to the Court. Put another way, my

[6] Per Lord Bingham in Ex parte Smith (op. cit) at 554-555 (quoting from the judgment of Lord Bridge in Ex Parte Bugdaycay. (at p.531).
[7] Per the European Court of Human Rights in HL V uk 2004) 40 EHRR 34.
[8] 2014 (1) CILR 12 at para. 208-221.
[9] Op cit. at para 213.
[10] Per Bingham MR from Ex parte Smith (above).

reluctance to intervene save upon a clear showing of unreasonableness on the part of the IAT, is diminished in the light of its failure in its duty of full and frank disclosure and this carries practical consequences.

44. It is in this manner that the issue – whether the decision is unreasonable in the classic sense – will be examined through the prism of heightened scrutiny.

45. There can moreover, be no doubt, as set out in section 19(1) of the Cayman Islands Constitution Order, 2009 that the right to lawful administrative action is a fundamental right which demands at the very least, a high level of protective oversight by the Court. Section 19(1), which is headed "Lawful Administrative Action", provides that all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

46. As Mr. McMillan submits, it is to be carefully noted that this section is found in Part 1 of the Cayman Islands Constitution Order, 2009 itself, bearing the title "Bill of Rights, Freedoms and Responsibilities".

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

48. Nor, moreover, can the IAT be in any doubt that the duty of full and frank disclosure applies to an administrative body like itself – the duty was recognized and explained by this Court as long ago as in December 1998 in *Streeter v Immigration Board*[11].

49. It cannot be said that the Tribunal has met this obligation in respect of the logistical materials.

50. More particularly, in relation to the Employment Relations Department's database and report, while the IAT was required and enabled by the Second Schedule of the Regulations to have regard to them, this court is obliged to scrutinize the manner in which it did so. For this reason the versions actually relied upon by the IAT and the manner in which it did so, should have been disclosed.

51. In the absence of this disclosure and any explanation of the manner of their application by the Tribunal, it is impossible for this Court to conclude that the IAT's decision taken by having to regard the logistical materials, was reasonable.

52. The same holds true for the IAT's reliance upon the Board's points calculation chart, about which there is the further complaint to be examined below that that reliance was unauthorized and *ultra vires*.

53. My determination at this juncture therefore, is that the outcome, as to the consequence of the IAT's lack of disclosure, cannot be merely neutral.

54. In my view, I am instead obliged – in light of the duty of heightened scrutiny resting upon the Court – to proceed on the basis that the margin of appreciation which would otherwise have been accorded the IAT's decision-making process is eroded to the point where the evidential burden has shifted to the IAT to establish the reasonableness of its decision, insofar as it relied upon the logistical materials without

[11] 1998 CILR 367

having first accorded the Applicant the opportunity to see and comment upon them and without now explaining its own reliance upon them, to this Court.

55. In this regard I confirm that I have seen and considered the minutes of the IAT's meeting at which it conducted the rehearing of the Applicant's application[12] and that there is there recorded nothing of the IAT's thinking on its reliance upon and application of the logistical materials.

56. With all the foregoing factors in mind, I am compelled to the conclusion, in agreement with the Applicant, that the IAT's decision to reduce the points awarded to her in the areas of "Occupation", "Skills", and "Funds and Salary", is irrational. This must be so in the absence of a rational explanation from the IAT and in light of the fact that she had *prima facie* enhanced her position in each of those areas as explained above.

57. And I will add here that the fact that the IAT had a discretion on a rehearing *de novo* to reduce points, did not relieve the IAT of its paramount obligation to act fairly and rationally and to do so in a transparent manner.

Natural Justice

58. I am compelled to a similar conclusion in relation to the Applicant's complaint of the breach of the rules of natural justice. Notwithstanding that it intended to award points for Occupation, Skills, Funds and Salary which would be crucially fewer than had been awarded by the Board, no warning that it had such a course in mind was communicated by the IAT to the Applicant to give her an opportunity to respond. Such an opportunity would have afforded her both sight of the logistical materials

[12] Produced by Senior Crown Counsel Mrs. Bothwell in response to Mr. McMillan's request by way of disclosure in these proceedings on April 5, 2014, by email.

upon which the IAT intended to rely (and did rely) and the ability to give an appropriate response.

59. Again, the fact that the IAT was free to reduce points upon a rehearing *de novo* did not relieve the IAT of its paramount obligation to act fairly.

