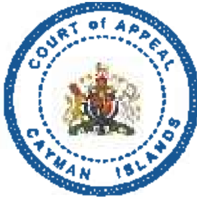

JRT OF APPEAL OF THE CAYMAN ISLANDS
FROM THE GRAND COURT OF THE CAYMAN ISLANDS
SION

CICA (Civil) 17 Appeal No of 2022
(G 52/21 & G 81/21)

BETWEEN:

JOEY DELOSA BURAY

First Appellant

LEON SUNIL CARMO D'SOUZA.

Second Appellant

-V-

IMMIGRATION APPEALS TRIBUNAL

First Respondent

-AND-

ATTORNEY GENERAL OF THE CAYMAN ISLANDS.

Second Respondent

BEFORE:

THE RT HON SIR JOHN GOLDRING, PRESIDENT
THE HON JOHN MARTIN KC, JUSTICE OF APPEAL
THE HON SIR RICHARD FIELD, JUSTICE OF APPEAL

Appearances: **Mr Alastair David of HSM Chambers for the Appellants**
Ms Claire Allen of the Attorney General's Chambers for the Respondents

Heard: **7 December 2022**

Draft circulated: **13 March 2023**

Judgment delivered: 30 March 2023

JUDGMENT

The President:

1. This is the judgment of the Court to which all of the members have contributed.

2. Many people wish to work in the Cayman Islands. Many of those permitted to do so wish permanently to remain there when their permit to work has expired. Unsurprisingly, the Government of the Cayman Islands has determined it is necessary both to control the number of work permits and the number of those subsequently granted permanent residence. In broad terms, a person may, after the eighth anniversary of being granted a work permit apply for permanent residence. In order to obtain such residence, such a person must attain at least one hundred and ten points on the basis of a Cabinet prescribed points system. If he fails to do so, he may appeal to the First Respondent. If that appeal fails permission to reside on the basis of his immigration permission ceases at its expiration.

3. The First and Second Appellants are respectively Philippine and Indian nationals. Each was granted a work permit. On their expiration, they applied for permanent residence. They both failed to achieve 110 points. Their subsequent appeals to the First Respondent were dismissed. Their appeals to the Grand Court on matters of law were dismissed by Walters J (Ag). It is against his judgment that they now appeal. It is the case of each Appellant that he has established a private life in the Cayman Islands, that the First Respondent's failure to consider that renders the decisions to refuse their applications for permanent residence contrary to their rights under section 9 of the Cayman Islands Bill of Rights and that their cases should be remitted to the First Respondent for reconsideration. It is further submitted that the statutory provisions are incompatible with section 9 of the Bill of Rights.

4. There is a secondary issue, namely whether there was procedural unfairness in the application of the statutory provisions to one or both of these Appellants in that the questions and their answers in the history and culture test (factor six of the Cabinet prescribed points system) were not disclosed to them.

5. In granting leave to appeal the President stated:

> "*This proposed appeal raises important issues of principle regarding the interplay between the points system and section 9 of the Cayman Islands Constitution. It also raises issues with respect to disclosure in immigration appeals. These are matters which in my view justify consideration by the Court of Appeal.*"

The statutory provisions

6. The relevant law at the time each of the Appellants applied for permanent residence was the Immigration Act (2015 Revision), their respective applications having been made under section 30(1) of that Act. The relevant law at the time of their appeals to the First Respondent

was section 37 of the 2018 Act, (entitled "*Persons legally and ordinarily resident in the Islands for at least eight years*") and, as material, is in identical terms to the Immigration (Transition) Act (2021 Revision), ("the Act") to which henceforth we shall refer.

Obtaining a work permit

7. Sections 56-66 of the Act set out the process by which an employer can apply for the grant and subsequent renewal of a work permit for an employee. In short, when a person is considering moving to the Cayman Islands to live and work, they may only generally do so if they are granted a work permit and may only remain while they hold such a permit. Neither the grant nor the possible periodic renewal of a work permit is guaranteed and such permits may only be granted for limited periods of time on the expiry of which an application must be made to renew them. A wide variety of factors are considered when an application for a work permit is made.

8. Section 66 sets the "*Term Limits*" for those in the position of the Appellants. The term limit is nine years from the time a person first entered the Cayman Islands as a work permit holder or, if he entered as a visitor, he is granted a work permit (section 66(1)).

9. By section 37:

> *"37. (1) Any person who has been, and is legally and ordinarily resident in the Islands for a period of at least eight years other than -*
>
> *(a) the holder of a Residency Certificate for Persons of Independent Means;*
>
> *(b) the holder of a Residency Certificate for Retirees;*
>
> *(c) the holder of a Certificate of Direct Investment or a Direct Investment Holder's (Dependant's) Certificate;*
>
> *(d) the holder of a Residency Holders (Dependant's) Certificate;*
>
> *(e) the holder of a Certificate of Permanent Residence for Persons of Independent Means; or*
>
> *(f) a person who was granted permanent residence under any earlier law in circumstances analogous to paragraphs (a) or (b),may apply in the prescribed form and manner to the Board or the Director of WORC [Workforce, Opportunities, Residency Cayman Office] for permission for himself or herself, his or her spouse and his or her dependants, if any, to reside permanently in the Islands and such application shall be accompanied by the prescribed application fee,*

issue fee, dependant fee and the annual fee with respect to the first year.

(2) For the purpose of assessing the suitability of an applicant for permanent residence, a points system shall be prescribed by the Cabinet.

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

(4)Where an application under subsection (1) has been refused and the applicant...has appealed against such refusal and lost the appeal, the applicant is barred from re-applying under the provisions of that subsection and shall leave the Islands upon expiration of any period during which the applicant was allowed to work under section 66(4) unless the applicant is entitled to remain by virtue of any other provisions of this Act [our emphasis]; and such disbarment shall continue-in the case of a worker, until the worker re-qualifies under the criteria contained in this section having taken the break in stay required under section 66(1)..."

10. The points system referred to in section 37(2) is set out in the "*Permanent Residence Assessment*" within Schedule 2 of the Immigration Regulations (2019 Revision) ("the 2019 Regulations"). It is a detailed, prescriptive document which sets out nine factors and a deductible component. (It is attached as appendix 1). The nine factors award points for:

Factor 1 – Occupation: maximum 30 points.

Factor 2 – Education, Training and Experience: maximum 25 points.

Factor 3 – Local Investments: maximum 30 points.

Factor 4 – Financial Stability: maximum 30 points.

Factor 5 – Community Minded / Integration into the Caymanian Community: maximum 20 points.

Factor 6 – History and Culture Test: maximum 20 points.

Factor 7 – Possessing Close Caymanian Connections: there is a maximum of 100 points for certain Cuban nationals. 40 points are awarded in respect of an applicant who is the parent, son or daughter of a Caymanian, 20 points for an applicant who is the brother, sister or grandparent of a Caymanian, provided the applicant has not received 40 points by virtue of being the parent, son or daughter of a Caymanian.

