ND COURT OF THE CAYMAN ISLANDS
[ON

CAUSE NO. G0155/2017
LEGAL AID NO. LACR/ 0162 /2015

BETWEEN:

OSBOURNE DOUGLAS

PLAINTIFF

AND:

(1) THE GOVERNOR OF THE CAYMAN ISLANDS
(2) THE DIRECTOR OF PRISONS

RESPONDENTS

CONSOLIDATED WITH:

CAUSE NO. G0164/2017
LEGAL AID NO. LACR/ 0225 /2015

BETWEEN:

JUSTIN RAMOON

PLAINTIFF

AND:

(1) THE GOVERNOR OF THE CAYMAN ISLANDS
(2) THE DIRECTOR OF PRISONS

RESPONDENTS

IN OPEN COURT

Before: **The Hon Mrs Justice Marva McDonald-Bishop (Ag)**

Appearances: **Hugh Southey KC instructed by Prathna Bodden of Samson Law for the Plaintiffs**

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

Heard: **20 – 23, November 2023**

Draft Judgment circulated: **24 October 2024**

Judgment delivered: **27 November 2024**

Judicial Review – Concurrence of Governor for removal of convicted prisoners to the United Kingdom to serve life sentences – Interference of Governor's concurring decision with human rights of the prisoners – Constitutionality of the Governor's concurring decision –Prisoners' right to respect for private and family life — The Colonial Prisoners Removal Act 1884 (47 and 48 Vict. C. 31), s2(d) – Cayman Islands Constitution Order 2009, ss 6,9, 19, 24,26

JUDGMENT

INTRODUCTION

1. The journey to the present proceedings has been long and litigious, spanning a complex procedural history that has taken the parties up to the highest appellate level of the Privy Council and back to the Grand Court for the resolution of certain unresolved issues. It is a classic study in hard-fought litigation concerning the constitutional rights of prisoners transferred from the Cayman Islands to the United Kingdom to serve life sentences.

2. These proceedings encompass two consolidated applications for judicial review and concurrent claims for breaches of the Constitution of the Cayman Islands ("the Constitution") instituted by the Plaintiffs, Osbourne Douglas ("Douglas") and Justin Ramoon ("Ramoon") against the Respondents, the Governor of the Cayman Islands ("the Governor") and the Director of Prisons. The applications challenge the Governor's decision to concur with the United Kingdom Secretary of State for Foreign and Commonwealth Affairs ("the Secretary of State"), to remove them from a prison in the Cayman Islands ("HMP Northward") to the United Kingdom prison system to serve the remainder of their sentences resulting from their convictions for murder and possession of an unlicensed firearm in the Grand Court of the Cayman Islands in 2016. The removal orders were made pursuant to section 2(d) of the Colonial Prisoners Removal Act 1884 (47 and 48 Vict. C. 31) ("the 1884 Act"), with the concurrence of the Governor of the Cayman Islands. Therefore, the decisions to remove the Plaintiffs were composite, involving cooperation between the Secretary of State and the Government of the Cayman Islands.

3. The Director of Prisons is joined as a party because of his statutory responsibilities for His Majesty's Cayman Islands Prison Service ("HMCIPS") under the Prisons Act (2020 Revision). By section 7 of that statute, he is in control and management of HMCIPS, which includes having responsibilities for the prison building and the discipline and good order of prisoners. As such, he would have had immediate responsibilities for the Plaintiffs when they were detained at HMP Northward.

4. The factual and procedural background to the proceedings has largely been traversed in earlier, related judgments of the Court of Appeal of the Cayman Islands and the Privy Council (see ***Ramoon and Douglas v Her Majesty the Queen*** Criminal Appeal Nos 34 and 35 of 2016, delivered 7 December 2018 ("CICA Criminal appeal judgment"), ***Douglas and Ramoon v The Governor of***

the Cayman Islands and The Director of Prisons CICA Civil Appeal Nos 15 and 16 of 2021 delivered 27 April 2022 ("CICA Civil appeal judgment") and ***Justin Ramoon v Governor of the Cayman Islands and another (Cayman Islands)*** [2023] UKPC 9 ("PC judgment"). It is, however, necessary for a clear appreciation of the instant proceedings to first provide a synopsis of the relevant background and chronology of events which led to the decisions to transfer the Plaintiffs to the United Kingdom and the resultant litigation that has ensued.

THE FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS

The Plaintiffs' offending and conviction

5. The Plaintiffs are half-brothers who share the same mother. Douglas is a citizen of the United Kingdom and the Cayman Islands. Ramoon is a citizen of the Cayman Islands. Up to June 2017, they both resided in Grand Cayman. They are both unmarried but are fathers of young children. Their mother and most of their family members also reside in the Cayman Islands.

6. The Plaintiffs' current predicament with which these proceedings are concerned arose from an incident, which occurred on 1 July 2015 in George Town, Grand Cayman. In that incident, Ramoon shot and killed Jason Powery at a bar in George Town, using a firearm given to him by Douglas moments before. The Plaintiffs were arrested and charged, and, on 26 May 2016, convicted of murder and possession of an unlicensed firearm.

7. On 19 December 2016, the Plaintiffs were sentenced to life imprisonment for the offence of murder with the stipulations that Douglas should serve a minimum of 34 years and Ramoon a minimum term of 35 years before eligibility for parole. They were also sentenced to concurrent terms of 10 years' imprisonment for possession of an unlicensed firearm. Ramoon was sentenced to an additional year on his minimum term to reflect his previous conviction for possession of an imitation firearm. They were both committed to HMP Northward, the only male prison in the Cayman Islands, to serve their sentences.

8. The Plaintiffs appealed their convictions and sentences to the Court of Appeal. On 7 December 2018, their appeals were dismissed. There was no further appeal regarding their convictions and sentences.

The Plaintiffs' transfer

9. On 27 April 2017, the Royal Cayman Islands Police Service ("RCIPS") made an urgent request to the Cayman Islands Government to consider the Plaintiffs' removal to the United Kingdom pursuant to the 1884 Act. Following that request, the Government made submissions to the Minister of State for the Overseas Territories for the removal of both Plaintiffs to the United Kingdom. On 15 and 16 June 2017, the Lord Chancellor signed warrants of reception for Douglas and Ramoon, respectively. Orders for the Plaintiffs' removal were made by the Secretary of State on 21 June 2017. The next day, on 22 June 2017, the Governor signed a notice of concurrence to the decision to remove Douglas to the United Kingdom resulting in his transfer to the United Kingdom on that date.

10. Following the removal of Douglas, the Cayman Islands Government issued a press release which read:

> *"This evening 22 June 2017, a prisoner was transported to the United Kingdom under the Colonial Prisoners Removal Act, 1884. The prisoner will be housed by Her Majesty's Prison and Probation Service until further notice. This removal was authorised by the UK and Cayman Islands Governments in the interests of national security and the public safety of the people of the Cayman Islands."*

11. Six days later, on 28 June 2017, the Governor signed another notice of concurrence to remove Ramoon to the United Kingdom, which led to his transfer on that date.

Pre-action correspondence after the transfers

12. Douglas' lawyers wrote to the Respondents on 31 August 2017 requesting reasons for the decision to remove him and disclosure of relevant documents related to his removal. On 21 September 2017, lawyers for Ramoon made similar requests. The Attorney General's Chambers responded to the letters from Douglas and Ramoon's lawyers on September 26 and 27, 2017, respectively. The letters outlined the reasons for the Governor's decision to relocate both Plaintiffs to the United Kingdom, which were consistent in content. The letters disclosed some critical information that has been extracted and summarised below.

(a) While detained at HMP Northward, the Plaintiffs had continued to control serious organised criminal activity in the Cayman Islands. HMP Northward was designed as a lower security facility and is unable to offer the level of security required in order to securely detain the Plaintiffs. It was considered that, as long as they remained there, their activities would continue to present a serious and tangible threat to public safety and national security in the Cayman Islands. In these circumstances, it was agreed between local and United Kingdom authorities that the only viable way to manage the risk posed by the Plaintiffs was removal under section 2(d) of the 1884 Act.

(b) Consideration was given to other alternatives, including transferring them elsewhere to another British overseas territory in the region, but it was decided that no suitable alternative existed. Transfer to a prison in the United Kingdom was the only appropriate option.

(c) The Plaintiffs were not notified of the intended removal because given the circumstances that informed the decision to transfer them, any forewarning would have had the potential to undermine the objectives of the removal.

(d) Consideration was given to the human rights implications of any transfer, with reference to the right to respect for private and family life in section 9(1) of Part 1 of Schedule 2 to the Cayman Islands Constitution Order 2009 ("the Bill of Rights") and Article 8(1) of the European Convention on Human Rights (“the Convention”). Specifically, it was noted that the Plaintiffs had grown up in the Cayman Islands and had family, including their children, there. It was also taken into account that they would receive weekly visits from family members.

(e) However, it was noted that the right to respect for private and family life permits proportionate limitations for certain specified purposes as set out in section 9(3)(a) of the Bill of Rights and Article 8(2) of the Convention.

(f) The removal of both Plaintiffs was considered a necessary and proportionate interference with their rights. Any disruption to their family relationships would be mitigated by the fact that foreign national prisoners in the United Kingdom are permitted to call abroad regularly and that the Cayman Islands Government might consider providing financial assistance to enable a close family member to visit each Plaintiff if a particular need was shown.

(g) While it was intended that consideration would be given to the Plaintiffs' return to the Cayman Islands at a later date, should the security conditions at HMP Northward improve, the basis for the decision to remove them remained current, and, therefore, their requests for an immediate return to the Cayman Islands could not be acceded to.

(h) Further, the information in response to which the Plaintiffs were removed was of a sensitive nature and would likely be the subject of a public interest immunity application in the event that the Plaintiffs proceeded to challenge their removal by way of litigation. As such, the Attorney General was unable to accede to their requests for disclosure of documentation at that stage.

13. It should be noted, parenthetically, that following the letters from the Attorney General's Chambers, there was further disclosure of material relative to the decisions to remove the Plaintiffs, which will be later discussed within the appropriate context.