60. The modern case law provides a clear guide to the application of the rules of natural justice in this regard.

61. *In Lloyd v McMahon* [1987] 1 All. E.R. 1118 at page 1161, Lord Bridge of Norwich explained:

> *"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial has to make a decision which will affect the rights of individuals, depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."*

62. *To* similar effect, in Wi*seman v Borneman* [1969] 3 All. E.R. 275, Lord Guest declared (at 279 G-)

> *"It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent on the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made on the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. The dictum by Byles J.; in Cooper v Wandoworth Board of Works (1863) 14 CBNS 180 AT 194, 143 ER 414 at 420) is clear to this effect and has been followed in many subsequent cases."*

63. This well-known line of judicial reasoning was more recently affirmed by the English Court of Appeal in *R v Secretary of State, ex p. Doody* [1993] 1 All E.R. 151.

64. There it was decided that the principles of natural justice endowed a prisoner serving a mandatory life sentence with the right to make representations in writing to the Secretary of State as to the period he should serve for the purposes of retribution or deterrence before the date for first review of his sentence and, before giving him the opportunity to make such representations, the Secretary of State was also required to inform the prisoner of the period recommended by the judiciary as the tariff period and any other opinion expressed by the judiciary which was relevant to the Secretary of States' decision as to the appropriate tariff period.

65. In other words, and in terms that would be more generally applicable to a case such as the present – the settled case law is to the effect that the requirements of natural justice entail giving a party the opportunity to make representations and the relevant information known to the decision-maker which would be pertinent to the party's ability to do so, before an adverse conclusion contrary to the party's interests is arrived at by the decision-maker.

66. This broad and fundamental principle of administrative law is also illustrated by the local case law.

67. In a context similar to the present this Court, in returning a matter to the IAT for its reconsideration, provided specific guidance in relation to further questions (interrogatories) which the IAT required that applicant to answer, going beyond any concerns which had been raised by the Board, in these terms[13]:

[13] *Ford v Immigration Appeal Tribunal* 2007 CILR 258 at 272.

> *"40. In conclusion, I would only add that whatever the underlying concern of the interrogatories may be, the IAT will be sure to allow the Appellant the fullest opportunity to address them. This will involve notifying, in the clearest terms, the real nature of the remaining concerns, if that be the case after the interrogatories are answered, and allowing him to respond to the concerns.*
>
> *41. Only then could it be said that "the appellant has in fact been dealt with fairly when the proceedings as a whole are considered", to adopt the further views expressed in Lloyd v McManon (1) above. With that caution given, I conclude that the interrogatories are not unlawful."*

68. In effect then, it can be said that the *Ford* decision stands, among other things, for the proposition that where on a rehearing the factual determinations may be at large, there has to be proper regard to the rules of natural justice.

69. In its reliance here upon the logistical materials without affording the Applicant the opportunity of responding to its intended application of them to her detriment, the IAT clearly failed to satisfy the requirements of procedural fairness imposed by the foregoing principles of natural justice.

The Principles against doubtful penalization, retrospectivity and *ultra vires*

70. Mrs. Bothwell arguing for the IAT was clear in her submissions that the Board's points calculation chart (which she described as a "policy document") had not been in existence when the Board considered the Application but was later promulgated by the Board and adopted by the IAT at the time of the rehearing *de novo* and without notice to the Applicant. This, Mrs. Bothwell acknowledged, resulted in the Applicant's points awarded for "Funds and Salary" being reduced from 10 (awarded by the Board) to 6 awarded by the IAT.

71. Mrs. Bothwell nonetheless says that the IAT's position is that it was/is entitled to adopt policy outside the Regulations as to how it awards points, once the policy is fair

and relevant and once the IAT continues to keep an open mind as to its discretionary powers under the Law and does not allow the policy to fetter its discretion.

72. She stated that the IAT does not agree that because the policy document is not in the Regulations it is *ultra vires*.

73. Mrs. Bothwell nonetheless conceded that the policy document was never published and that if not having been aware of the policy document the Applicant was denied an opportunity to make representations, then there has indeed been a breach of natural justice.

74. That being the case as I have found, Mrs. Bothwell made a further submission. In assuming that the case should be referred back to the IAT, she argued that the basis for any further rehearing would be that whatever the state of the Law at the time of the first rehearing, the Law currently in place should apply.

75. In other words, irrespective of the detrimental impact of any change in legislation and of the latterly adopted logistical materials including the policy document, it is the Law presently in place that applies to any rehearing. Thus, the policy document which has since been authorized and must now be regarded as a part of the Law, would be validly applied. It would follow, says Mrs. Bothwell, that the onus should be upon the Applicant to show that the repealed Law (as it existed without the policy document) still applies to proceedings of the IAT.

76. She submits that the current logistical materials, including the policy document (ie: the Board's points calculation chart) would be applicable.

77. It follows that I am required to compare the state of the Law (including the logistical materials to the extent authorized) as it stood at the times of the Applicant's applications to the Board and before the IAT, and as it stands now.