Factor 8 – Demographic and Cultural Diversity: maximum 10 points.

Factor 9 – Age Distribution: maximum 10 points.

11. There are deductible components to a maximum of 100 points. They relate to character, health, and the lack of a reasonably funded pension plan. Neither Appellant had any points deducted.

12. By section 21(1) of the Act, a person who is aggrieved or dissatisfied by a decision of the Board or the Director of WORC may appeal to the First Respondent. Section 21(6) requires the Board or Director to deliver the reasons for its decision to the First Respondent. By section 21(8)

> "*An appeal…may be lodged on the ground, or grounds and no other, that the decision in question is-*
> *(a)erroneous in law;*
> *(b) unreasonable;*
> *(c)contrary to the principles of natural justice; or*
> *(d) at variance with the Regulations.*"

13. Appeals take place on paper, albeit there is a discretion to call witnesses (section 22). The First Respondent must take into account the reasons for the Board's or Director's decision and the detailed grounds of appeal. Section 22(4) and (5) state that:

> "*(4) Where at a hearing on grounds the…[First Respondent]…determines that at least one of the grounds…has been made out the [First Respondent] shall proceed to a re-hearing of the original application which was the subject of the appeal…*
> *…(5) [It]…shall do so by way of a hearing de novo and shall take into account any fresh evidence put forward by the appellant or the Director…or the Board that may have arisen in relation to the parties which is submitted in writing.*"

14. By section 66(4), a person who has applied for permanent residence may apply to the Director of WORC for permission to continue working during the currency of his application for permanent residence. Section 66(8) deals with the position of someone who has been refused permanent residence and whose appeal rights have been exhausted, on the face of it, the position of the Appellants. It states:

> "*A person working under permission granted under subsection (4) shall, in the event that-*

(a) the person's application for permission to reside permanently in the Islands has been unsuccessful and no appeal has been filed within the time allowed for doing so; or

(b) having filed for permission to reside permanently in the Islands has been unsuccessful and all further appeals have been exhausted and in either event that person's time limit has expired, be entitled to continue receiving permission under subsection (4) for a period not exceeding ninety days from the date of the communication to that person of such a refusal or the determination of any appeal or proceedings arising therefrom, whichever shall be the later, and after such period expires that person shall leave the Islands; and neither the Board nor the Director of WORC shall issue or renew a work permit for the person until the person has ceased to hold a work permit for not less than one year thereafter."

15. In short, therefore, once all appeal rights have been exhausted, and following a period of grace of ninety days, a person is no longer permitted to reside in the Cayman Islands on the basis of his permission to work. He is required to leave. Nothing in the legislation prevents such a person seeking permission to visit the Cayman Islands, in order, for example, to see his friends as a visitor, although he may need a visa to do so.

16. Section 9 of the Bill of Rights, which reflects, although not in identical terms, Article 8 of the European Convention on Human Rights, provides:

"***Private and family life***

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

...(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any other property in such a manner as to promote the public benefit;...

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

17. By sections 23 and 24 of the Bill of Rights:

> "***Declaration of incompatibility***
>
> *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 Parliament shall decide how to remedy the incompatibility.*
>
> ***Duty of public officials***
>
> *24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified.*"

18. The submission is that section 37(3) of the Act is incompatible with the Bill of Rights and the Court should make a declaration to that effect.

The Appellants

The First Appellant

19. The First Appellant has lived in the Cayman Islands since February 2008, when he was granted a work permit. On 24 January 2017 he submitted his application for permanent residence to the Chief Immigration Officer. On 10 November 2017 he sat the history and culture test. On 14 November 2017 the Cayman Islands Department of Immigration informed him that "*you scored 24 out of 40 on the History and Culture Test...This score equates to 12 out of 20 points being assigned to Factor six...for the purposes of the Permanent Residence assessment.*" On 15 January 2018 the Chief Immigration Officer wrote:

> *"I wish to advise that your application for the right to reside permanently in the Cayman Islands has been assessed against the Permanent Residence Points System and has been refused.*
>
> *In considering an application for permanent residence...the Board or Chief Immigration Officer upon applying the criteria set out in the points system shall grant permanent residence to all applicants attaining one hundred and ten points or more. In this particular case, the total score attained is 61 points."*

20. The First Appellant was informed of his right of appeal to the First Respondent. He was also informed that:

> *"If you currently possess an authorisation to work (PCW) you may continue to do so until its expiry...you may have it extended to bring it to 90 days...[It may be renewed]...until the end of the appeals process, after which time you are entitled to a final ninety days after which you must leave the Islands..."*

21. On 6 February 2018 the First Appellant served a notice of his intention to appeal. On 24 February 2018 the Chief Immigration Officer submitted to the Chairman of the Immigration Appeals Tribunal the reasons for the Board's refusal to grant permanent residence. He relied upon the score of sixty-one being "*insufficient to qualify for the grant of permanent residence.*" He set out the points achieved under the different factors.

22. On 10 April 2018 the First Appellant's attorney set out in a letter to the IAT that more points should have been awarded for the factors of education and local investment. In a decision dated 27 December 2019 the First Respondent accepted the Chief Immigration Officer had erred and ordered a de novo hearing. On 19 August 2020 the First Appellant provided an affidavit in support of the matters relied on. It said nothing about his private life.

23. On 11 December 2020 the First Respondent dismissed the appeal. It stated that in the light of fresh documents submitted, it had proceeded to a hearing de novo. It recalculated the allocation of points, resulting in a total of seventy-four. Significantly for present purposes, it went on to say:

> *"The Tribunal further considered the Cayman Islands Constitution Order and the Cayman Islands Bill of Rights and the Appellant's rights under "Section 9-Private and family life (2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that is reasonably*

justifiable in a democratic society"-and "(e) to regulate the right to enter and remain in the Cayman Islands." There is no indication that the Appellant has established a family unit within the Islands in accordance with the Court ruling of "Ian Fernando Ellington V The Chief Immigration Officer 29 April 2020." Therefore, the Tribunal determined having reviewed all the correspondence before it from the Appellant, his agent and WORC that there is nothing which indicates that this right is engaged."

24. On 15 January 2021 the First Appellant requested the First Respondent to reconsider its decision. For the first time, he raised his private life. His attorneys wrote:

> *"Upon reviewing the decision of the Tribunal, it would appear the Tribunal erred in law in regards to Factor 4 [Financial Stability] and have not considered the Appellant's Right to a **Private** Life...*
>
> ***Right to a Private Life***
> *It is noted that at the end of the decision, the Tribunal went on to consider the Appellant's Right to a family life in the Cayman Islands making reference to the case of Ellington...It would appear that the Tribunal accept that they are required to consider the Appellant's family life in the Cayman Islands, however they have failed to consider his right to a Private Life in the Cayman Islands...*
> *It is...averred that as the Appellant had been in the Cayman Islands for roughly 12 years at the date of the Tribunal's decision, that he had been working in the Cayman Islands for all that period of time, that he was a part owner in businesses here and that he had established numerous ties and friendships in the Cayman Islands. As such, the Tribunal were required to consider whether the decision to reject his application would amount to a breach of his right to a private life...*
> *For clarity's sake, it is not the Appellant's position that anyone who establishes a "Private life" in the Cayman Islands is required to be granted Permanent Residence..."*

25. On 16 February 2021 the First Respondent responded:

> "*The Tribunal is of the view that it did consider the Appellant's Right to Private Life and determined that its decision does not in any way adversely affect his Private Life.*"

The Second Appellant

26. The Second Appellant has lived and worked in the Cayman Islands since November 2009. On 15 October 2018 he submitted his application to the Caymanian Status and Permanent Residency Board. Among other things, he emphasised how happy he was to live in the Cayman Islands and that it was his home.