The commencement and procedural history of the litigation

14. Reacting to the decisions to remove them to the United Kingdom, the Plaintiffs filed applications for leave to apply for judicial review on 21 and 28 September 2017. Douglas' application was filed before his lawyers received a response from the Attorney General to their request for reasons and disclosure. The Plaintiffs were granted leave to file their applications for judicial review by Carter J (Ag) on 7 and 14 December 2017. Carter J (Ag) also ordered, among other things, that the Plaintiffs' applications and grounds for leave to apply for judicial review stand as "*a duly constituted application brought concurrently pursuant to section 26 of the Bill of Rights*". She further made orders for disclosure, required the Respondents to indicate whether the applications were being opposed on jurisdictional grounds and whether there would be applications for material to be withheld from disclosure on public interest immunity ("PII") grounds.

15. On 17 January 2018, by order of the court, the two applications for judicial review were consolidated and other directions given regarding disclosure and the PII application.

16. These orders and others resulted in several interlocutory applications with corresponding satellite proceedings and decisions. However, before providing an insight into those satellite proceedings (which is necessary for an understanding of the issues that are for consideration before this court), it is deemed necessary to set out the scope of the applications for judicial review.

The applications and grounds for judicial review

17. Amidst several satellite proceedings, the Plaintiffs amended their applications for judicial review in October and November 2019. They advanced the same challenge to the decisions, having expressly adopted each other's judicial review grounds in their respective amended applications. The joint challenge stands on six major grounds that had been extracted from paras. 13 – 40 of Douglas' application and para. 25 of Ramoon's application. These grounds are compressed in outline as follows:

(a) The failure to provide written reasons for the decisions to remove the Plaintiffs from the Cayman Islands (***Osbourne ground (b)***, ***Ramoon ground (1)***);

(b) The absence of any lawful or legitimate basis for the removal of the Plaintiffs (***Osbourne ground (a)***, ***Ramoon ground (2)***);

(c) The removal is not justified or is disproportionate, and in breach of sections 6 and 9 of the Bill of Rights (***Osbourne ground (a)***, ***Ramoon ground (5))***;

(d) The absence of proper procedural safeguards and guarantees of fairness surrounding the decision to remove the Plaintiffs from the Cayman Islands (***Osbourne ground (b)***, ***Ramoon ground (3)***);

(e) Breach of the right to access justice at common law and/or section 7 of the Bill of Rights (***Ramoon ground (4)***); and

(f) Failure to have regard for the best interests of the Plaintiffs' children in the decision-making process (***Ramoon ground (6)***).

18. Collectively, the Plaintiffs seek the following relief:

(a) A declaration that the removal decisions and/or any decision to transfer and/or consent to their transfer to the United Kingdom constitutes a violation of the Constitution of the Cayman Islands (and specifically the rights identified in the grounds).

(b) A declaration that their continued detention in the United Kingdom is in breach of the Constitution.

(c) An order of certiorari quashing the removal decisions.

(d) An order of mandamus, (or certiorari of any decision taken to the contrary) that the Respondents forthwith order their return to the Cayman Islands and take all necessary steps to have them returned to HMP Northward to serve the remainder of their sentences.

(e) A declaration or an order of mandamus that ensures that the procedure by which any such decision is taken by the Respondents shall hereafter be rendered fair and provide adequate safeguards for their rights and the rights of their family.

(f) Such further, necessary and consequential or other relief the court shall deem appropriate.

(g) Costs.

Relevant satellite applications and decisions of the Grand Court

19. Both sides brought various satellite proceedings between February 2018 (before the Plaintiffs amended their judicial review applications) and February 2021 (after the amendments). There were corresponding decisions made and directions given for the progress of the case to the substantive hearing of the applications for judicial review. The most material proceedings, decisions and directions emanating from them will be specifically mentioned to provide some context for the instant proceedings.

20. Between February and March 2018, the Respondents issued a summons for the court to set aside the grant of leave to apply for judicial review and requested a PII hearing. The application to set aside the grant of leave for judicial review did not succeed.

21. In July 2019, Carter J (Ag) had to consider further preliminary issues, including the Plaintiffs' application for disclosure, the Respondents' PII application, the appointment of a special advocate, and whether a closed material procedure ("CMP") was available in the Cayman Islands. A special advocate, Mr Ashley Underwood KC, was appointed by Carter J (Ag) to represent the Plaintiffs' interests at the PII and CMP hearings. The special advocate was given access to all the withheld material and made representations on the Plaintiffs' behalf regarding their material. The Plaintiffs were excluded from those hearings.

22. By judgments dated 2 July 2020 ("the CMP Judgment") and 19 October 2020 ("the PII Judgment"), Carter J (Ag) held, respectively, that a CMP was not available in the Cayman Islands, and that a substantial amount of the documents on which the Governor relied in making the impugned decisions were to be withheld from disclosure on PII grounds. PII was upheld on, among other grounds, national security and the threat to third parties.

23. By order dated 7 January 2021, Carter J (Ag) gave case management directions, including adjourning the following matters for determination at a final hearing:

(a) The Respondents' application to strike out the applications for judicial review on the ground that they were untriable;

(b) The preliminary question raised by the Respondents as to whether the Bill of Rights applied to the impugned decisions or whether the Grand Court has jurisdiction under section 26 of the Bill of Rights to review the decisions on Bill of Rights grounds ("The Bill of Rights Issue"); and

(c) The Plaintiffs' substantive applications for judicial review.

24. The Respondents reserved their position regarding any appeal until the final hearing of the judicial review applications. In keeping with that position, Carter J (Ag) extended time for the parties to appeal the CMP and PII Judgments until after the conclusion of the substantive applications for judicial review.

The final hearing of the applications for judicial review

25. The final hearing of the Plaintiffs' applications for judicial review was conducted before Wood J (Ag) in 2021. He had no access to the PII material as no CMP was available. On 28 May 2021, with written reasons following on 29 November 2021, he refused the applications.

26. By this time, the Plaintiffs' appeals against their convictions and sentences had been dismissed by the Court of Appeal on 7 December 2018.

PROCEEDINGS IN THE COURT OF APPEAL

27. The Plaintiffs appealed Wood J (Ag)'s refusal of their applications for judicial review. The Respondents filed a counter-notice of appeal from the CMP judgment of Carter J(Ag), contending that a CMP was available in the Cayman Islands.

28. The Court of Appeal noted that it was accepted by all concerned in the appeal that the decision of Wood J. (Ag) on the substantive applications for judicial review was inadequate (para. 3 of the CICA civil appeal judgment). As a result, his decision could not stand.

29. The Court of Appeal identified and addressed the primary issues for its determination, namely:

(a) whether the Bill of Rights applies to the decisions ("the Bill of Rights Issue");

(b) whether the 1884 Act is in accordance with the law ("the Lawfulness Issue");

(c) the options available to the court should a CMP not be available ("the CMP Issue");

(d) whether the Respondents took into account the Plaintiffs' family ties when making the decisions regarding the removal ("the Substantive Issue"); and

(e) the extent to which the Plaintiffs can rely on a failure to build or rebuild a prison in the Cayman Islands ("the Prison Upgrade/Rebuild Issue").

30. On these issues, the Court of Appeal decided as follows:

(1) *The Bill of Rights issue*

31. The Bill of Rights applies to the impugned decisions, the determination of the applications for judicial review, and the appeals. The evidence shows a significant impact on the Plaintiffs' rights guaranteed by section 9 of the Bill of Rights.

(2) *The Lawfulness Issue*

32. The 1884 Act is in "accordance with the law" for the purposes of the rights enjoyed by the Plaintiffs to respect for their private and family life under section 9 of the Bill of Rights. The terms of the 1884 Act are sufficiently precise, and there is no need to introduce a third policy to govern the

exercise of the Governor's discretion. The procedures available to the plaintiffs to challenge the removal were and are sufficiently precise.

(3) *The CMP Issue (alternatives to a CMP)*

33. The alternatives to a CMP were unsatisfactory. The Plaintiffs' rights could only be justly and fairly vindicated by an effective judicial review process which is not possible unless the court considers the justification for and the proportionality of the decisions on the same basis and on the same information as that which was considered by the Governor, which is not possible without a CMP. A CMP was, therefore, necessary for the Plaintiffs to challenge the decisions and to have their challenge determined fairly by the court, which would not be possible without a CMP. It was not open to the court to allow the appeal and the applications for judicial review simply because there had been no disclosure of the PII material and no opportunity for the court to review the PII material in a CMP. On the other hand, the Respondents' argument that the appeal and the applications should be struck out or stayed could not succeed.

(4) *The CMP Issue (availability of CMP)*

34. A CMP is available in the Cayman Islands; therefore, a CMP could and should be ordered.

(5) The Substantive Issue

35. Although little contemporaneous evidence was disclosed of the reasons for the impugned decisions, the Respondents had taken into account the family ties of the Plaintiffs when making the decisions although the disclosed part of the redacted submission to the United Kingdom Ministers disclosed no reference to their children or their families. On the main issue of whether the decisions were a disproportionate and unjustifiable interference with the Plaintiffs' constitutional rights as alleged by them, the case should be remitted to the Grand Court for determination following a CMP, which was available in the Cayman Islands.

(6) The Prison Upgrade/Rebuild Issue

36. This issue was remitted for consideration along with the substantive issue of proportionality.

RAMOON'S APPEAL TO THE PRIVY COUNCIL

37. Ramoon appealed to the Privy Council on the Lawfulness, CMP and the Substantive issues. Douglas did not appeal. The Respondents cross-appealed on the issue concerning the alternatives to a CMP in the event the Board concluded that no CMP was available in the Cayman Islands. There was no appeal or cross-appeal regarding the Court of Appeal's treatment of the Prison Upgrade/Rebuild Issue, which was remitted for hearing by this court.

38. The Privy Council formulated the issues for its consideration in these terms:

(a) Whether the Court of Appeal erred in concluding that the Grand Court had jurisdiction to hold a CMP or (if such jurisdiction existed) that the jurisdiction could properly be exercised.

(b) Whether, in the event that the Court of Appeal erred and no CMP was available, the application for judicial review should be allowed, dismissed, stayed or struck out or remitted to the Grand Court for reconsideration.

(c) Whether the decision challenged was "in accordance with the law".

(d) Whether no account was taken of the impact of transfer on the appellant's and child's family life and that the decision was accordingly unlawful.