78. An important point of reference with which to begin this exercise is the unconscionably long delay of some seven years that attended the Applicant's application to the Board for PR on 7th November 2006[14] until it was finally refused by the IAT on 17th October 2013. This is important because during the period of the delay, the logistical materials (which included the Board's points calculation chart and, given its nature, the Court is obliged to assume changed in its content from time to time) may have operated to the detriment of the Applicant.

79. Put another way, as the Applicant has emphasized in paragraph 17 of her second affidavit, the continuing administrative delays for which the Board and the IAT were exclusively responsible may have caused and/or resulted in the diminishment or erosion of her prospects for success in being granted PR as her application came to be subjected to logistical materials that were of doubtful applicability.

80. In the Fifth Edition of his authoritative work on Statutory Interpretation, Francis Bennion states the following principle at section 271:

> *"It is a principle of legal policy that a person should not be penalized except under clear law (in this Code called the principle against doubtful penalization).*
>
> *The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalizes a person where the legislator's intention to do so is doubtful, or penalizes him or her in a way which was not made clear. In some cases, however, the court may*

[14] As explained above, it was actually considered by the Board 9th May 2009.

find that the intention to impose the detriment was so strong as to require the doubt to be overridden."

81. Francis Bennion himself elaborated upon the principle in an essay entitled "*Human Rights: A Threat to Law?"* [203] UNSWL Law JL 34; (2003) 26(2) University of New South Wales Law Journal 418:

> *"Under another name, this is the old principle that a person is not to be put in peril upon an ambiguity. It has also been judicially stated that "Plain words are necessary to establish an intention to interfere with ....common law rights". In this context the term "penal" has been treated by the Courts as a term of art, and yet given differing meanings. This is misconceived, because any law that inflicts hardship or deprivation of any kind is in essence penal. Some types of damage may be regarded in modern terms as contravening human rights, but that as I have said adds nothing of any substance. By reference to the principle against doubtful penalization (whether so-called or not) English Courts have over the years constructed a complex edifice of what we now call human rights."*

82. The principle against doubtful penalization was also referred to as an *"important principle"* by Lord Bingham in *R v Z* [2005] 3 All. E.R. 95 at page 103 H-J:

> *"Mr. MacDonald has relied on the important principle of legal policy, exemplified by Tuck & Sons v Preister (1887) 19 QBD 629, that a person should not be penalized except under a clear law, should not (as it is sometimes said) be put in peril on an ambiguity: See Bennion on Statutory Interpretation (4th Edn., 2002) p905".*

83. In section 271 *Bennion (op. cit)* goes on to explain that the principle against doubtful penalization should be applied to the purported imposition of criminal liability (or sanction). The learned author then states, in particular relevance to this appeal:

> *"Nature of the Principle: whenever it can be argued that an enactment may have legal meaning requiring infliction of a detriment of any kind the principle against doubtful penalization comes into play. If the detriment is severe the principle will be correspondingly powerful. As Staughton LJ said in relation to penalization through retrospectivity, it is "a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."*

84. To my mind, these principles lead inexorably to the conclusion in particular, that the retrospective application of the Board's points calculation chart to the detriment of the Applicant was impermissible. This is apart from the question of the doubtful authority of the Board to promulgate and apply such a chart as a policy document. The same would hold true for any other aspect of the logistical materials even if lawfully authorized but which changed so as to operate to the detriment of the Applicant, between the time of her application to the Board and its ultimate refusal by the IAT some seven years later.

85. The principle and my reasons for observing it here can be further illustrated by reference to the legislative history.

The legislative history

86. The Immigration Law and Regulations have been often amended, repealed and replaced over the years. Indeed, the primary legislation currently in force since 1st January 2004 – the Immigration Law 2003 – Law 34 of 2003) – has been amended and revised on no fewer than fifteen occasions. I refer to the most salient aspects of the legislative history.

87. It appears that the criteria for the assessment of applications for PR which specified such matters as character, suitability and financial independence, were first promulgated in section 29(2) of the Immigration Law 2003 (Law 34 of 2003).

88. These criteria were repealed by the Immigration (Amendment) (No. 2) Law 2006, section 20 of which in subsection (1B) provided instead that:

> *"For the purpose of assessing the suitability of an applicant for permanent residence other than a person referred to in subsection*

(1A) [a worker who had worked and resided within the Islands for 15 years or more], a points system shall be prescribed by the Governor."

89. Accordingly, the Governor in Cabinet first prescribed a Points System by way of the Second Schedule to the Immigration (Amendment) (No. 3) Regulations 2004. These were amended by the Immigration (Amendment) (No. 3) Regulations promulgating the Points System that was applicable and which was applied to the Applicant's application when it came to be heard by the Board on 1st May 2009 (but as the Points System then appeared in the Second Schedule to the Immigration Regulations (2007 Revision)).