27. On 25 January 2019 the Second Appellant sat the history and culture test. On 12 March 2019 he was informed that his application for permanent residence had been refused, he having attained a total of 99.50 points. On 29 March 2019 a notice of appeal was filed. That notice requested the Board or Director of WORC to disclose the history and culture test questions, and the answers given by the Second Appellant.

28. On 11 April 2019 the Caymanian Status and Permanent Residency Board's reasons for the refusal of permanent status were provided to the chairman of the First Respondent. Reliance was placed on the Second Appellant only having achieved 99.50 points. As to the history and culture test, it stated he was awarded 14.5 points out of a maximum of 20.

29. On 29 March 2019 the Second Appellant's attorneys (HSM) wrote to the First Respondent seeking a copy of the history and culture test. They stated, among other things, that:

> "*...Anecdotal evidence has been provided to HSM...that the test that applicants...sit has questions that are factually wrong and also there is [sic] sometimes questions which are factually wrong...that are duplicated ...*"

30. On 15 April 2019 an Appeal Statement was provided to the Second Appellant. The history and culture questions and answers were not provided. On 10 May 2019 the Second Appellant's grounds of appeal were submitted to the First Respondent. They ran to no less than 147 paragraphs. While there was reference to what was said to be the Board's failure to undertake a two-stage process, the second stage being consideration of the Second Appellant's section 9 rights, no detailed grounds were advanced as to why, in his case, a proper application of proportionality required that he be granted permanent residence.

31. On 5 November 2019 the Interim Director of WORC refused the request for the history and culture test, stating:

> "*...please be advised that your request for copies of your client's History and Culture test cannot be accommodated...*"

32. On 8 December 2019 the Second Appellant's application for disclosure of the culture and history test by way of a Freedom of Information request to the Ombudsman of the Cayman Islands failed as not being in the public interest.

33. On 9 June 2020 the First Respondent "*determined that grounds of appeal were not established.*" It did not consider the facts de novo. There was no mention of section 9 of the Bill of Rights.

Mr Eakin

34. Before the judge below was an affidavit from Mr Eakin, an employee of the Ministry of Border Control and Labour of the Cayman Islands Government. He has been closely involved in the development of the immigration system. It is not necessary to set out the detail of his evidence. In short, it was said the points system was devised to create a transparent system which was fair to applicants. It was the product of a committee specifically tasked to create such a system.

The judgment below

35. The judge rejected the Appellants' contention that the failure by the Board or Director to consider section 9 of the Bill of Rights was unlawful. He found there was no incompatibility. Before this court, Mr David has put the argument somewhat differently from the way advanced before the judge. He has not pressed the submission that the Director or Board should have considered section 9, rather that on appeal the First Respondent should have done so.

36. The judge also rejected the contention that there should have been disclosure of the culture and history tests: moreover, that in the present cases, disclosure would have made no difference to the outcome. Had he obtained maximum marks, each Appellant would still have fallen short of the necessary 110 points.

The issues and the court's conclusions

37. There is no dispute that the points system does not allow any separate consideration of an applicant's section 9 rights outside that system. There is no power conferred on the

immigration authorities or on the Tribunal by statute or by the Regulations thereunder to confer residential status outside the points system (see section 37(1)(b) of the Act). (We consider below a submission that an application to the Cabinet could be made for a declaration that the applicant is exempt). As Walters J put it [94]:

> "*This means that there is no need nor room for the exercise of any additional discretion in that regard and no need nor room for a separate section 9 review.*"

38. The Appellants' essential argument is that either the points system itself is incompatible with their rights enshrined in section 9 because it does not permit consideration of those rights, or that even if that system does incorporate consideration of such rights, it is an incomplete code because it does not permit any consideration of such rights outwith the points system.

39. The argument inexorably leads to the need for the Court to consider the by now traditional issues as to (i) whether the legislative objective of the Act justifies limiting rights under section 9; (ii) whether the measures designed to meet the legislative objective are rationally connected to it; and (iii) whether the means used to impair those rights are no more than is necessary to accomplish that objective (see.eg. *De Freitas v Permanent Secretary of Agriculture* [1999] 1 AC 69, cited in *Huang v Home Department* [2007] UKHL 11 [2007] 2 AC 167 [19]). There was no dispute that the objective at which the legislation was aimed was legitimate, namely the regulation of the right to enter or remain in the Cayman Islands. This is particularly emphasised in section 9(3)(e) (*supra*) and section 16 (3)(b) which disapplies the rule against discrimination:

> "*with respect to the entry into or exclusion from ...or residence within the Cayman Islands of persons who are not Caymanian.*"

40. Nor was it disputed that the measures are rationally connected to that objective. It is under the third issue that the dispute in these appeals arise, namely the extent to which the question of proportionality is capable of being determined under the points system and the extent to which proportionality has been properly considered, under that system in the case of these Appellants.

41. It must, as *Huang* (supra) and *R(Razgar) v Home Department* [2004] 2 AC 368 teach, always be borne in mind that the issue of proportionality is to be determined by striking a fair balance between the rights of these individual Appellants and the interests of the Island community at large. The severity and consequences of interference with the Appellants' section 9 rights call

for careful assessment at the stage that the proportionality of the impugned decisions is considered (see *Razgar* [20]).

42. The parties adopted the 5 stage approach identified by Lord Bingham in *Razgar* [17]:

> *"(1) Will the proposed removal be an interference by public authority with the exercise of the applicant's right to respect for his private... life (2) if so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) if so, is such interference in accordance with the law?(4) if so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

43. We do not understand Lord Wilson to be setting out a different approach in his more recent re-iteration of how courts should approach the issue of proportionality in *R(Aguilar Quila) and another v Secretary of State for the Home Department* [2011] UKSC 45 [30] and [45].

Is Section 9 Engaged?

44. The Respondents contend that the Appellants knew, from the outset of the nine year period during which they remained on the Island, that the time during which they could remain and construct a private life was limited and that unless and until they were granted the status of a permanent resident such a life was precarious. In those circumstances any interference was so slight as not to amount to any interference with private life at all. Alternatively, they argue that the consequences of the refusal of permanent residence are not sufficiently grave as to engage section 9. We propose to deal with those arguments together since the issues to which they give rise are indistinguishable.