39. In outline, the gravamen of the Privy Council's decision on the critical issues was as follows.

(1) <u>The Lawfulness Issue</u>

40. The Board agreed with the Court of Appeal that section 2 of the 1884 Act establishes a test with sufficient precision to meet the requirement that it be 'in accordance with the law' and that further elaboration of the test is not required. The objective identified in section 2 of the Act, which is the prisoner's safer custody, is a legitimate objective and requires a comparison of the risk to the public or national security, were the prisoner not to be removed. Subject to one matter, which is the absence of notification to Ramoon before removal, there were adequate safeguards against abuse of the power of removal conferred by section 2 of the 1884 Act.

41. The one outstanding matter is Ramoon's complaint that his removal was not in accordance with the law because he was not given any advance warning of his removal and had no opportunity to challenge it in advance. This aspect of the plea must be addressed based on the evidence at the remitted judicial review hearing.

(2) The CMP Issues (availability of CMP)

42. Reversing the Court of Appeal, the Board opined that a CMP was unavailable to the Grand Court in the judicial review hearing. It was not open to the Board to invent a CMP on the Cayman Islands under the guise of the development of the common law. It was a matter for the legislature. Accordingly, the Respondents' cross-appeal on this issue could not succeed.

43. This case is not an exceptional case in which the PII ruling has resulted in a situation where, without disclosure of the PII material, the Grand Court would be unable to decide the dispute fairly. There was reasonably extensive disclosure and "gisting" of the contents of the PII documents. Moreover, as far as the threat posed by the Plaintiffs was concerned, there was compelling evidence of the dangerousness arising from their conviction for a "particularly cold-blooded gang killing". There was no unfairness in the Plaintiffs' claim for judicial review proceeding to trial based on the material, which is now available due to the PII exercise. The appeal, therefore, failed on this issue.

(3) Whether the decisions did not take into account the impact of the transfer on family life

44. The Board saw no reason to depart from the primary findings of fact of the Court of Appeal that Ramoon's right to family life and his child's family life were not ignored. However, his rights to dignity, respect for his family life and the right to respect for the family life of his child must be taken into account and given due weight in the proportionality balancing exercise, with the child's best interest as a primary consideration. Whether or not appropriate weight was given to these considerations in the proportionality balancing exercise is a matter for the hearing of the remitted judicial review.

45. Though Douglas was not a party to the appeal, the pronouncements of the Privy Council in Ramoon's appeal are binding on this court in relation to him. Accordingly, the decision is applied with equal force in considering the case of both Plaintiffs, jointly and severally.

THE REMITTED ISSUES FOR DETERMINATION

46. Upon the invitation of the court, the Plaintiffs' counsel filed a List of Issues with the comments of the Respondents' counsel, aimed at delineating the issues to be determined by the court following the appeal process and the remittal of the judicial review for hearing.

47. Two broad issues have been identified, which the court has adopted, bearing in mind the comments of the Respondents in respect of each:

(a) Whether the removal was a disproportionate interference with the Plaintiffs' right to private and family life and their right to be treated with humanity and with respect for the inherent dignity of the human person in breach of section 6 and/or section 9 of the Bill of Rights in its substantive aspect **("the proportionality ground")** (Ramoon amended grounds [70] – [79] and Douglas amended grounds [15] – [24]); and

(b) Whether the Plaintiffs' removal was unfair and breached section 9 of the Bill of Rights in its procedural aspect because they were not given a realistic opportunity to make representations before their removal **("the fairness ground")** (Ramoon amended grounds [56] – [64] and Douglas amended grounds [25] – [35]

48. From these grounds and the written skeleton arguments of the parties, three sub-issues have been raised for the consideration of the court in determining the remitted grounds, which are:

(a) Whether the Respondents are unable to demonstrate that the removal was proportionate in light of the failure to make provision for high-risk prisoners ("**the Prison Upgrade/Rebuild Issue**") **(Ramoon amended grounds [79(3)] and Douglas amended grounds [23(a)]).**

(b) Whether proportionality is considered at date of removal or in light of subsequent developments ("**the Timing Issue**").

(c) What approach the Court should take in the light of the fact much of the underlying evidence on which the Decisions were based has been withheld by order of Carter J on PII grounds ("**the PII Issue**").

THE ESSENTIAL LEGAL AND CONSTITUTIONAL FRAMEWORK

49. To determine the issues remitted to the court for resolution and the sub-issues arising from them, a clear understanding of the legislative and constitutional context in which the impugned decisions were made and the challenge brought by the Plaintiffs to them is critical.

The applicable legislative scheme

50. Section 2(d) of the 1884 Act sanctioned the Plaintiffs' removal from the Cayman Islands to the United Kingdom. The relevant provisions of the Act that relate to the decisions to remove the Plaintiffs state in part:

> **"2. *Removal of prisoners from British possessions in certain cases***
> *Where as regards a prisoner undergoing sentence of imprisonment in any British possession for any offence it appears to the removing authority and herein-after mentioned either-*
> *(a) ...*
> *(b) ...*
> *(c) ...; or*
> ***(d) that by reason of there being no prison in the said British possession in which the prisoner can properly undergo his sentence or otherwise the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect****..."*
> *In any such case the removing authority may, subject, nevertheless to the regulations in force under this Act, order such prisoner to be removed to any British possession or to the United Kingdom to undergo his sentence or the residue thereof."* (Emphasis added)

51. By virtue of section 5, the removing authority for the purposes of the 1884 Act is the Secretary of State acting with the concurrence of the Government of every British possession concerned. In this case, the Secretary of State would act with the concurrence of the Government of the Cayman Islands- the British possession concerned.

52. The procedure for removing the Plaintiffs under section 2 was prescribed by regulations in the Colonial Prisoners Removal Order in Council 1907 No. 742 ("the 1907 Order"), which was followed.

53. Section 8 of the 1884 Act addresses how transferred prisoners are dealt with upon transfer. The section reads, in so far as is relevant:

> ***"8. Dealing with removed prisoner***
> (1) *Every prisoner removed in pursuance of this Act shall, until he is returned in pursuance of this Act, be dealt with in the part of Her Majesty's dominions to which he is removed, in like manner as if his sentence (with such variation, if any, of the conditions thereof as may have been duly made in pursuance of regulations under this Act) had been duly awarded in that part, and shall be subject accordingly to all laws and regulations in force in that part, with the following qualifications, that his conviction judgment and sentence may be questioned in the part of Her Majesty's dominions from which he has been removed in the same manner as if he had not been removed, and that his sentence may be remitted and his discharge ordered in the same manner and by the same authority as if he had not been removed."*

54. As life prisoners transferred to the United Kingdom under the 1884 Act, the Plaintiffs had the right conferred by section 273 of the Criminal Justice Act 2003 to apply to the High Court to determine the minimum term they must serve before eligibility for parole. They availed themselves of that right and received a reduction of three years in their minimum term to reflect the additional hardship caused by serving their sentences in the United Kingdom. See, for instance, regarding Osbourne Douglas, the judgment of Davis J in ***Re OD (Minimum Term)*** [2019] EWHC 3018 (QB). The same decision was made in Ramoon's case.

55. Also, like every other life prisoner in the United Kingdom, the Plaintiffs are entitled to apply to the United Kingdom Parole Board to be considered for release at the expiry of the minimum term to which they had been sentenced under sections 28 and 34(1) of the Crime (Sentences) Act 1997.

56. Also, of relevance is the fact that they have the same rights to contact as any other prisoner in the United Kingdom prison system: see Prison Rules 1999/728, r. 34. Additionally, they have enhanced rights as foreign national prisoners, including free phone calls once a month, unlimited cash on their phone cards, and flexible telephone hours.

57. Although the Plaintiffs are subject to the laws of the United Kingdom upon their removal, they are seeking orders to be made by this court for their return to the Cayman Islands. Section 3 of the 1884 Act, therefore, becomes relevant. It reads:

> *"**3. Return of removed prisoner.***
> *(1) Where a prisoner has been removed in pursuance of this Act, a Secretary of State or the Government of a British possession to which the prisoner has been so removed, may order the prisoner, for the purpose of undergoing the residue of his sentence, to be returned to the British possession from which he was removed.*
>
> *(2) If a Secretary of State or the Government of a British possession to which a prisoner is removed under this Act, requires the prisoner to be returned for discharge to the British possession from which he was removed, the prisoner shall, in accordance with the regulations under this Act, be returned to the said British possession for the purpose of being there discharged at the expiration of his sentence. In any other case a prisoner when discharged at the expiration of his sentence shall be entitled to be sent free of cost to the British possession from which he was removed;*
> *Provided that where a prisoner at the date of his sentence belonged to the Royal Navy or to Her Majesty's regular military forces, nothing in this section shall require such prisoner to be returned to the British possession from which he was removed, or entitle him to be sent there free of cost."*

58. The United Kingdom being the 'British possession' to which the Plaintiffs had been removed - that may order their return to the Cayman Islands, the British possession from which they were removed.

The relevant constitutional provisions

59. A brief consideration of some relevant provisions of the Constitution is also helpful as it relates to the Governor's powers and role within the scheme of the 1884 Act vis-à-vis the role of His Majesty in the affairs of the Cayman Islands when the decisions were made.

60. The Governor is appointed by His Majesty (section 29 of the Constitution) and exercises the Crown's authority in accordance with (and subject to) the terms of the Constitution (section 31). By section 43(1), executive power is vested in His Majesty, but that power is exercised on his behalf

by the Government of the Cayman Islands, consisting of the Governor as His Majesty's representative and the Cabinet, either directly or through public officers (section 42(3)). By virtue of section 55 of the Constitution, the unique functions of the Governor include responsibility for the internal security of the Islands.

61. The Governor's responsibility for the internal security of the Islands is a material fact of note when the court considers the constitutionality of the Governor's action in concurring with the decisions to remove the Plaintiffs from the Cayman Islands.

62. Disgruntled by their transfer to the United Kingdom, with no plan in place for their immediate return to the Cayman Islands, the Plaintiffs have alleged infringement of their rights guaranteed by the Bill of Rights and are seeking redress, pursuant to sections 26 and 27 of the Bill of Rights, which provide, in so far as is relevant:

> *"26. (1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time."*
>
> *"27. (1) In relation to any decision or act of a public official which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order within its powers as it considers just and appropriate."*

63. The Plaintiffs have alleged violation of their rights guaranteed by sections 6(1) and 9(1) of the Bill of Rights and have prayed in aid sections 19 and 24 in seeking redress for their removal to the United Kingdom.