90. The same Points System remained in place, then in the form of the Second Schedule to the Immigration Regulations (2010 Revision), when the Application came to be heard by the IAT in the two stages on November 1, 2012 and April 4, 2013 (as explained above) – the "2004 – 2010 Points System".

91. As discussed above, nowhere in the Law or Regulations or in the 2004 – 2010 Points System, was there any power given to the Board for the promulgation or use of its points calculation chart although, in the Points System (at Factors 2 and 3 – respectively dealing with "Occupation" and "Skills"), reference is made and implicit authorization is given to the Employment Relations Department's database and report.

92. The 2004-2010 Points System was repealed and replaced by that contained in the Second Schedule of the Immigration (Amendment) Regulations, 2013 and that was in turn repealed and replaced by the Second Schedule to the Immigration (Amendment) Regulations, 2015 (the "current Points System") made under the Immigration Law (2014 Revision).

93. There are fundamental changes wrought or to be wrought by the current Points System. Its Score Tabulation allows higher numbers of points to be attained under the various factors for a maximum of 215 points but requires a minimum of 110 points for a grant.

94. One sees, for instance, immediately at the beginning of the current Points System, the following:

> *"1. The Cabinet, in its discretion may publish a list of occupations specified as priority occupations.*
>
> *2. Where such a list is published, the Board or the Chief Immigration Officer [(the latter first given the power to make grants by the Immigration (Amendment) No. 2) Law 2006)] as the case may be, in considering an application for permanent residence under section 30, shall take such priority occupations into account."*

95. While it is my understanding that Cabinet has not yet published a list of priority occupations, were it to do so, an occupation like that of the Applicant could come to be regarded as not being a priority occupation. Thus, on the assumption that a priority occupations list (if published) could also be taken into account by the IAT operating on the basis that the Law currently in place is to be applied to the rehearing of her appeal, the Applicant could be affected detrimentally.

96. This is made clear enough by the Explanation now in place under the Occupation Factor in the current Points System, the first of the three crucial factors relating to the Applicant:

"

FACTOR 1	POINTS
Occupation	Maximum 30 points
a. Current Occupation	Maximum 15
b. Priority Occupation	Maximum 15

Explanation

1. Applicants will receive points for their current occupation. The points allocated to occupation are based on current demand for the occupation which is measured based on the ratio of Caymanians to non-Caymanians in the labour market.

2. The points allocated to each occupation under this Factor will be reviewed and adjusted periodically as needed.

3. The applicant will be awarded points based on the occupation he is working in at the time of the application submission. Where the applicant is unemployed at the time the application is being decided on, no points will be awarded under this category.

"

97. These Explanations appear to describe a system that is intended to replace that which relied upon the Employment Department's database and report used under the 2004-2010 Points System. If so, there are immediate and obvious concerns, not least of which is the absence of any explanation as to what source of information or what considerations would inform the reviews and adjustments to be periodically carried out as contemplated by Explanation 2. Nor is there any explanation as to who would be responsible for those exercises and what measures would be put in place to ensure that they are reasonably and objectively carried out.

98. In light of the concerns identified and discussed in this judgment, it is difficult to imagine a policy that could be more opaque, uncertain and prone to arbitrariness than one by which points are to be allocated to occupations based upon merely subjective assessments of their importance in the context of the local economy.

99. It is to be expected therefore, that the periodical review and adjustments of which Explanation 2 speaks, will be carried out in a manner capable of withstanding the kind of heightened scrutiny now required of the Court.

100. But be all that as it may, the obvious implication arising for the Applicant from Explanation 2 as it stands, is that the points which could be allocated to her occupation would be very much at large were the current Points System to be deemed applicable to her application.

101. Thus, the exercise of discretionary judgment to the allocation of the points for her occupation could result in the points formerly awarded to the Applicant in that respect by the Board being reduced to her detriment.

102. That is but one example of potential detriment. Further changes wrought by the current Points System could be just as telling for the Applicant.

103. The second factor, simply and compendiously described as "Skills" under the 2004-2010 Points System, is now described more elaborately as "Education, Training and Experience", with the natural implication that each heading is to attract particular assessment. This is explained under Factor 2 partially in these terms:

> *"Points will be allocated based on the applicant's academic qualifications, technical qualifications or educational certificates, by any internationally or nationally recognized institution or official body related in the applicant's current field of expertise or trade."*

104. By contrast, the "Skills" factor of the 2004-2010 Points System was simply explained as follows:

> *"An applicant will be allocated points in accordance with the level of skills required for his occupation, based on the Employment Relations Department report*[15].