45. The foundation of the Respondents' argument is that these cases are not cases of removal or deportation where an applicant has built up family or private life with which removal or deportation will inevitably interfere. In the instant cases the Appellants have known all along that they may not be permitted to remain and that such private life as they have managed to develop would be limited and liable to come to an end.

46. This distinction has been recognised in the ECrtHR, in particular in *Jeunesse v the Netherlands* (Appln.12738/10 3 October 2014) on which the judge heavily relied and in *Pormes v The Netherlands* (25402/14 28 July 2020). The Court said in *Jeunesse*:

> *"103. Where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a fait accompli does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Benamar v. the Netherlands (dec.), no. 43786/04, 5 April 2005; Priya v. Denmark (dec.) no. 13594/03, 6 July 2006; Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 43, ECHR 2006-I; Darren Omoregie and Others v. Norway, no. 265/07, § 64, 31 July 2008; and B.V. v. Sweden (dec.), no. 57442/11, 13 November 2012).*
>
> *105. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to Article 8 to grant her a residence permit, thus enabling her to exercise family life on their*

territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (see Ahmut v. the Netherlands, 28 November 1996, § 63, Reports of Judgments and Decisions 1996-VI). As regards this issue, the Court will have regard to the following principles as stated most recently in the case of Butt v. Norway (no. 47017/09, § 78 with further references, 4 December 2012)."

47. The Court went on to consider the relevant principles in relation to an alien seeking residence who complains of violation of article 8 rights:

> *"106. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.*
>
> *107. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of*

immigration law) or considerations of public order weighing in favour of exclusion (see Butt v. Norway, cited above, § 78).

108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, p. 94, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; M. v. the United Kingdom (dec.), no. 25087/06, 24 June 2008; Rodrigues da Silva and Hoogkamer v. the Netherlands, cited above, § 39; Arvelo Aponte v. the Netherlands, cited above, §§ 57-58; and Butt v. Norway, cited above, § 78)."

48. In *Jeunesse* the applicant succeeded in establishing that her right under article 8 to respect for the family life she had developed had been violated in the exceptional circumstances of her case. The view that in exceptional circumstances (a phrase which the UK courts have explained) a violation of article 8 might be established was re-iterated in *Pormes*.

49. That too concerned a case where an applicant sought to establish a violation of Article 8, though he had no right to residence and thus was not in the same situation as one whose right was being removed or was subject to a deportation order. The distinction was reinforced in that case. The Court said:

"*58. As can be seen from the preceding paragraphs, the relevant principles as well as the factors and considerations to be taken into account when examining whether Article 8 of the Convention imposes a positive obligation on a State to admit an alien unlawfully residing in its territory have so far mainly been formulated in cases which concerned family life or in which the Court considered it appropriate to focus on that aspect. The Court finds that similar considerations apply in respect of an alien who has established social ties amounting to private life in the territory of a State during a period of unlawful stay. The extent of the State's positive obligations to admit such an alien will depend on the particular*

circumstances of the person concerned and the general interest. Moreover, the factors set out in paragraph 56 above also apply – to the extent possible – to cases where it is more appropriate to focus on the aspect of private life. Equally, if an alien establishes a private life within a State at a time when he or she is aware that his or her immigration status is such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only.

Application of the above principles in the instant case

59. *The Court notes that the applicant arrived in the Netherlands in April 1991 when he was not yet four years old and that he thus spent most of his childhood and youth in that country (see paragraphs 5-6 above). However, after his short-term tourist visa had expired in August 1991, his residence in the Netherlands was at no time lawful. He was thus not a "settled migrant" as this notion has been used in the Court's case-law (see paragraph 52 above). Therefore, the domestic authorities' refusal to grant him a residence permit did not require the "very serious reasons" that would be needed to justify the expulsion of a settled migrant who had arrived in the Netherlands at around the same age (see paragraph 52 above).*

60. *At the same time, the Court cannot accept the Government's submission that, as the applicant had established his private life in the Netherlands whilst he was residing in the country unlawfully, the refusal to admit him would be contrary to Article 8 of the Convention in exceptional circumstances only (see paragraph 43 above). As set out above (see paragraph 58 in fine), that principle applies if it is known to the person concerned from the moment he or she starts a private life in the host country that his or her immigration status may well stand in the way of the continuation of that private life. In the present case, the Court observes that when the applicant started to build up his ties with the Netherlands he was completely unaware that neither his presumed father nor his foster parents had taken steps to regularise his stay in the country. Having regard to his young age when he came to the Netherlands and the other circumstances of the case, the Court considers that this cannot be held against the applicant. In that latter context, and with reference to paragraph 57 in fine above, the Court finds, moreover, that the applicant cannot be identified with any omission on the part of his foster parents to*

ensure that his stay in the Netherlands had a lawful basis since, as Dutch nationals (see paragraph 5 above), their right of residence in the Netherlands was not dependent on whether or not the applicant would be granted a residence permit – as was also recognised by the Administrative Jurisdiction Division of the Council of State (see point 2.5 in paragraph 23 above).

61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

50. Neither of these cases support the view that the private life built up during the period in which an alien is seeking to qualify for permanent residence is bound to be so insignificant that it does not warrant any protection at all. They cannot be read as authority for the proposition that if, by reason of a refusal of resident status, private life is curtailed or cut off that can never in any circumstances be regarded as interference. The most these cases establish is that, in general, it will be far easier to justify any interference where no right is being removed or withdrawn. In short, a refusal of a right to residence is far more likely to be found to be proportionate. *Pormes* says as much.

51. In both of these cases the ECrtHR reached their conclusion (in *Jeunesse*, that there had been a violation of Article 8, and in *Pormes* that there had not) on the basis that despite the fact that the applicants were aliens seeking residence, Article 8 was engaged even though no existing rights were being withdrawn and the applicants were not being deported. They are cases which contradict the assertions made by the Respondents that there can be no interference with private life and section 9 is not engaged.

52. Moreover, there is United Kingdom authority which supports the conclusion that these threshold submissions, which the Respondents have advanced, should be rejected. In *Balajigari v the Home Department* [2019] EWCA Civ 673, migrants granted leave to remain

under a points based system were refused indefinite leave to remain on grounds of discrepancies in their declaration of earnings. The applicants contended that there had been a failure to assess the proportionality of their likely removal in light of their private life developed while they were in the UK. The Court held that Article 8 was engaged:

> "[83] *We start with the first of the bases on which Mr Biggs says that article 8 is engaged. Ms Anderson, reinforced on some aspects by Mr Malik, advanced various arguments in response, which we take in turn.*
>
> [84] *First, Ms Anderson referred to an observation at para. 124 of the judgment of Underhill LJ in MS (India) v Secretary of State for the Home Department [2017] EWCA Civ 1190, [2018] 1 WLR 389, to the effect that the refusal of ILR does not "as such" engage article 8 (p. 429 C-D). With respect, that does not meet Mr Biggs' point. He was not complaining of the refusal of ILR as such but of what he said was its necessary consequence in cases of the present kind, namely liability to removal. In MS, untypically, the refusal of ILR did not entail liability to removal: the applicant was in practice irremovable and had indeed been granted (limited) leave to remain.*
>
> [85] *Secondly, she referred to the recent decision of the Supreme Court in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, [2018] 1 WLR 5536, that a migrant's immigration status is to be regarded as "precarious" within the meaning of section 117B (5) of the Nationality, Immigration and Asylum Act 2002 at all times up to the point at which they are granted ILR. That too is directed to a different issue. The fact that a migrant's status may be precarious for the purpose of section 117B does not prevent them developing a private life in the UK in the period prior to settlement: its relevance is to the weight to be accorded to that private life in any assessment of the proportionality of removal.*
>
> [86] *Pausing there, once those arguments are disposed of it is seems to us inescapable that, as Mr Biggs submitted, in the generality of cases a T1GM ILR applicant is likely to have built up a sufficient private life for his or her removal to engage article 8; and we will proceed on that basis. But that must be subject to the caveat that the engagement of*

article 8 is of its nature a question of fact to be determined on the facts of the particular case, and there may be cases in which for particular reasons that general conclusion does not apply.

[87] Ms Anderson's third point, on which we were also helpfully addressed by Mr Malik, was of a different character, namely that, even if the removal of a T1GM ILR applicant following a refusal under paragraph 322 (5) would engage their article 8 rights, the decision to refuse ILR cannot be equated with a decision to remove. The two decisions were distinct, both in theory and in practice. In the first place, some applicants might still have unexpired leave from the previous grant. It was true that the Secretary of State's decision under paragraph 322 (5) meant that he would be entitled to curtail that leave under paragraph 323, which cross-refers to the same grounds; but that would nevertheless be a distinct decision which he might or might not choose to take. Further, even if the previous leave had expired, the Enforcement Warning informed applicants that if they claimed that they were entitled to leave on a different basis they could make a separate application. And even if there was no such basis the Secretary of State would not proceed to removal without service of the "removal window" notice. Ms Anderson and Mr Malik sought to reinforce this point by reference to the decision of the Supreme Court in Patel v the Secretary of State for the Home Department [2013] UKSC 72, [2014] 1 AC 651, which confirmed the distinction between a decision to refuse leave to remain and a decision to remove.

[88] This argument has more force than the first two, but we have come to the conclusion that it too does not meet the Appellants' case. We park for the moment the case where an applicant for ILR still has unexpired leave and focus on the case, which is likely to be the more typical, where the previous leave has expired and the applicant only has "3C leave". In our view the making of a decision which (subject only to a suspension pending administrative review if sought) both deprives the applicant of leave to remain and, as the necessary corollary, renders him or her liable to immediate removal, as set out in the Enforcement Warning, is in itself an interference with their article 8 rights. We do not think that that analysis is affected by the fact that if the applicant

does not, as he or she is invited and expected to do, leave forthwith further enforcement steps will have to be taken. It cannot be the case that a migrant's article 8 rights are not engaged until the moment of the knock on the door: what matters is the point of legal decision."

53. In the Cayman Islands this court has already considered the engagement of section 9 in *the Chief Immigration Officer of the Cayman Islands v Ellington* (CICA 15 of 2020), the case of the holder of a work permit married to a Caymanian with a Caymanian son. His conviction for robbery and sentence for more than one year led to the statutory consequence that he was a prohibited immigrant, required to leave the Islands. The absence of any power to consider the applicant's family life under the statutory scheme was incompatible with section 9, as the President explained in his judgment at [79].

54. Walters J took the view that the distinction between removal or deportation cases and those in which a non-resident lived in the knowledge that their stay on the Islands might be limited, and that they might have to leave if their application was unsuccessful, was determinative. Non-residents applying for permission to reside were in a position to predict whether they were likely to qualify and could manage their private lives accordingly:

> "*[85] I think that it is important to draw a distinction between the Points System in the Cayman Islands and many of the relevant Article 8 cases. The English and ECtHR cases are generally dealing with situations in which an individual is facing forced removal or deportation from England or the relevant European country, in circumstances where there is an element of discretion being exercised as to whether such action is warranted, to the extent that it interferes with that person's rights, whether it infringes them and, if so, whether that is reasonably justifiable. Cases such as Ellington deal with situations in which an individual's continued residence in a county becomes unlawful in circumstances in which they have not had any opportunity to challenge that decision or have their Article 8 or Section 9 rights considered.*
>
> *[86] In my view, those are very different situations to an application for PR and the working of Points System in the Cayman Islands. In my view, that process can only be reached after successive work permits have been granted during which period, as Mr Eakin explains, a prospective applicant for PR will have been able to self-assess whether or not they are*

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

55. He summarised his view at [87]:

> *"Jeunesse helps illustrate the situation that arises in the Cayman Islands when an individual applies for PR. At that point, they are not aliens applying to enter the country, they are not individuals whose presence is tolerated or has become undesirable raising the question of their removal or deportation. They are closest to being settled migrants but subject to the time limit prescribed by the 2022 Act. If they choose to apply for PR and their application is unsuccessful, the state is not interfering with their Section 9 rights because their right to reside in the country is not being withdrawn; rather, it is coming to an end in accordance with the law in a way that is transparent and largely predictable."*

56. In our view the judge was wrong in three significant respects. First, the fact that applicants may predict the likelihood of the success of their application may, in most cases, be correct but it does not follow that they cannot develop a private life, however well they might 'manage it'. Second, these Appellants are in an analogous situation to the applicants in both *Jeunesse*, and *Pormes*. These Appellants were 'aliens' in the sense used in the European cases: they did not have a permanent right to residence and were seeking that status. True they were on the Islands lawfully but then the applicant was lawfully in the Netherlands in *Pormes*. Third, the fact that the case was not concerned with the withdrawal of a right to reside is relevant to the nature and extent of the right under section 9. But it does not mean that there is nothing to be protected under section 9 at all. That a right to reside was not withdrawn merely leads to the conclusion that the balance between the interests of the state and the applicant will be struck more readily in favour of the state and only in what the European cases call exceptional cases will Article 8 or section 9 rights be violated. After all, in *Jeunesse* the applicant succeeded.

57. The judge's view was, in part, founded on the decision of Mrs Justice Ramsay-Hale, as she then was, in *Ambriz* v *The Attorney General and IAT* (G207 of 2020). In fairness to the Chief Justice, we should say that compatibility does not seem to have been an issue in that case (see the Judgment [38]). She analysed the statutory framework and concluded that it did not allow for the exercise of discretion. She said:

> *"[36]. Section 9 is simply not engaged. There is no discretion to give lesser or greater weight to any particular factor or to consider any matter which are not set out in Schedule 2. The decision maker must apply the criteria set out in the points system and grant permanent residence if the applicants has 110 points."*

58. She continued:

> *"[37] To put it another way, even had the IAT decided that dismissing the appeal would breach Mr Ruiz's section 9 rights, it could not have granted him permanent residence unless he had the requisite 110 points as it is bound by the statute.*
>
> *[38] The broader challenge made by Mr Ruiz to the unconstitutionality of the points system, as being incompatible with section 9 of the BoR, is outside the scope of this appeal. I would note here for completion only and without comment on an issue which is not before me for resolution, Ms. Allen's submission that the points system is compatible with the BoR, having been designed to take account of an applicant's private and family life, allowing points, inter alia, for their familial ties to Caymanians, the extent of their civic engagement and integration in the community and the business relationships they have developed."*

59. Walters J commented:

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

The judge did not and did not need to consider the matter further than that."