64. Section 6 (1) of the Bill of Rights provides:

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

65. Section 9 provides, in so far as is relevant:

> *"(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.*
>
> *(2) ...*
>
> *(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—*
>
> *a. in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any other property in such a manner as to promote the public benefit;*
>
> b. *for the purpose of protecting the rights and freedoms of other persons; ...*".

66. By virtue of section 19:

> *"(1) All decisions and acts of public officials must be lawful, rational, proportionate, and procedurally fair.*
>
> (2) *Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."*

67. Section 24 provides in these terms regarding the duty of public officials:

> *"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."*

68. Under s.28, "*public official*" includes, among other things, "a public or governmental body and any organisation or person carrying out a public function or duty, including the Governor, except where the nature of their act is private". The Respondents are indisputably public officials.

69. It is settled beyond dispute on the authority of the Court of Appeal that "the Bill of Rights forms the framework according to which the decision of the Governor falls to be judged" (CICA civil appeal judgment at para 62). Nothing in the 1884 Act authorises or requires the Governor to act in a way incompatible with the Bill of Rights, so the exceptions in section 24 could never apply to the 1884 Act. The Court of Appeal also opined that given that the 1884 Act applies to both the United Kingdom and the Cayman Islands, it must, therefore, be interpreted and applied in the same way both in the Cayman Islands and in the United Kingdom and so the courts of the Cayman Islands must interpret it in a manner which is compatible with the Human Rights Act 1998 (paras 58 and 59 of the CICA civil appeal judgment). Those rights are consistent and compatible with rights under the Bill of Rights.

70. However, as the Court of Appeal highlighted, although the scope of the Convention was extended to the Cayman Islands, the Islands had adopted their model of the 1998 Act, although not in identical terms (para 61 of the CICA civil appeal judgment). Accordingly, nothing in the 1884 Act or the Human Rights Act 1998 could authorise a decision which infringes a prisoner's rights under section 6 or section 9 of the Bill of Rights – the rights at the centre of the dispute in this case.

71. In this context, it should also be noted that the United Kingdom had permanently extended the European Court of Human Rights (the ECtHR) jurisdiction to the Cayman Islands from 23 February 2006. Therefore, the jurisprudence of the ECtHR is relevant to the interpretation and application of the Bill of Rights, where necessary.

THE CONTENTS AND SCOPE OF SECTIONS 6 AND 9 OF THE BILL OF RIGHTS

72. The scope and contents of the rights guaranteed by sections 6 and 9 of the Bill of Rights in issue are given specific consideration because the parties do not agree on the scope and significance of s.6 in this case and, therefore, the treatment that should be accorded it in the analysis on proportionality and justification.

Section 6 of the Bill of Rights

73. Section 6(1) guarantees the Plaintiffs the right as prisoners to be treated with humanity and with respect for the inherent dignity of the human person. There is no express analogous provision to

this section in the Convention. The distinct stand-alone place of this right in a human rights regime is adopted from Article 10.1. of the International Covenant on Civil and Political Rights ("ICCPR").

74. Article 10.3. provides, in part, that "*the penitentiary system shall comprise the treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation*". This is not expressly adopted in section 6 of the Bill of Rights but is implied in its terms and becomes applicable through the ECtHR jurisprudence regarding prisoners' rights.

75. A brief but helpful explanation of the scope and content of this right is gleaned from an exposition on the human rights system of Australia provided on the website for the Office of the Attorney-General of that jurisdiction (see https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-humane-treatment-detention last accessed on 24 October 2024). Like the Cayman Islands, Australia has incorporated Article 10 of the ICCPR in its human rights regime. It is explained that the right means that detainees should not be subject to any form of hardship or constraint in addition to those that are unavoidable incidents of detention in a closed environment. The right is said to complement the prohibition on torture and cruel, inhuman or degrading treatment or punishment but is engaged by a broader range of less severe mistreatment. Mistreatment may amount to a violation of Article 10 even if it does not rise to the level of torture or cruel, inhuman or degrading treatment or punishment.

76. The right has been held to be violated in cases where the detainee was, for example, "subjected to unreasonable restrictions on correspondence with his/her family". It applies to anyone detained, regardless of age or citizenship.

77. The Reporting under the ICCPR Training Guide, Professional Training Series No. 23 (2021) (online manual), prepared by the United Nations Human Rights Office of the High Commissioner, is also instructive. It directs that in determining whether the conditions of detention violate the standard guaranteed by Article 10, the nature and context of the treatment, its duration and its physical or mental effects and the characteristics of the individuals concerned should be considered. Examples of inhuman conditions include a lack of adequate food, water, medical services, accommodation and bedding, and a minimum level of privacy. State parties should, among other

things, put in place legislative, administrative, and practical measures to rehabilitate convicted persons, including education, vocational training, and guidance.

78. The Guide also discusses links with other articles of the Covenant. It notes that Article 10 is frequently mentioned in conjunction with Articles 6 (right to life), 7 (prohibition of torture) and 9 (right to liberty and security of person) since non-compliance with Article 10 can lead to violations of the rights guaranteed by the other provisions. It is also generally quoted in connection with Article 14 (right to a fair trial), as the safeguards contained in this article are a way of guaranteeing the other rights. Section 6(1) should, therefore, be viewed in the same light as impacting other rights.

79. In the absence of any express limitation in the Bill of Rights, similar to that in Article 4 of the ICCPR, which allows derogation from article 10 in limited circumstances, the Plaintiffs' argument, in this case, is that section 6(1) of the Bill of Rights is an absolute right admitting no derogation. They contend that it demands a separate and distinct analysis and treatment from the section 9 rights that are subject to limitation because a breach of section 6 cannot be justified. The Respondents do not accept this argument, hence the issue that has arisen for the court's determination. A look at section 9 is now warranted.

Section 9 of the Bill of Rights

80. Section 9 of the Bill of Rights is analogous to Article 8 of the European Convention on Human Rights (ECHR). Article 8 reads:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

81. The Plaintiffs claim a violation of the right to respect for their family life. In so far as the interpretation and application of section 9(1) of the Bill of Rights, within the context of this case are concerned, the oft-cited case of ***Polyakova and Others v Russia*** App. No. 35090/09, ECtHR7 March 2017 ("***Polyakova***"), is instructive. In that case, the applicants complained of a violation of Article 8 of the Convention on account of the lack of an effective opportunity for prisoners and their relations to maintain family and social ties during their imprisonment in a remote penal facility ranging at distances from between 2000-8000 kilometres from their home. After examining each applicant's particular circumstances, the court concluded there was a violation of Article 8 of the Convention regarding the prisoners and their families' rights guaranteed by Article 8. The court, referring to its established jurisprudence from previously decided cases, affirmed some statements of principle of relevance to this case at paras. 81-89 and 100-101 of the judgment. These principles are summarised below.

82. The essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by public authorities. The provision protects, in particular, a right to personal development and to establish and develop relationships with other human beings and the outside world (see ***Pretty v the United Kingdom*****,** no. 2346/02 at 61, ECHR 2002-III). The Convention must be interpreted and applied to render its rights practical and effective, not theoretical and illusory (see ***Christine Goodwin v the United Kingdom*** [GC], no. 28957/95 at 74, ECHR 2002 – VI). Any interference with a right protected by the first paragraph of Article 8 (paragraph 8.1) of the Convention must be justified in terms of the second paragraph (paragraph 8.2), namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein.

83. The very essence of the Convention is respect for human dignity. Rehabilitation, that is, the reintegration into society of a convicted person, is required in any community that established human dignity as its centrepiece (see ***Vinter and others v the United Kingdom*** [GC], nos. 66069/09 113, ECHR 2013 (Extracts)).

84. Prisoners continue to enjoy all the fundamental rights and freedom guaranteed under the Convention except for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. There is no question that a prisoner forfeits his Convention

rights because of his status as a person detained following conviction. Article 8 of the Convention requires the State to assist prisoners as far as possible to create and sustain ties with people outside prison to promote the prisoners' social rehabilitation. In this context, the location of the place where the prisoner is located is relevant.

85. Regarding visiting rights, Article 8 of the Convention requires States to take into account the interests of the convict, their relatives and family members. The State does not have a free hand in introducing restrictions in a general manner without affording any degree of flexibility for determining whether limitations in specific cases are appropriate or necessary, especially regarding post-conviction prisoners The margin of appreciation left to the State in the assessment of the permissible limits of the interference with private and family life in the sphere of regulation of visiting rights of prisoners has been narrowing (see ***Khoroshensko v Russia*** *Application no. 41418/04*).

86. While the Convention does not grant the prisoners the right to choose their place of detention, and the fact that prisoners may be separated from their families and housed at some distance from them is an inevitable consequence of their imprisonment, to ensure respect for the inherent dignity of the human person, the States should aim at maintaining and promoting prisoners' contacts with the outside world. To achieve this aim, the domestic law should provide prisoners (or, where relevant, their relatives) with a realistic opportunity to advance reasons against their allocation to a particular penal facility and to have them weighed against any other considerations in the light of the requirements of Article 8 of the Convention before the domestic authorities. This would mean that Article 8 of the Convention should be incorporated into decision-making.

87. There are various ways to include considerations of Article 8 of the Convention in the decision-making process; the consultation procedure is one of the safeguards against arbitrariness. What is salient in this context is that the domestic authorities perform an individual assessment of a prisoner's situation before deciding on allocation to a penal facility. A formalistic reference to, for example, security considerations without examining the person's circumstances cannot substitute for such individual assessment.

88. Any restriction on the Convention rights of the prisoner must be justified in each case. This justification can flow, among other things, from the necessary and inevitable consequences of imprisonment or an adequate link between the restriction and the circumstances of the prisoner in question (see ***Dickson v. the United Kingdom*** [GC], no. 44362/04, at 68, ECHR 2007-V).