105. This explanation suggests that the assessment of an applicant's level of skills should be taken relative to his or her occupation and without any broader question as to whether that level of skills can be objectively verified by reference to an internationally or nationally recognized certification. Or whether, for that matter, an applicant's level of skills has been acquired in relation to an occupation deemed a priority occupation by Cabinet or by the decision-making authorities[16].

106. Similar concerns from the Applicant's point of view, would arise in the event her application is deemed liable to be assessed under the current Points System under Factors 3 and 4 – "Local Investment" and "Financial Stability": the factors which were respectively described as "Financial Assessment" and "Funds and Salary" under Factors 3 of the 2004 – 2010 Points System.

107. Under "Financial Assessment" in the 2004 – 2010 Points System, an applicant could earn a maximum of 20 points by showing

a. Investment in property in the Islands;

b. Investment in a local company.

108. The Explanation simply stated:

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[15] An iteration or iterations of which were relied upon but never produced or disclosed by the Board or the IAT as discussed above.

[16] Under the current Law, being the Chief Immigration Officer, the Board or the IAT.

"In assessing the investment made by an applicant under (a) and (b) the Board shall take into account the applicant's investment relative to his actual means."

109. Thus, what might otherwise have been seen as a modest investment, might have been acceptable nonetheless if it had been made by a person whose means subjectively suggested a significant commitment by way of investment in the Islands.

110. Under the current Points System, the Explanation is expanded upon by the introduction of a formula thus:

"

Explanation

Total investment (numerator) relative to total income earned over the last five years immediately preceding the application (denominator).

$$\frac{\text{Total Investment}}{40\% \; of \; total \; income \; for \; last \; five \; years} \; x \; 30$$

Notes:

- Total investment requires a minimum threshold of CI$50,000. No points will be awarded for investments of less than this amount. But where the investment exceeds CI$50,000, points will be awarded for the full value, i.e. including the first CI$50,000.

- Maximum points will be awarded automatically where the total investment exceeds CI$500,000.

- Income means either-

  90% of total documented income for the last 12 months prior to making the application, multiplied by five; or

  100% of total documented income for the last five years....

"

111. Thus, it is clear that a stricter, less discretionary approach to the assessment of an applicant's local investments is required by the current Points System, such that its application instead of that in place when her application was heard under the 2004-2010 Points System could redound to the Applicant's detriment.

112. So too with Factor 4 of the current Points System, in its requirement of proof of "Financial Stability" rather than simply "Funds and Salary". This is now broken down under two subheads: (a) "*Evidence of cash and savings held locally*" and (b) "*Evidence of salary and income*".

113. For each of (a) and (b) a maximum of 15 points can be awarded.

114. Factor (a) allocates points based on the amount of savings an applicant has accumulated as a percentage of aggregate salary/income over the last twelve (12) months, with the maximum 15 points to be awarded if that percentage is 5 or greater.

115. Factor (b) applies eleven (11) annual salary bands ranging from the highest of $150,000 or greater, to the lowest of under $15,000; and allows points to be awarded relative to each of the eleven bands – 15 points for the highest to 0 points for the lowest. This is an allocation system that appears to broadly reflect the policy of the Board's points calculation chart – that which had been devised by the Board after it heard the Applicant's application but nonetheless applied by the IAT, on its rehearing *de novo* of the Applicant's appeal.

116. Two things must be emphasized from this. First, the current Factor 4(b) "Evidence and Income", adopts a narrower band of 11 (eleven) salary scales, compared to the 21 (twenty-one) used in the Board's chart, so the two are not the same even though the policy is broadly similar.

117. Second, the current Factors (4(a) and 4(b) have been promulgated and published as part of the current Regulations in the Second Schedule and so now have the binding force of the law. As discussed above, that never took place in relation to the Board's points calculation chart – confirmatory of the unauthorized and *ultra vires* nature of the latter. But more to the point of potential detriment here – it cannot be said with any certainty that the 10 points awarded by the Board for "Funds and Salary" would not be diminished by the IAT now applying the current Factor 4(b), were it allowed to do so upon a further rehearing directed by this Court.

118. The sum effect and the conclusion to which I am compelled therefore, is that the application of the current Points System could operate and redound to the detriment of the Applicant when compared to the 2004 – 2010 Points System in ways not clearly contemplated and permitted by the Legislature. For that reason, the principle against doubtful penalization and retrospectivity of the Law, are also engaged and require that I direct that the rehearing of the Applicant's application by the IAT takes place pursuant to the Law and Regulations as they stood at the time the application was taken by the Board; viz: pursuant to the 2004 – 2010 Points System; and more specifically – to the extent that there were variations within the 2004 – 2010 Points System itself – pursuant to the version that was applicable at the time of the Board's hearing of the application.