60. If all the judge was doing at this stage of his reasoning was commenting on the absence of any express provision for consideration of section 9 in the statutory framework, then that is plainly correct. But we think that his judgment may be open to misinterpretation. It is dangerous to use the expression, adopted from the words of Ramsay-Hale J, that "*Section 9 is not engaged*". In the context of consideration of the jurisprudence of the Strasbourg court, and such cases in the UK jurisdiction as *Razgar*, there is a risk that Ramsay-Hale J and Walters J might be read as concluding that there is no potential for the engagement of section 9, that an applicant for permanent residence cannot develop any private life and that therefore neither tribunal nor court need consider it. But their reasoning does not and cannot support that conclusion.

61. The mere fact that the legislation makes no reference to consideration of rights under section 9 does not mean that it ought not to do so, or that the legislation is compatible with the Bill of Rights. Such a process of reasoning would beg the very question which must be decided, namely whether the failure to provide for any consideration of section 9 rights outwith the points system is incompatible with section 9.

62. The Respondents argue that there is no need for the legislation to do so because the points system itself sufficiently takes into account any applicant's section 9 rights. The references to employment and business investments (Factors 1, 3 and 4) and to the relationship to the community and to Caymanian family connections (Factors 5 and 7) are all references to aspects of private or family life, the rights to which are protected under section 9. There is, therefore, no need for any separate consideration (see Judgment [94]).

63. That is a conclusion which we will consider later in this judgment but, as it seems to us, the very content of the points system contradicts any suggestion that section 9 is not engaged or that applications for permanent residence are outwith the ambit of section 9. The points system merely demonstrates what seems to us to be obvious: that applicants in the many years during which they seek to qualify may well develop a private or family life. For that reason, we conclude that section 9 is engaged.

Interference with section 9 Rights

64. The next question, therefore, is whether the decisions not to grant permanent residence interfered with the rights of these Appellants under section 9. Both Appellants speak of some interference with relationships with friends and with business associates. Mr Buray says:

> "*The decision means that I will have to leave the Cayman Islands, my home for the past 13 years and I will also have to leave two businesses of which I am a part owner. I will also be leaving a large number of very close friends.* (Affidavit [9])

65. Mr D'Souza says:

> "*I came to the Cayman Islands in 2009, I have now been a lawful resident of the Cayman Islands for over 11 years. I very much regard the Islands as my home. I have a wide circle of friends here, a good job (before I had to stop working due to PCW issues) and I hope to invest in a local company. My whole life is in the Cayman Islands and I would be very disappointed if I was required to leave.*"

66. While it is correct that, as the Respondents submit, the Appellants may return as tourists and seek new work permits subsequently, there is plainly an adverse impact on their private life after refusal of the status of permanent resident. They are entitled to a final 90 day permission to continue working, but thereafter must leave the Cayman Islands, and neither the Board nor the Director of WORC may grant or renew their work permits until they have ceased to hold them for not less than one year after leaving the Islands (see sections 37(4), 66(1) and 66(8) of the Act). It seems to us that that is an impact on their private life of a significance which amounts to interference with their section 9 rights.

Ought there be consideration of Section 9 outwith the Points System?

67. The real question however relates to the proportionality of the decision, assessed in accordance with the factors identified in *Razgar* and *Quila*. Of the four questions which Lord Wilson re-iterated at [45], the first three seem to us to be beyond argument and were not contested in this case. The crucial point turned on whether the rules which leave no room for any consideration of section 9 rights outwith the points system strike a fair balance between the rights of these Appellants and the interests of the community or, even if they do in the instant appeals, whether, absent any provision for consideration of section 9 rights outwith the points system, they are compatible with section 9.

68. The first of those issues does not appear to us to cause any difficulty. Neither of these Appellants advanced any aspect of family or private life at risk of particular interference as a result of the refusal of permanent residence, other than that which might reasonably be anticipated, were permanent residence to be refused. They did not draw attention to any particularly acute impact or hardship which might flow as a result of the refusal. Their description of the impact was just as might be expected; nothing was advanced in either of their cases which would require some particular consideration outside the points system. In those circumstances it seems to us plain that the refusal of permanent residence was justified in the interests of immigration control and struck the right balance between their limited private life and the interests of the Islands.

69. That is not, however, an end of the matter. It is a striking feature of the legislation in the Islands that no provision whatever is made for a case which does require consideration of private life outwith the points system. The Respondents say there is no need, in the light of the family or private life factors within that system to which we have already drawn attention, for any separate consideration, as the judge himself concluded. The legislation and the Regulations providing for a points system are a comprehensive code, they contend, which adequately protects any rights which an applicant has developed under section 9.

70. In many cases that is, no doubt, correct. And if the points system is, in many cases, adequate to safeguard the section 9 rights of those seeking permanent residence, assessment of the proportionality of refusing permanent residence under a points system will not itself be incompatible with section 9, since that system is *capable* of safeguarding such rights. The importance of applying rules which are predictable, consistent and fair was stressed by Lord Bingham in *Huang* (*supra*):

> *"[16] There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if the system is perceived by applicants internationally to be unduly porous unpredictable or perfunctory...."*

71. Endorsement of assessment under a points system is to be found in a number of United Kingdom authorities, but in each of those cases the impugned system was coupled with the possibility of consideration of 'exceptional cases' outside the impugned system. None of

those authorities lead to the conclusion that there is *never* any need for consideration of such rights outwith a points system. On the contrary they support the view that legislation, if it is to be compatible with the Bill of Rights, must allow, if the facts advanced by an applicant so warrant, for consideration of section 9 rights outwith the points system. It is to those authorities we now turn.