89. In the earlier case of ***Vintman v Ukraine*** *(2014) ECHR 28403105,* cited in ***Polyakova***, it was stated at para 78 that:

> "*...detaining an individual in a prison which is so far away from their family that visits are made very difficult or even impossible may, in some circumstances, amount to interference with family life, as the opportunity for family members to visit the prisoner is vital to maintaining family life... It is, therefore, an essential part of a prisoner's right to respect for family life that the authorities assist them in maintaining contact with their close family.*"

90. The preceding principles form the common thread running through all cases involving the rights of transferred prisoners under Article 8 of the Convention. (See too ***Fraile Iturralde v Spain*** (2019) 66498/17, [17-19] **[116/1938]**; ***Danilevich v Russia*** (2021), [47] **[55/1878]**; ***Khodorkovskiy v Russia*** (2014) 59 E.H.R.R. 7, [835-837] and ***Ilerde and others v Turkey*** *(Applications nos. 35614/19 and 10 others)*). As such, the principles distilled from these cases are strongly applicable to the consideration of this case, which involves the engagement of prisoners' rights under section 9(1) of the Bill of Rights. Therefore, as the authorities have established, the Plaintiffs are still entitled to the protection of their human rights that their detention has not suspended. Their section 9 right to respect for family life is one such right of immediate relevance that has not been suspended or obliterated by incarceration or transfer.

91. However, the right is not absolute. It is qualified by section 9(3) of the Bill of Rights in the same way Article 8.2 of the Convention has done to Article 8.1. The right can be departed from where and to the extent that it is "reasonably justifiable in a democratic society" for any of the purposes specified in section 9(3). Those purposes include protecting specific public interests, including defence, public safety, public order, public morals and the rights and freedoms of other persons. Therefore, a government measure that interferes with a prisoner's right to family life, while he or she is detained, may be lawful if justified under section 9(3).

92. The evidence and background to these proceedings, including the decisions of the appellate courts detailed above and the concession of the Respondents, have already established that the Plaintiffs' removal, so far away from home, has significantly interfered with their family life. Section 9(1) of the Bill of Rights is indisputably engaged and interfered with, thereby requiring justification under section 9(3) of the Bill of Rights.

WHETHER A SEPARATE ANALYSIS IS REQUIRED FOR SECTION 6 RIGHTS

93. The Plaintiffs have projected the section 6 right as a separate and distinct right that has been interfered with and, as such, should be given separate analysis and treatment from the section 9 right when justification for the interference is being considered. They maintain that treating prisoners with dignity requires safeguarding the rights in issue. In particular, respect for dignity requires the Respondents to 'aim at maintaining and promoting prisoners' contacts with the outside world'. The sort of transfer in issue undermines contact and dignity, they contended. According to them, section 6(1) demonstrates the particular weight attached to the dignity of prisoners by Cayman society. The importance of dignity means that a lack of resources is no answer in the context of complaints such as those in this case. Section 6 is in terms that make it clear that it gives rise to unqualified rights, and so interference with it cannot be justified on any ground advanced by the Respondents or at all.

94. The Respondents contend, in opposition, that section 6 adds nothing to the analysis of the section 9 right, at least in the context of a prisoner's right to assistance with maintaining family contacts, because that right is already protected by section 9 and so a violation of section 9 will involve a breach of section 6. So, according to the Respondents, the duty under section 6 of the Bill of Rights does not impose any additional or more onerous duty in this specific context.

95. To support their position, the Respondents noted that the ECtHR has referred to the terms of Article 10 of the ICCPR in several cases, including those engaging Article 3 of the Convention (the prohibition against torture, degrading and inhuman treatment). They noted that the contents of Article 10 of the ICCPR "are undoubtedly to be implied into other ECHR articles, including Article 8, because 'the very essence of the Convention is respect for human dignity': (see, for example, ***Polyakova*** paras 87-88, 100, 113)." For these reasons, the Plaintiffs' assertion that section 6 provides for an 'absolute right' and 'interference with it cannot be justified' is not supported by

authority and provides no assistance when determining whether there is a breach of section 6 in this context. According to the Respondents, the answer is that there will be a breach of section 6 when the failure to promote the maintenance of a prisoner's family contacts amounts to a violation of section 9. That is how the right to dignity is understood in the Strasbourg jurisprudence and the approach they are inviting this court to take.

96. Having assessed the contents of the relevant rights, I am moved to agree more with the Respondents' position that section 6 does not warrant a separate analysis in so far as it is raised within the context of the section 9 right. Regarding the argument that the interference with respect for private and family life has given rise to a violation of section 6, there would be no requirement for a separate analysis of section 6. In such circumstances, it would be the violation of the right to respect for family life under section 9 that would feed into section 6, thereby leading to a violation of that right. There would be no independent free-standing facts that would separately engage section 6. Based on the Strasbourg Court's jurisprudence, inherent in the Plaintiffs' section 9 right, which is engaged in this case, is their inherent right to be treated with humanity and respect for their dignity as human beings, which is given expression in section 6 of the Bill of Rights. As the court said in ***Polyakova***, "*in order to ensure respect for the inherent dignity of the human person, the States should aim at promoting prisoners' contacts with the outside world*" (para [100]).

97. To this extent, therefore, even though section 6 is expressed as an absolute right, where it is inextricably wrapped up in the section 9 right, as in this case, and not engaged based on any other free-standing ground, then it would not be violated if section 9 is not violated. The section 6 right raised on the pleadings in this case is, in effect, coterminous and co-extensive with the section 9 right that is also pleaded. For this reason, a violation of section 6 cannot be found if the interference with the right under section 9 is justified.

98. It follows that the fact that section 6 is expressed in absolute terms would not benefit the Plaintiffs if the Respondents are found to have established justification for interfering with the section 9 rights. For there to be a violation of section 6, the Plaintiffs would have to establish some other independently pleaded ground on which section 6 can properly be found to be engaged. On my assessment of the grounds and evidence in the case, I have found none. Therefore, whether there is a violation of section 6(1) of the Bill of Rights will be determined after the question regarding the

justification for the interference of section 9 is analysed and resolved, without conducting any separate analysis.

THE PROPORTIONALITY GROUND

Issue 1 – whether the removal was a disproportionate interference with the Plaintiffs' right to private and family life and their right to be treated with humanity and with respect for the inherent dignity of the human person in breach of sections 6 and/or section 9 of the Bill of Rights in its substantive aspect

99. As it relates to the Plaintiffs' challenge on substantive grounds, they complain, in sum, that the decisions are unfair and disproportionate for six broad reasons, namely: (a) the abnormal long-distance transfers; (b) the impact of the transfers on their family life; (c) the impact of the transfers on the family life of the children; (d) the interference with mental health rights, particularly, in the case of Douglas; (e) interference with right of access to lawyers; (f) no consideration given to mitigation at time of the decisions; (g) limited mitigation of the impact of transfer; and (h) absence of plans to facilitate return of the Plaintiffs to include high security provisions in the Cayman Island's prison systems for Category A prisoners.

100. The Respondents have conceded that the exceptional circumstances of this case, including the fact that the Plaintiffs have young children, have constituted a significant interference with the Plaintiffs' rights to and respect for family life.

101. However, while the Respondents have accepted that there has been significant interference with the Plaintiffs and their children's rights to family life, they do not agree that the interference is to the extent contended by the Plaintiffs. The Respondents contend that the interference with the Plaintiffs' right to respect for their private and family life is justified, lawful and proportionate under section 9(3) of the Bill of Rights on national security and public safety grounds**.** This, they say, is demonstrated by the risk the Plaintiffs posed to the safety and security of the Cayman Islands and its people based on established facts and facts derived from intelligence. The established facts, according to them, include (a) the Plaintiffs' predicate offending and conviction with a continuous denial of guilt; (b) their previous convictions; (c) their gang membership; (d) their disciplinary records while incarcerated; (e) their Category A status which still remains despite their detention in the United Kingdom; (f) the inability of HMP Northward to safely secure them; and (g) the steps

taken to mitigate the effects of the transfer. In so far as the intelligence material is concerned, that discloses, among other things, the Plaintiffs' continuing involvement in criminality, a plan to escape custody, and the risk they posed to prison employees and the public in the Cayman Islands. Therefore, there is no violation of the Plaintiffs' constitutional rights under sections 6 and 9 of the Bill of Rights as alleged.

102. The Plaintiffs have rejected the reasons put forward by the Respondents as justification for the transfers. They deny that they are involved in any criminality and pose a threat to national security and public safety. Their evidence in this regard has been considered. Accordingly, it is recognized that they have joined issue with the Respondents on all the matters relied on as justification for the decisions to remove them from the Cayman Islands.

103. It is by now well-established that the impugned decisions have substantially interfered with the Plaintiffs right to respect for their family life. This is the admission of the Respondents and the conclusion of the appellate courts by which I am bound. The question is whether the interference is justified under section 9(3).

104. At para 36 of the Court of Appeal's judgment, Moses JA helpfully identified what he viewed as the central issue which falls to be determined in the judicial review hearing, when he stated in part:

> *"...in the instant case the issue which falls to be determined is whether the Respondents can make out their case that the risks to national security and public safety were such as to compel a decision to remove the appellants from the islands, and if they can, whether there was any less drastic alternative which might have afforded greater protection to the prisoners' rights and interests of their children."*

The relevant sub-issues

105. Before addressing the issue arising on the substantive proportionality ground, it is imperative to settle some collateral matters that are relevant to conducting the inquiry regarding proportionality and justification. These collateral matters have arisen from the terms of the Plaintiffs' pleaded case, the Respondents' response to that case, the parties' oral and written submissions, the Plaintiffs' List of Issues with the Respondents' Comments filed in October 2023 and the requirements of the general law. These collateral matters include the burden and standard of proof, the approach

and standard of review to be deployed in the assessment of proportionality, and the sub-issues identified by the parties, which I will address as - the Timing Issue; the Prison Upgrade/Rebuild Issue; and the PII Issue.

The approach

(i) The burden and standard of proof

106. The Respondents have rightly accepted that the onus is on them to justify interfering with the Plaintiffs' rights to respect for their private and family life guaranteed by section 9(1) of the Bill of Rights. This is in keeping with the accepted principle of law that once the interference with their constitutional right is established by the Plaintiffs, the burden shifts to the State to prove that the interference is justified under section 9(3) (see ***R (Aguilar Quila) v Secretary of State for the Home Department*** [2012] 1 AC 621 at [45] ("**Quila**")). The State has admitted the interference resulting in a shifting of the evidential and legal burden to prove the interference was justified.