119. The following statement from Halsbury's Laws, Statutes and Legislative Process, Vol. 96 (3012), Fifth Edition, paragraph 617 supports this conclusion and gives further important guidance in determining the bounds of the doubtful penalization of legislation:

> *"...the true test is now considered to be whether a particular construction inflicts a detriment, or greater detriment, on persons affected. A law that inflicts hardship or deprivation of any kind on a person is in essence penal.*

There are degrees of penalization, but the concept of detriment inflicted through the State's coercive power pervades them all. The substance, not the form, of the penalty is what matters. The law is concerned that a person should not be put in peril of any kind upon an ambiguity; hence the principle against doubtful penalization."[17]

120. Accordingly and in conclusion, to the extent as I have found that the Law and Regulations are not clearly stated to be retrospectively applicable so as to operate to the detriment of the Applicant, it would be impermissible to require that her application be dealt with under a version of the Law or Regulations that would operate doubtfully in that way.

Sections 15(3)(A) and Section 16(5) and (6) of the Immigration Law (as amended by the Immigration (Amendment) No. 2 Law 2013

121. I may not pass from this debate without considering what it is that the Immigration Law itself appears to say about the question of the applicable provisions and their transitional effect.

122. Section 15(3)(A) now states in relation to appeals from decisions of the Board and the Chief Immigration Officer:

"At a hearing on grounds under subsection (1) the Immigration Appeals Tribunal shall apply the Law that is or was in effect at the time of the Board's or the Chief Immigration Officer's decision."

[17] I note that I have seen and considered the judgment of Hall J (Actg.) in *Davidson v I.A.T.*; Cause No. G 468 of 2011(written Judgment delivered on October 15 2013) in which the Learned Acting Judge decided (no doubt correctly) to direct a rehearing of an application for permanent residence on the basis of a failure by the IAT to allow the applicant to address an issue as to the allocation of points.
However, Hall J (Acting) went on to state in terms to be regarded as obiter dicta (at p18) that in the allocation of points the IAT would be guided by "the current circumstances of the Applicant" and at p20 lines 7-8 that "*It was entirely appropriate that the (IAT) apply the current laws when awarding points.*"
It does not appear that in arriving at that view, the Learned Acting Judge took into account section 15(3)(A) or any other transitional provisions of the Immigration Law (to be discussed below) or the case law discussed above on the principles of doubtful penalization and retrospectivity and for these reasons, I am compelled to disagree with her obiter dicta as it differs from the conclusion at which I have arrived in this judgment.

123. As a result of the same amending legislation, sections 16(5) and (6), dealing with the conduct of appeals (as indicated in the marginal note to sub-section (6)) also state:

> *"(5) The Immigration Appeals Tribunal or the pertinent Board when rehearing an application under subsection (4) shall do so by way of a rehearing de novo and shall take into account any fresh evidence by the appellant or the Chief Immigration Officer or the Board that may have arisen in relation to the parties, which is to be submitted in writing.*
>
> *(6) The Law in force at the time of the rehearing by the Immigration Appeals Tribunal or the Board shall govern the proceedings under subsection (5).*

124. Thus, seemingly contradictorily, on the one hand section 15(3)(A) requires the IAT to apply only the Law that is or was in effect at the time of the decision of the Board or Chief Immigration Officer under appeal and, on the other hand; under section 16(6) the IAT is required to apply the Law in force at the time of the rehearing by the IAT itself (or the Board as the case might be).

125. I agree with Mr. McMillan that this apparent contradiction can only be sensibly reconciled if section 16 is interpreted as being concerned with the "conduct of appeals", as the marginal note indicates, and therefore with procedure only and as the expression "shall govern the proceedings" also implies. Moreover, as to the application of the substantive law, as between section 15(3A) and section 16(6), it follows that section 15(3A) must accordingly apply.

126. This particular dichotomy between substantive law and procedure is borne out by section 114(7) of the latest version of the Law (as introduced by section 39 of the Immigration (Amendment) (No. 2) Law, 2013) and which states:

> *"For the avoidance of doubt where an appeal to the Immigration Appeals Tribunal was made prior to the commencement of the Immigration (Amendment) (No. 2) Law, 2013, the procedure governing*

the making and determination of such an appeal shall be that which is in effect after the commencement of that Law but the appellant shall have a period of sixty days from the commencement of that Law in which to file detailed grounds of appeal as required by section 15(6) and if no written submissions are received by the Tribunal during such period it may proceed to determine the appeal without further notice being given to the appellant." (Emphasis added.)

127. The words in emphasis suggest the legislative intention that the dichotomy is to be observed and that only the procedural and not the substantive law currently in effect can be applied retrospectively[18] so as to govern the applications and earlier appeals which had arisen for consideration under the earlier legislation.