72. In 2012, new immigration rules were introduced in the United Kingdom which the Government asserted properly reflected their view and Parliament's view as to how the balance should be struck between the public interest and an individual's rights under article 8. The Upper Tribunal (Immigration and Asylum Chamber) rejected that view in *The Secretary of State for the Home Department v Izuazu* [2013] UKUT 00045 (IAC) and ruled that where a claimant does not meet the requirements of the rules, a judge must go on to make an assessment of Article 8 [41]. The rules are the starting point of consideration of factors under Article 8, not the conclusion ([49(vi]). Nor is the test whether there are 'exceptional circumstances' or 'insurmountable obstacles'; they do not provide a test, but may be factors in a decision on proportionality in an individual case [50]-[58]. The Upper Tribunal concluded at [67]:

> "*Accordingly, we conclude that there can be no presumption that the rules will normally be conclusive of the article 8 assessment or that a fact sensitive inquiry is not normally needed. Indeed, the conclusion under the rules may often have little bearing on the judge's own assessment of proportionality..... If there is no presumption that the provisions of the rules reflect and apply the balance between the competing considerations, exceptional circumstances cannot be the test to be applied under the law...*
>
> *[70]. The use made of such guidance by the upper tribunal and the application in the course of the evaluation of the term exceptional circumstances is not a reference to a definitive test or otherwise unlawful, but is an appropriate way of setting the contract for the particular decision.*"

73. In *Nagre v the Secretary of State for the Home Department* EWHC 720 (Admin) the UK Court considered *Izuazu;* it approved the decision but made an important qualification. By that time the Home Office had introduced guidance as to "exceptional circumstances" in cases where a refusal under the Rules would result in unjustifiably harsh consequences. The Court approved that Guidance, so that:

"[14] The definition of "exceptional circumstances" which is given in this guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of Article 8. The practical guidance and illustrations given in the passage quoted above support that interpretation. No challenge is brought to the lawfulness of this guidance. In my view, it gives clear and appropriate guidance to relevant officials that if they come across a case falling outside the new rules, they nonetheless have to consider whether it is a case where, on the particular facts, there would be a breach of Article 8 rights if the application for leave to remain were refused."

74. The Court then made what it described as "slight" but, in our view, an important modification, which goes to the practicalities of consideration of claims for permanent residence in the Islands:

"[30] The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

75. The Court then concluded:

"[34] In cases where consideration of the new rules does not fully dispose of a claim based on Article 8, the Secretary of State will be obliged to consider granting leave to remain outside the Rules. If she does not, where there is an appeal the First-Tier Tribunal will be obliged to consider allowing the appeal, and where there is no appeal, judicial review will lie.

[35] The important points for present purposes are that there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules and that, consequent upon this feature of the overall legal framework, there is no legal requirement that the new rules themselves provide for leave to remain to be granted under the Rules in every case where Article 8 gives rise to a good claim for an individual to be allowed to remain. This had always been the position in relation to the operation of the regime of immigration control prior to the introduction of the new rules, and the introduction of the new rules has not changed these basic features of the regime."

76. It is important to stress the distinction between this UK case and the instant appeal. The Court in *Nagre* was not faced, as we are, with legislation which prevents the grant of permanent residence outside the legislation and the rules. In the UK the rules and guidance did not assert that they were comprehensive, whereas the legislation and Regulations on the Islands admit of no consideration whatever outside the points system, other than the possibility raised by the Respondents of consideration by the Cabinet (to which we will return later).

77. In *R (MM (Lebanon)) v the Secretary of State for the Home Department* [2017] UKSC 10 [2017] 1 WLR 771, the Supreme Court considered a challenge to the rules, on the basis that the rules themselves did not guarantee compliance with article 8. They endorsed the view that the rules, in that case relating to minimum income requirements, were not comprehensive, as the rules themselves recognised, and as was conceded by the Home Department, but that itself did not justify the conclusion that the rules were not compliant with the UK Human Rights Act. In short, the rules would only be incompatible if they were incapable of being operated in a proportionate way. They cited with approval Aikens LJ in the court below [56] and Laws LJ at [57]. The Court continued:

"[59] Failure to qualify under the rules is not conclusive; rather it is (in Lord Bingham's words) -

"... the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative." (para 6) Thus, whatever the defects there may be in the initial decision, it is the

duty of the tribunal to ensure that the ultimate disposal of the application is consistent with the Convention.

[60.] This analysis provides a simple answer to the central issue in the case. It removes any substantial basis for challenging the new rules as such under the HRA. (The treatment of children under section 55 of the 2009 Act raises different issues, to which we shall return.) It follows that such a challenge in the present context must stand or fall under common law principles. The question in short is whether, taking account of the fact that those rules are only one part of the decision-making process, they are in themselves based on a misinterpretation of the 1971 Act, inconsistent with its purposes, or otherwise irrational. Under the HRA the main focus of attention shifts to the instructions issued by the Secretary of State to entry clearance officers for dealing with cases outside the rules (described at paras 20ff above). The question then is whether there is anything in those instructions which unlawfully prevents or inhibits them from conducting a full "merits-based" assessment as required by the HRA.

[61]. As to how that question should be approached, we now have authoritative, up-to-date guidance in the judgment of the Grand Chamber in Jeunesse (paras 42-43 above) which conveniently draws together earlier Strasbourg jurisprudence. As we have explained, in agreement with Lord Reed in Hesham Ali, para 42, and Agyarko, para 42, the ultimate issue is whether a fair balance has been struck between individual and public interests, taking account of the various factors identified."

78. An attempt to strike down rules made in the UK for the admission of adult dependant relatives was rejected in *Britcits v the Secretary of State for the Home Department* [2017] EWCA Civ 368 on the basis, following *MM*, that they were not incapable of being operated in a proportionate way. This was a case where analysis of the rules impugned showed that the rules themselves could be operated in a proportionate way so as to consider the individual's particular circumstances (see [72]-[78]).

79. The contrast between the rules which these UK courts were considering and the system in these Islands is significant. By reason either of statements of policy, within promulgated exceptions to the rules (e.g. *Nagre* and *MM*) or by reason of the wide power to balance the interests of state and individual within the rules themselves (*Britcits*), UK rules have been

held to be capable of permitting the Tribunals and Courts to consider individual factors and balance them against the public interest.

80. In the Cayman Islands, however, there exists no such possibility. It is true that the legislation and rules fulfil the important function of transparency, clarity and consistency to which Lord Bingham referred in *Huang*. They provide for grants of permanent residence to be consistent with the social and economic needs of the Islands. Moreover, they are the product not merely of departmental guidance but of debate and decision in Parliament. But they must comply with the Bill of Rights, and in our judgment the failure to afford any opportunity whatever to consider a case outwith the points system is incompatible with section 9. It is not possible to say that in every case the points system will itself adequately take into consideration the impact of a refusal on an individual's private or family life.

81. The Respondents contended that there was an opportunity to grant permanent residence outside the points system to be found in section 53(1)(b) which grants the Cabinet power to declare a person exempt. This provides:

> ***"PART 7 - GAINFUL OCCUPATION OF NON-CAYMANIANS***
>
> *53.(1) This Part does not apply to —*
>
> ....
>
> *(b) any person who may, from time to time, be declared by the Cabinet to be exempt for any purpose either unconditionally or subject to such conditions as may be prescribed*; "

82. It does not seem to us that this section can be deployed to provide a system for determining proportionality outwith the terms of the points system. The provision makes no reference to an intention to confer power to consider the cases of applicants who wish to rely on section 9 outwith the points system, and as this court pointed out in *Ellington* (supra at [77]), no procedure is provided for either an applicant or the Cabinet to follow. We reject, therefore, the suggestion that there is any power to consider applications for permanent residence other than that which is provided in the points system.