107. The State is required to prove justification on a balance of probabilities in keeping with the general civil standard of proof.

(ii) The test of 'reasonably justifiable in a democratic society'

108. The test to be applied in determining whether the State has justified the interference with the Plaintiffs' constitutional rights in this case is now well-settled. The authorities have established that in cases of judicial review, involving human rights challenges, the approach is one of proportionality, which is different from the approach in treating with traditional judicial review grounds.

109. The test that the court must apply to the question of whether a challenged measure on human rights grounds is reasonably justified in a democratic society is for the court to ask and answer these four questions: (i) whether the objective of the impugned measure is sufficiently important to justify the limitation of a fundamental right; (ii) whether the limitation on the right is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. See ***Huang v Secretary of State for Home Department*** [2007] 2 AC 167 ("***Huang***"); ***Bank Mellat v HM Treasury*** **(No 2)**

[2014] AC 700, 770 ("***Bank Mellat (No 2)***") at paras. 20 (Lord Sumption JSC) and 73-74 (Lord Reed JSC) and ***Royal Cayman Islands Police Assn. v Police Commissioner*** [2019] (1) CILR 107.

110. In ***Suraj v Attorney General of Trinidad and Tobago*** [2022] UKPC 26, [2022] 3 WLR 309 and later, in ***The Attorney General v The Jamaican Bar Association, The General Legal Council v The Jamaican Bar Association*** [2023] UKPC 6, at para 77 ("***The Jamaican Bar Association case***"), the Privy Council affirmed the above approach as "the modern conventional approach to issues of proportionality". It stated that it is similar to the test laid down in the Canadian case of ***R v Oakes*** [1986] 1 SCR 103 ("the ***Oakes*** test").

111. Lord Sumption further observed in ***Bank Mellat (No 2)*** at para 20, that the four requirements, although "logically separate" may "inevitably overlap in practice because the same facts are likely to be relevant to more than one of them".

(iii) The standard of review in assessing proportionality

112. Appreciating the standard of review that the court should apply in assessing proportionality is critical. In this regard, I am guided by the relevant authorities relied on by the parties. See, in particular, ***Tweed v Parades Commission for Northern Ireland*** *(HL(NI)) (2007) 1 A.C. 650,* where, at para 35, Lord Carswell approved the pronouncements of Lord Steyn in ***R (Daley) v Home Secretary*** [2001] 2 AC 532, 547 at para 27 ("***Daley***"); ***Bank Mellat (No 2)***, and ***R (Prolife Alliance) v British Broadcasting Corporation*** [2004] 1 AC 185.

113. I have also received invaluable guidance from the helpful work of Anthony White QC and Matthew Purchase, *Administrative Law,* in the text *Civil Appeals, Second Edition* (General Editor, Sir Michael Burton). The learned writers drew from case law and succinctly restated the key principles at pages 389-392, paras 9-100 to 9-109 of their work.

114. The statements of principles from those authoritative sources have been distilled, synthesised and compressed, for expediency, while adhering as closely as possible to the formulation of the principles by the relevant cited authorities.

115. The Human Rights Act 1998, which incorporated most of the articles of the ECHR into UK law, has had a significant impact on the court's approach to the decisions of public authorities in judicial review proceedings. The Act requires public bodies to act compatibly with those articles. A stipulation in those articles that any interference with those rights is lawful, only if it is proportionate in response to a legitimate aim, requires the courts to assess for themselves the balance that the decision maker has struck. Thus, cases involving Convention rights have introduced a new dimension to judicial review.

116. The starting point is that while there is an overlap between the traditional grounds of review and the approach of proportionality, the intensity of review is greater under the proportionality approach. The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

117. Human rights decisions under the Convention tend to be very fact-specific, and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts.

118. A more intensive review and a closer factual analysis of the justification for restrictions imposed is required than used to be undertaken on judicial review challenges. The heightened scrutiny test developed in the case of ***R v Ministry of Defence, ex p Smith*****,** [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. The intensity of the review is guaranteed by the twin requirements that (a) the limitation of the right was necessary in a democratic society in the sense of meeting a pressing social need, and (b) the interference was proportionate to the legitimate aim being pursued. Therefore, the differences in the approach between the traditional grounds of review and the proportionality approach may sometimes yield different results. It is, therefore, important that cases involving Convention rights must always be analysed in the correct way. This does not mean there is a shift to merits review. On the contrary, the respective roles of judges and administrators are fundamentally distinct and will remain so. The intensity of review in a public law case will depend on the subject matter, even in cases involving Convention rights; context is everything.

119. In addressing the critical question in any proportionality case as to whether the interference with the right in question is objectively justified, it is the court's recognition of the margin of appreciation due to administrative decision-makers, which stops the challenge from being a merits review; the two concepts go hand in hand. With the margin, national courts will accept that there are some circumstances in which the legislature, executive and public bodies are better placed to perform those functions. Therefore, regard must be had to the margin of appreciation in evaluating the challenged decision.

120. The margin of appreciation recognises that the court does not become the primary decision-maker on matters of policy, judgment, and discretion so that public authorities should be left with room to make legitimate choices. The width of the margin of appreciation and the intensity of the review, which it dictates, can change depending on the context and circumstances. In other words, proportionality is a flexi-principle, while the latitude connotes the degree of deference by the court to public body. The extent of the margin will depend on a variety of considerations and, with it, the intensity of review appropriate in the particular case.

121. In a proportionality challenge under the Convention, the focus is on the result, not the process. The court must determine whether the decision itself was proportionate, not whether the decision maker correctly applied the principles of proportionality and reached a rational conclusion on the question. So proportionality must be assessed objectively by the court. See ***R(SB) v Governors of Denbigh High School*** [2007] 1 AC 100 at para. 30 and ***R (Nassari) v Secretary of State for the Home Department*** [2010] 1 AC 1 paras 12-14.

122. However, proportionality is a matter of judgment, not fact (see ***A. Secretary of State for the Home Department.*** *[2005] 2 AC 68* at para 44). It will remain a rare case where findings of fact will need to or should be made in judicial review. The challenge, by definition, goes to the legality of the decision impugned. Generally, no fact-finding will be necessary unless perhaps in the procedural challenges where it may be necessary to establish what happened during the course of the decision-making process rather than what material was before the decision-maker.

123. The margin of appreciation respects and serves to maintain the carefully-guarded distinction between the public body as a primary decision-maker and the court as the reviewing authority.

124. Ultimately, it is for this court to determine whether the human rights of the Plaintiffs have, in fact, been infringed and not whether the removing authority properly took them into account (***Belfast City Council v Miss Behavin' Limited*** [2007] UKHL 19).

(iv) The Prison Upgrade/Rebuild issue (List of Issues sub-issue a.)

125. In the filed List of Issues, the Plaintiffs have posed this question for resolution within the context of the proportionality ground:

> "*Whether the Respondents are unable to demonstrate that the removal was proportionate in light of the failure to make provision for high-risk prisoners ('the Prison Rebuil[d] Issue') (Ramoon amended grounds [79(3)] and Douglas amended grounds [23(a)]);"*

126. The Respondents do not accept that the sub-issue as framed by the Plaintiffs in the terms stated above falls for determination. They submitted that, at the Court of Appeal, they sought to strike out the part of the claim that asserts a failure to rebuild HMP Northward to accommodate Category A prisoners, as unlawful but that the Court of Appeal refused to do so. Rather, the Court of Appeal only allowed this ground to proceed on a very limited basis which is not reflected in the sub-issue as framed. Reference was made to para 159 of the CICA civil appeal judgment in support of this argument. At para. 159, Moses JA opined:

> *"But the Appellants' argument that failure to deploy resources can be no defence to a failure to respect the prisoners' rights is not a direct challenge to the decision not to build a different or more secure prison. It is open to them, on the pleadings, to make that argument. Their argument is not that the failure to build or rebuild a prison was unlawful but rather that if there was an unjustified and disproportionate interference with the prisoners' rights then that failure would not afford a defence. I would, therefore, rule that it is open to them to make that argument on the pleadings"*

His Lordship then stated at para [160]: "*It is not possible to go any further; resolution of the question will be for the Grand Court on remittal applying a CMP*."

127. Based on the Respondents' interpretation of the Court of Appeal's judgment, Mr Bowen KC argued on their behalf that the issue concerning upgrading or rebuilding HMP Northward would only arise if the Plaintiffs had first established that their removal was an unjustified interference with their section 9 rights. In their view, the issue as framed does not reflect the terms on which the Court of Appeal permitted the Plaintiffs to advance this argument at the remitted judicial review hearing. The Court of Appeal requires the Plaintiffs first to establish that the removal decisions were disproportionate.

128. The Plaintiffs responded that the Respondents' argument is flawed on three distinct bases. The first is that the ECtHR case law demonstrates that the duty to provide resources is intended to prevent separation such as that in issue (see ***Polyakova***). It is not simply considered when a breach of Article 8 is established. That is reflected in the fact that there is no defence under Article 8 to a disproportionate decision. Secondly, consistent with the case law of the ECtHR, section 6 is in issue. Section 6 is an absolute right and interference with it cannot be justified. Thirdly, the Respondents' reliance on the judgment of the Court of Appeal is misplaced. The Court of Appeal was merely confirming that the Plaintiffs could rely on resource issues as pleaded and the approach they have explained above is pleaded.

129. I note that despite the debate between the parties, there was no ground of appeal (or counter-appeal) involving that issue before the Privy Council. Therefore, the Board did not treat with it as a specific issue because it was not raised before them. However, it is noted that in treating with the findings of the Court of Appeal on that aspect of the claim, the Privy Council stated, at para 29[6] of its judgment, that the Court of Appeal had concluded that -

> *"The Plaintiffs could rely on a failure to build or rebuild a prison with necessary security in the Cayman Islands as part of their challenge to their transfer on human rights grounds, but resolution of that issue would be remitted to the Grand Court applying a CMP."*

130. Evidently, the Board had interpreted this aspect of the Court of Appeal's reasoning to be that the Plaintiffs may rely on the failure to build or rebuild a prison with the necessary security measures as part of their challenge to their transfer on human rights grounds.