128. The recognition and treatment of the dichotomy in that way is only reinforced by section 114 (1) and (2).

129. Subsection 114(1) provides that nothing in the Law shall adversely affect the rights of any person (albeit here I accept only the rights of the Applicant to a fair consideration of her application) acquired under the earlier Law. Subsection 114(2) provides that where an application for PR was made prior to the commencement of the Immigration (Amendment) (No. 2) Law, 2013 and is still pending, the Board and the Chief Immigration Officer (as the decision-makers) shall deal with such application in accordance with the law in effect immediately prior to such commencement.

130. It would be strange and illogical if the rehearing before the IAT were to be dealt with differently, so as to make the Law currently in place but which was not in place at either

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[18] The dichotomy is also recognized in the settled authoritative case law. In *Bertoli* et al *v. Malone* 1990-91 CILR 58, the Court of Appeal, applying *Yew Bon Tew v Kenderaan Baas Mara* [1983] A.C. 553, upheld the retrospective application of the procedural provisions of the Mutual Legal Assistance (United States of America) Law and Treaty even while recognizing the rule against the retrospective application of penal legislation.
While the Court of Appeal eschewed the attachment of the labels "procedural" or "substantive" in favour of examining the effect of the provisions, its conclusion turned on the fact that the provisions carried no substantive penal effect but were only administrative in nature and evidentiary in effect. The Court of Appeal's decision was upheld by the Privy Council: [1991] UKPC 17; CILR 1992-93 Note 1.

the time of the original hearing before the Board or the first rehearing before the IAT, applicable.

131. Mrs. Bothwell's submission to the effect that such different treatment would be justified on the basis that the IAT would be exercising its original jurisdiction (rather than its appellate jurisdiction) by way of rehearing *de novo* (presumably on fresh evidence as well) can be no basis for overlooking either the principle against doubtful penalization or the detrimental impact of the unconscionable delay that has beset the resolution of the Applicant's case over the course of more than seven years.

132. Here, the Applicant submits and I accept and conclude, that the substantive law to be applied upon the further rehearing of her appeal is that which was contained in the Immigration (Amendment) (No. 2) Law 2006 as revised in the Immigration Law (2010 Revision) and the 2004 – 2010 Points System.

133. I summarize my conclusions and directions as follows:

(i) The IAT has regrettably impeded the course of justice by its reliance upon the logistical materials without first having afforded the Applicant the opportunity to speak to that material.

(ii) The IAT has also regrettably failed to disclose to the Applicant and to the Court, the extent and manner of its reliance upon the logistical materials such that the Court has been unable objectively to assess the reasonableness of that reliance.

(iii) The IAT may therefore not be accorded the usual margin of appreciation for its decision and in failing to meet its duty of disclosure, has also failed to discharge the evidential burden which rests upon it to overcome the *prima facie* irrationality of its decision.

(iv) In failing to disclose to the Applicant the logistical materials upon which it intended to rely, including the Board's points calculation chart which had hitherto never been published, the IAT also acted in breach of the well-established principles of natural justice in a manner in contradiction of the guidance given by this Court in the *Ford* case (above).

(v) The Board's points calculation chart which was never promulgated under the Law or Regulations, was unauthorized and its application by the IAT to the Applicant's case was therefore *ultra vires*, void and of no effect.

(vi) In directing that the IAT rehears the Applicant's appeal, I also direct that in order not to fall foul of the principle against doubtful penalization, it does so by having regard to the Law and Regulations that were in place at the time of the hearing before the Board and before the IAT itself, viz: the Immigration Law 2003 as amended by the Immigration (Amendment) (No. 2) Law 2006 (and as revised in the Immigration Law (2010 Revision) and the 2004 – 2010 Points System. The IAT should apply the same Employment database and Employment report, as appropriate, that the Board had applied and points for "Funds and Salary" should be awarded solely upon the merits and not on account of any unauthorized policy document. The IAT is also directed to disclose to the Applicant any material upon which it intends to rely.

(vii) In the premises, the decision of the IAT is set aside for substantial wrong and miscarriage of justice as required by Order 55 r 7(7) of the Grand Court Rules and the IAT is directed to rehear the Applicant's application for PR in accordance with law.

134. As usual, the costs must follow the events and so the IAT must pay the Applicant's costs, to be taxed if not agreed.

JUDGMENT
IN CAUSE NO. G0387 OF 2013

135. The Applicant, Ms. Alisha Racz is a citizen of Canada who has resided in the Cayman Islands since 25 January 1999. She is employed as Executive Secretary – Corporate Communications at Water Authority-Cayman, the Government owned statutory body that supplies water and sewage treatment services on Grand Cayman, and the Sister Islands.

136. She too appeals under Section 17(2) of the Immigration Law (2013) from a decision of the IAT dated 15 October 2013 in which, upon the rehearing of her application for PR, the IAT awarded her 95 points, 5 less than the minimum 100 required at the time. The Board had awarded her 87 points.