83. The upshot, accordingly, is that the legislation and the points system do not provide a comprehensive code which would provide for the issue of proportionality to be determined in every case in accordance with section 9 of the Bill of Rights. The system fails to allow for the possibility that the impact on private or family life which follows from a refusal of permanent residence may be such as to warrant striking the balance between individual and public

interests other than in the way the points system dictates. It does not permit consideration of the type of case to which the ECrtHR referred in *Jeunesse* and *Pormes*, in other words cases where, exceptionally, the points system does not give sufficient weight to the particular individual circumstances of an applicant.

84. We should stress that we do not and should not prescribe with any precision a test for identifying those cases which require consideration of section 9 outwith the points system. Although the Strasburg Court in *Jeunesse* and *Pormes* foresaw that the interests of the state would prevail over those of an individual applicant for permanent residence save in exceptional cases or particular hardship, the UK courts have stressed on many occasions that the court was not setting out any test of exceptionality (see the cases summarised at [58] in *Izuazu)*. There is no hardline rule for such identification (see *EB (Kosovo) v Secretary of State for the Home Department* (2008) UKHL 41 [12]), nor could there be since what is required by section 9 is a "*broad and informed judgment which is not constrained by a series of prescriptive rules*" (*EB* [21]).

The decisions in the Appellants' cases

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

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

Declaration of Incompatibility

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

The history and culture test: Ground 2

88. There remains one particular point of complaint on which both of the Appellants rely under Ground 2 of the appeal. This contends that the First Respondent, the IAT, should have required the Department of Immigration to disclose questions and answers in the history and culture test which the Appellants were required to take. It is contended that without such disclosure neither of them can be confident that some error had not been made.

89. The First Appellant, Mr Buray was, after a rehearing ordered by the IAT, awarded 74 points, which included 12 points for the history and culture test. The IAT found, in the case of the Second Appellant, that there were no grounds for appeal and thus the award of 99.5 points by the Board, which included 14.5 for the history and culture test, stood.

90. Thus neither appellant achieved the 110 points needed and even if they had attained the maximum points under the history and culture test, 8 points more for Mr Buray, 5.5 more for Mr D'Souza, they would not have reached that total. Applicants are only allowed to take this test once.

91. Nonetheless they contend that, in the light of evidence of past errors in the test, the obligations of fairness and transparency demand disclosure. Failure to order disclosure was an error of law and in both cases a *de novo* hearing should have been and should now be ordered. Were such a hearing ordered, some new factor, as yet unknown might be relied upon in the cases of both Appellants which would justify some higher award of points, propelling them both up to or beyond the target of 110 points.

92. There is some evidence of mistakes having been made in the past, though not at the time when either appellant took this test. Those representing these Appellants have for some considerable time, on behalf of a number of clients seeking permanent residency, sought disclosure of the questions and answers. They say they have been provided with what they

call 'anecdotal evidence' that questions on the multi-choice test were factually wrong and sometimes 'duplicated'. Evidence before the Grand Court showed that the Secretary of the Caymanian Status and Permanent Residency Board had accepted that there had been errors in 'the recent past'.

93. There is undoubtedly a duty to disclose information which relates to relevant factors considered by the Board or to the IAT, or which is relevant to their reasoning (see *Streeter v IAT* [1998] CILRE 357). Facts must be presented in a full and transparent manner (*Hutchinson Green & Racz v IAT* [2015] 2 CILR 75 [47] and [48].

94. The Respondents resist disclosure on the basis that it would undermine the integrity of the test. Mr Eakin, from the Ministry of Border Control and Labour, explained that the test consists of forty multiple choice questions. These questions are generated randomly for each testing session from a bank of 300-400 questions. Test results are recorded on a Workforce Opportunities & Residency Cayman database. Neither the Board nor the IAT see the questions and answers. They report the score, obtained from the database.

95. Disclosure is limited to prevent applicants merely learning by rote the questions and answers rather than genuinely seeking to learn the history and culture of the Islands. The possibility of memorising the questions and answers is said to undermine the purpose of the test which is to assess the applicant's integration into Caymanian society by reference to knowledge of local history, tradition, customs and current events (see WORC evidence recorded in Ombudsman's decision 6 December 2019).

96. The Appellants' riposte is to refer to the ease with which the questions and answers can be obtained online. The online versions were not the subject of any evidence and the Respondents merely declined to admit or deny whether the online versions were accurate.

97. We do not agree with the basis on which the judge dismissed this part of the argument. He quoted the Ombudsman's conclusion and then said that "*it was not for me in these proceedings to examine that decision*", because it had not been judicially reviewed.

98. The arguments advanced by the Appellants may have been the same or similar to those advanced before the Ombudsman but the juridical basis was different. The Ombudsman was dealing with the refusal of the Board to disclose under the Freedom of Information Act (2018 Revision). The Judge's consideration was not constrained by that Act or by the decision of the

Ombudsman. That the Ombudsman had declined disclosure was not a reason for the judge to do so. Accordingly, we must ourselves consider the legality of the refusal to order disclosure.

99. The assessment of those responsible for the test that its purpose would be undermined is not impugned on the basis that it is irrational. The decision as to how to administer the tests is a matter for those responsible. Of course, if there was an assertion that at the time these Appellants took their test the questions and answers were inaccurate, then the court would have expected a positive, sworn assertion that they were not.

100. But no such assertion has been made. The highest the case made on behalf of the Appellants is put, is that if they saw the questions and answers they might be able to detect some error. That is not a basis for ordering disclosure, in particular where the consequence is that the policy of non-disclosure would be undermined. Whilst, of course, full disclosure should be made where it is relevant and where fairness and transparency so demand, absent any evidence of error, an applicant is not entitled to an order for the purposes of creating a case of which there is no evidence whatever.

101. There is a further reason why neither the Board nor the IAT were in error in refusing disclosure. In the instant cases, there was no purpose to be achieved. Even if the applicants had been awarded the maximum, they would, as we have pointed out, not achieve the required number of points. Accordingly, to undermine the policy decision when nothing could be gained by the Appellants would be unjustified. For that reason alone, disclosure was neither relevant nor material to any issue in the case. Disclosure could not have made the slightest difference to the Appellants' position.

102. The Appellants contend that a decision that disclosure should be ordered would not be fruitless. It would involve a conclusion that the Board and the IAT were in error and a *de novo* hearing would have to be ordered at which either Appellant might find some new basis for adding to his points. The nature of that new basis was never made clear; it was merely speculative and thus the application for disclosure, and what it might achieve, bore the stamp of Mr Micawber, living always in the hope that "*something might turn up*". That is not, in our judgment, the basis for making any order or for granting any relief. We dismiss the second Ground of Appeal and limit ourselves to a declaration recording that the section 37(3) of the Immigration (Transition) Act 2018 (and accordingly of the Immigration (Transition) Act (2021 Revision)) is incompatible with section 9 of the Bill of Rights.

Costs

103. If not agreed, the parties must file submissions as to costs no later than 28 April 2023.