131. Given that the Court of Appeal had not rejected the notion that there could be an argument regarding the failure to build or rebuild a more secure prison within the context of the proportionality ground, I would follow the Privy Council's formulation of what it recorded to be the Court of Appeal's conclusion regarding this matter. I have chosen to do so because the Court of Appeal's formulation of how the argument may be deployed is, unfortunately, not clearly understood. As the Respondents have contended, it seems from the Court of Appeal's reasoning that the argument raising lack of resources, arising from the failure to build or rebuild a prison could only be argued by the Plaintiffs after the Respondents have raised it as a defence following a finding that the interference was disproportionate and unjustifiable.

132. However, in my view which reflects the Plaintiffs' position, once it is already established to the court's satisfaction that there had been disproportionate and unjustifiable interference with the Plaintiffs' rights, it would be open to the court to conclude then and there, given the absence of justification, that there is a violation of the rights. On that reasoning, there would be no further room after such a finding for the Respondents to raise lack of resources as an excuse or defence thereby giving rise to a consideration of the prison rebuild issue. The Plaintiffs would have a right to raise such arguments or to respond to them before any determination of proportionality. This accords with the Plaintiffs' position on the issue.

133. My approach in dealing with this issue is, even more, informed by a consideration of the Plaintiffs' pleadings that each has adopted. In the original application for judicial review filed on 28 September 2017, Ramoon did not specifically plead failure to upgrade HMP Northward as a distinct ground where he set out his grounds for judicial review at para. 29 of his claim. At ground 7 of the claim, he stated his detention was in breach of section 5 of the Bill of Rights and or breach of, among other things, "the public law duties of provision". Later, at para. 90, in the context of that ground, Ramoon averred "in the further alternative" that the Respondents' "failure to make provision or take reasonable steps to remedy any asserted deficiency to the security in place at HMP Northward is in breach of obligations at law and unlawful". Although this ground was not explicitly stated in Douglas' pleadings, he, nevertheless, adopted it.

134. Later, Ramoon amended his application removing ground 7 under which the Prison Upgrade/Rebuild issue was originally pleaded. Para. 90 of the original application which had expanded that ground was removed. At first blush, there seemed to have been an abandonment of the ground regarding illegality. However, at para 79 of his amended application, under the heading dealing with ground 5, Ramoon raises issues regarding proportionality and justification (the proportionality ground), Ramoon pleaded that the Respondents have failed to demonstrate that the decision in question is proportionate for three reasons. The first reason stated at para. 79(1), which is the relevant one, is that it must have been clear for many years that there was a need to make provision for prisoners who are high risk. That implies that there is no reason why changes to the prison could not have been made years ago. Douglas adopted this ground in his amended application at paragraph 23a of his amended grounds.

135. It was against this background of the amended pleadings that the arguments arose in the Court of Appeal regarding the Prison Upgrade/Rebuild Issue. The Respondents' position was that the pleading regarding the prison was no longer being pursued and the argument relying on it should not be permitted. The Court of Appeal refused to strike out the Plaintiffs' pleadings because it found that the argument advanced before it was not a challenge on the ground of unlawfulness of the failure to upgrade or rebuild a prison. However, it cannot be said that what is stated by the Plaintiffs in the List of Issues is a challenge to the lawfulness of a decision regarding the prison.

136. However, I accept the Respondents' viewpoint that the sub-issue as framed in the List of Issues does not accord with the Court of Appeal's formulation or the manner it stated the argument regarding the prison may be deployed. Notwithstanding this, a consideration of paras. 79(1) (Ramoon) and 23a (Douglas) of the amended pleaded grounds clearly shows pleadings relative to the Prison Upgrade/Rebuild issue in the context of the proportionality ground. No reference is made there to the illegality of the decision not to provide a prison, which was pleaded in para 90 of Ramoon's original application. I note that no reference was made in the Court of Appeal's judgment to this revised ground in para 79. It appears that its attention was directed to the original pleading in para 90 under the original ground 7 and not the averment made within the context of proportionality at para 5 of the amended application.

137. Having considered the amended pleadings at paras 79 and 23 of Ramoon's and Douglas' amended applications regarding the Prison Upgrade/Rebuild Issue, respectively, I would hold that it is open to the Plaintiffs to argue the Prison Upgrade/Rebuild Issue based on what is pleaded in their amended applications. Accordingly, it seems fair for the Plaintiffs to maintain that the Prison Upgrade/Rebuild Issue is part of their case under the proportionality grounds. Therefore, it falls to be examined by this court as part of the proportionality ground in the terms it is pleaded in Plaintiffs' amended application and regardless of how it is formulated in the List of Issues.

138. I am far more comfortable with adopting this position because the ground, as contained in the amended application, was not struck out by the Court of Appeal, but instead was remitted to this court for consideration. This decision of the Court of Appeal was not challenged before the Privy Council and, therefore, remains undisturbed. Therefore, the sub-issue will be addressed within its proper context at the material time.

(v) The Timing Issue – whether proportionally is considered at the date of removal or in light of subsequent developments (List of Issues –sub-issue b.)

139. The Plaintiffs contended that, in considering proportionality, the court must consider evidence of the impact of the impugned decisions up to the hearing. They provided detailed reasoning for this viewpoint, which the court has considered. Primarily, they contended that the review cannot be confined to the date of the Governor's decision. This is because the court has to determine proportionality for itself as it is the primary decision-maker regarding whether there has been a violation of the right in question. Second, assessing proportionality requires an evaluation of 'the severity of the consequences', and those consequences become more evident as time passes. Therefore, the court will not be determining issues for itself if it restricts itself to only the matters known at the date of the decisions. Reliance is placed on ***Belfast CC v Miss Behavin*** and ***Bank Mellat (No 2)***.

140. The Plaintiffs contended further that it was the Governor's office and other Cayman authorities who sought the transfer of the Plaintiffs. Therefore, the Governor must continue to review the justification for transfer because the obligations imposed by section 9(1) of the Bill of Rights require the Respondents to minimise separation. The Governor is subject to continuing obligations to comply with the Bill of Rights. The United Kingdom authorities are in a worse position to assess

proportionality (by analogy with ***R (Barclay) v Lord Chancellor (No 2)*** [2015] AC 276 at [39]). While the Governor must seek the consent of the United Kingdom for the Plaintiffs' return, that does not mean she has no role to play. In cases like ***Vintman***, the ECtHR considered what happened after the decision in question (see ***Vintman,*** at para [103]).

141. The Respondents disagree with the Plaintiffs' position. They contended, in opposition, that the court can only be concerned with the lawfulness of the transfer at the time of the Governor's concurrence to the removal. The court's function, they submitted, is to determine the lawfulness of the decisions at the time they were taken and by reference to the evidence that was before the Governor, the decision-maker. That is because any decision as to whether the Plaintiffs should be transferred back to the Cayman Islands from the United Kingdom is a matter for the United Kingdom Government (the Secretary of State) under the terms of the 1884 Act, (section 3(1)). The Governor has no function within that statutory framework, although it is accepted that, in practice, the Governor may request the Secretary of State to exercise the power of return under section 3(1). If the decisions were lawful at the time they were made, then, in that case, any issue as to the lawfulness of the continuing detention in the United Kingdom for the purposes of section 9 of the Bill of Rights is a matter for the United Kingdom Government and not the Cayman Islands Government. Therefore, the Plaintiffs' challenge to any decision not to return them to the Cayman Islands can only be made against the Secretary of State in the High Court in London.

142. The Respondents contended further that the simple fact that a court making a human rights assessment must determine for itself the proportionality of the interference does not mean that it must do so by reference to material that was not available to the decision- maker at the time of the decisions. After citing for support the statements of principle in such cases as ***A, R and another v CC Kent Constabulary (CA)*** [2013] EWCA Civ 1706 at [79-84], and ***R (BAA) v Home Secretary (CA)*** [2021] 4 WLR 124 at [46], the Respondents maintained that none of the circumstances arise in this case which would justify a departure from the principle that the lawfulness of the decision must be assessed on the material before the decision-maker at the time it was made and not by reference to fresh material after the decision was made.

143. In settling the contention raised by the parties on this sub-issue an apt starting point is to note that the impact of the Governor's decisions would have been felt after the Plaintiffs' removal when they

were in the United Kingdom. What transpired in the United Kingdom is, therefore, relevant in showing the fact of interference, the extent of the interference and the impact of the interference. It is, however, by now an admitted fact that there has been significant interference with the Plaintiffs' right to respect for their family life due to their removal from the Cayman Islands. As already stated, the interference is established, the question now is justification which lies on the Respondents.

144. Therefore, the court is not now concerned with any decision to continue to keep the Plaintiffs in the United Kingdom or not to return them to the Cayman Islands. For this reason, subsequent developments affecting the question of the Plaintiffs' return are not relevant to this enquiry. The acceptability of the Governor's justification for concurring in the transfer of the Plaintiffs depends on the prevailing circumstances at the time she made the decisions that led to the Plaintiffs removal from the Cayman Islands. It was when the Plaintiffs were removed from the Cayman Islands, that the Governor's concurring decisions would have crystallised. The Plaintiffs' status would have changed from that of Caymanian prisoners to being United Kingdom prisoners in their capacity as transferred prisoners (section 8 of the 1884 Act).

145. In considering this sub-issue as to the appropriate timeline for considering proportionality, I have gained invaluable guidance from the cases of ***A, R Oao v CC Kent Constabulary*** ("***Kent Constabulary***") paras. [79-84] and ***R (BAA) v Home Secretary*** (paras [44]-[46]). These authorities have established three circumstances in which a court may consider the lawfulness of executive action by reference to fresh material that was not before the decision-maker at the time the impugned decision was made. These are where:

(a) the court is effectively the primary decision-maker rather than carrying out a process of judicial review. See ***Kent Constabulary*** (paras 78-84) citing ***Huang and Manchester City Council v Pinnock*** [2011] 2 A.C. 104;

(b) the decision-maker is a public body with a continuing duty concerning the matter, although in such cases, the more appropriate course is usually for the affected individual to ask the decision-maker to consider the up-to-date material and to make a fresh decision that may be the subject of judicial review: ***Kent Constabulary*** (paras 78-84); and

(c) the fresh material relates to a fact in issue that existed at the time of the decision and which the decision-maker ought to have known: ***BAA*** (para 46).