137. Her appeal against the decision of the IAT proceeds upon grounds similar to those in the Hutchinson-Green appeal in Cause No. G0386 of 2013 and so it was proposed by Mrs. Bothwell and Mr. McMillan (who appears also for Ms. Racz), that I consider the appeals together and depending on the outcome, grant or refuse them together. In the event, this appeal also has been allowed and the matter referred back to the IAT for re-consideration in keeping with the directions given above in the Hutchinson-Green appeal.

138. On that basis, the following brief summary of the factual background will serve to set out the context for my decision in this matter.

139. The IAT having awarded Ms. Racz a total of 95 points, she wrote to the IAT on 8th November 2013, requesting that it reconsider its decision but no response was received.

140. The IAT had reduced "Occupation" by 8 points and "Funds and Salary" by 7 points. Meanwhile, "Knowledge and Experience" had been increased by 18 points from 2 points to 20 points; "Skills" by 2 points from 17 points to 19 points and "Contribution to Community" by 3 points from 6 points to 9 points. Apparently, says Ms. Racz, she received no appropriate or proportionate or sufficient points for her pension funds or for her sole ownership of an apartment valued at over CI$134,000. In summary, 23 points were awarded and a decisive 15 points were lost.

141. She complains that "*At no material time was I informed by or on behalf of the IAT that the IAT would consider reducing the number of points previously awarded and at no material time was I invited to make any submissions as to why my previously earned points should not be reduced. Had the said 15 points not been reduced and instead remained at their previous level, I would have received a grant of PR*".

142. She therefore complains that the IAT failed to accord her a fair hearing consistent with the principles of natural justice in circumstances where she had a reasonable expectation that her previously awarded points would not be reduced without an opportunity to make submissions to the IAT upon the specific issue.

143. That the IAT further acted unfairly and irrationally in failing to take into account or alternatively into proper account under her "Funds and Salary", her salary of CI$50,679.00. That the IAT further acted unfairly and irrationally in failing to take into account under "Occupation" the factors which had led the Board to award 12 points rather than 4 points and/or to justify in any way the said extraordinary reduction.

144. Still further, that the IAT failed at any material time to inform her that it would in practice examine her points at large and not only in relation to the matter of which she had complained, thereby depriving her as matters ensued, of a fair hearing in accordance with the principles of natural justice.

145. She emphasizes that at no material time did the IAT identify for her assistance and benefit any of the adverse factors which might lead the IAT to reduce the points previously awarded.

146. In the instant matter, no oral submission took place before the IAT in relation to the reductions, even though it was appropriate that the IAT should have expressly invited such oral submissions from her in these circumstances.

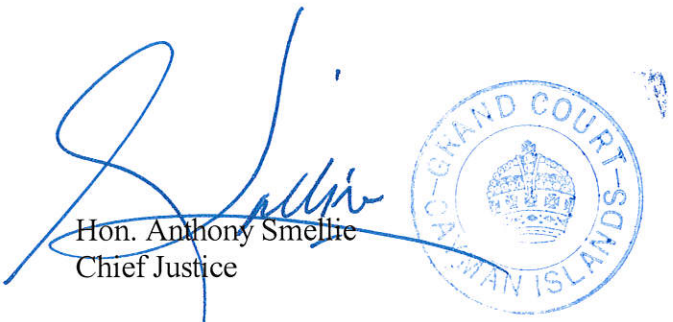
147. By reducing her points in the aforesaid unilateral and untransparent manner, the IAT created an appearance of bias in its deliberations.

148. She submits that the IAT acted in this matter unfairly, irrationally, unlawfully, erroneously, and in a manner that was *ultra vires* its statutory duties and responsibilities. Accordingly, that the decision of the IAT should be set aside for substantial wrong and miscarriage of justice so that her application can be reheard in accordance with law.

149. Finally, by way of relevant background, Mr. Grizzel in his first affidavit filed in response to Ms. Racz's appeal, confirms that the IAT calculated the points awarded for "Occupation" with reference to the Employment Relations Department's database as required by Schedule 2 of the Points System in the Immigration Regulations. And that the IAT calculates points awarded for "Funds and Salary" based on the points calculation chart created by the Board in August 2009 and adopted by the IAT "*to ensure consistency of points awarded*".

150. In the premises, I accept that the outcome in the Hutchinson-Green appeal should determine the outcome in this appeal and direct accordingly that this application is referred to the IAT for its reconsideration in keeping with the appropriate principles and subject to the same directions as given in Hutchinson-Green appeal.

151. Costs will follow the events in this Cause also.



Hon. Anthony Smellie
Chief Justice

August 28, 2015