146. Beatson LJ observed in ***Kent Constabulary***, at para. 80, that:

> *"If the court is required to scrutinise such material, it is difficult to see how the process can be characterised as one of the review of a decision made by the public authority which has been given primary responsibility for a subject matter, often because of its special knowledge and expertise."*

147. At para 91 of the same judgment, Beatson LJ concluded:

> *"In a case such as this, where the primary decision-maker is not under a continuing duty in relation to the matter in the way that the Home Secretary is in the cases to which I referred ... the reviewing court should not consider post-decision material when conducting its assessment of whether a prima facie infringement of an ECHR right has been justified as proportionate."*

148. In ***BAA*** at para. 44, reference is made to the court's pronouncements in ***DB v Chief Constable of the Police Service of NI*** [2017] UKSC 7, at para 76, where it was stated that "*... a judgment on what is proportionate should not be informed by hindsight*". Then, the court in ***BAA*** stated (para 46):

> *"Where a salient fact emerges before a court or tribunal in the course of its own review in a human rights case,* ***then unless that fact was known, or should have been known, it must be wrong in principle to condemn an earlier decision in relation to the rights in question****, whether a matter of a decision as to proportionality or otherwise"* (Emphasis added)

149. Beatson LJ explained in **Kent Constabulary** that in carrying out this exercise to determine the relevant time for considering proportionality, the first task is to establish the relevant facts, which may well have changed since the original decision was made. In this case, the relevant facts are (a) whether the removal of the Plaintiffs to the United Kingdom was expedient for their safer custody due to the risk they allegedly posed to national security and public safety and the inability of the Cayman Islands Government to securely accommodate them at HMP Northward in the light of that risk assessment; and (b) whether the removal was a necessary and proportionate response to the alleged risk.

150. Having applied the applicable principles of law to the relevant facts for determination, I find that none of the three circumstances that would justify this court considering material or information not available to the Governor at the time the decisions were made arise in the circumstances of this case. I endorse the Respondents' submissions, in the light of the standard of review already established, that even though the court is the decision-maker regarding proportionality, it is not the primary decision-maker concerning the removal of the Plaintiffs. It is still conducting a judicial review of the Governor's decisions, which is not a merits review. Therefore, it is not open to the court to review the decision on material that was never before the Governor or which she would not have known or ought to have known at the time she concurred in the removal decisions. Furthermore, as highlighted by counsel for the Respondents, it is not part of the Plaintiffs' case that the Governor failed to take into account facts or any fact in issue that she knew or ought to have known at the time of the decisions.

151. The statutory context in which the Governor exercised her power and the circumstances of the case are not such that the Governor bore responsibility for the Plaintiffs upon their detention in the United Kingdom especially in the context of this case where the removal was a composite decision between the Cayman Islands and the United Kingdom Governments. Therefore, there came a time when the responsibility for the Plaintiffs would have shifted to the United Kingdom especially in matters over which the Cayman Government had no control or jurisdiction. As already indicated, the Plaintiffs, upon their removal, were by law, transferred prisoners who fell within the jurisdiction of the United Kingdom. Accordingly, their treatment in detention was the responsibility of the United Kingdom Government and not the Cayman Islands Government. The Governor, therefore, was not required to consider new facts for a new decision to be made by her under the law regarding the detention of the Plaintiffs in the United Kingdom or their return. No other decision is required of her or can properly be made by her within the statutory regime regarding the interference with the Plaintiffs' rights under section 9(1) to cease while they are in the United Kingdom.

152. Indeed, neither Respondents in the instant case has any continuing statutory duty regarding the Plaintiffs while they are in the United Kingdom as transferred prisoners. This means that new developments in the United Kingdom resulting from the transfer will be for the Secretary of State and the United Kingdom prison authorities and not for the Respondents. There is, therefore, no

scope within the relevant statutory scheme of the 1884 Act for the Respondents or any of them to review the challenged decisions.

153. ***Kent Constabulary*** has established that the court may employ a flexible approach in some cases as some flexibility will enable the court to do justice, especially in an immigration context in changed circumstances. But the authorities have established that even within that context, the proper way of proceeding would be for a claimant to make a fresh application to the decision-maker, which would be subject to further review by the court (See ***Kent Constabulary*** [77 and 78] citing ***Secretary of State for the Home Department*** [2004] LGR 463). The appropriate course in many cases, the court said, "is not to review the decision on the basis of new material" [para 84].

154. Counsel for the Respondents posited that, "the focus must be on the material that was available to the Secretary of State and the Governor at the time of the [d]ecisions, including the anticipated impact of removal on the Plaintiffs' right to family life at or shortly after the decision to remove, having regard to any mitigating measures that were and are available". I accept those submissions.

155. Accordingly, to assess proportionality, the court is not required to take into account all the updated consequences of the removal as advanced by the Plaintiffs. Following the guidance afforded by case law, the Plaintiffs would have to satisfactorily establish that the updated material being relied on to show unjustifiable continuing interference with their sections 6 and 9 rights in the United Kingdom relates to a fact that existed at the time of the decisions or is a fact in issue which the Governor knew or ought to have known at the time she made the decisions (see ***BAA*** [46]).

156. In disposing of the sub-issue, I will conclude that the pertinent time for assessing proportionality and determining justification, in this case, would be at the time the Governor gave her concurrence for the Plaintiffs' removal and up to when the Plaintiffs were removed from the Cayman Islands. This approach has considered matters known and ought to have been known or anticipated by the Governor as the probable and reasonably foreseeable consequences of the decisions on the Plaintiffs' right to respect for family life. The enquiry also involves an evaluation of the measures taken to mitigate those consequences following the Plaintiffs' removal from the Cayman Islands. In essence, not all the subsequent developments, following their removal from the Cayman Islands, that have been relied on by the Plaintiffs, as constituting unjustifiable interference with their

sections 9 and 6 rights, can be laid at the feet of the Governor and/or the Director of Prisons. This will be demonstrated during my analysis of the substantive proportionality ground.

(vi) THE PII ISSUE – what approach the court should take to the material withheld from disclosure on PII grounds

157. The remaining sub-issue for special consideration relates to the court's treatment of the material excluded by Carter J (Ag) on PII grounds. These sub-issues arise primarily from the Plaintiffs' written submissions (paras 40 and 56) and the Respondents' response to them.

158. In speaking on this sub-issue, Mr Southey KC submitted on behalf of the Plaintiffs that if material is withheld by the Respondents following a PII application, the court cannot consider the material, and so it cannot justify the interference with the Plaintiffs' rights. According to King's Counsel, the interference with the Plaintiffs' rights is not justified because, for example, no fact-finding is possible because evidence has been withheld. In particular, he said, the court is required to make findings as to whether the allegations that are said to justify the interference are true. According to King's Counsel, disclosure is particularly important where fact-finding is required. He relies on ***Al-Sweady v Secretary of State for the Defence*** [2009] EWHC 2387 (Admin) ("***Al-Sweady***") in support of his arguments.

159. Mr Southey further argued that the court needs to look at the material as a matter of principle, and it cannot assume that the assertions are well-founded. The court, he contended, is not in a position to assess risk to national security because it does not have the material subject to PII to provide the whole picture. Whatever the court does, there will be a mismatch between the material considered by the Governor in making the decision and the material available to the court. In his view, underlying material must be disclosed as summaries may mislead (see ***Tweed v Parades Commission for Northern Ireland*** [2007] 1 AC 650).

160. King's Counsel submits that even if fact-finding is not required, the disclosure in this case lacks sufficient particulars to enable the court to assess the weight to be given to matters relied on by the decision-makers (***Kent Constabulary*** para [36]). In the absence of material and in circumstances in which the burden is on the Respondents (***Quila***), the court must proceed on the basis that no weight must be given to assertions not supported by underlying material. Further, without disclosure of the

underlying material, it is not possible to assess the credibility of the claim, and it cannot be assumed that the Respondents had a lawful basis for the decisions challenged (***Begum v Tower Hamlets LBC*** [2003] 2 AC 430 ("***Begum***") at [99]).

161. Mr Southey maintained that it is important that a reliable decision be made that takes all relevant matters into account. He stated that the justification put forward by the Respondents lacks any adequate evidential basis. The court does not have the PII material, and so on the facts of this case, the application for judicial review succeeds because the Respondents have not made good their defence in the case.

162. Mr Bowen strenuously countered Mr Southey's arguments regarding the non-disclosure of the underlying material and its adverse effect on the Respondents' case. In short, Mr Bowen pointed out that Mr Southey, acting on behalf of the Plaintiffs in the Court of Appeal and the Privy Council, had explicitly abandoned that position after the Court of Appeal and the Privy Council rejected it. Mr Bowen noted that Mr Southey has now sought to revive before this court the same position he had abandoned before the Privy Council. Therefore, the court should reject his submissions.

163. Mr Bowen further posited that based on the reasoning of the Privy Council, it is not open to this court to proceed as if the PII material does not exist. The court, he said, cannot turn a blind eye as a matter of rationality or binding authority. The court has to take into account, where there is evidence or gist that this intelligence existed. The correct approach for the court, he said, is to determine the applications by reference to the open material but to accept, at face value, the Respondents' evidence - including the gist of the underlying material - to the extent it is based upon material that Carter J (Ag) has ordered withheld on PII grounds. The Board has already ruled that this does not create unfairness, but instead, it is a "procedural limitation on the use of classified information", which is justified under Article 6/ section 26 of the Bill of Rights (see para 52 of the PC judgment). Mr Bowen maintained that if there was any inconsistency between that underlying material and the open evidence and the gist, that would have been identified in the PII process. Carter J (Ag) had already identified in the PII judgment that the underlying material does not assist the Plaintiffs (see para 83 of the PII judgment).

164. Furthermore, and in any event, he continued, a fact-finding exercise such as that contended for by the Plaintiffs would have been unnecessary and unwarranted even if the relevant material was not subject to PII. What is required is balancing the impact of the removal on the Plaintiffs against the interests of national security and public safety. That involved a number of expert judgments made by a range of decision-makers, including the RCIPS, the OTD's Regional Prisons advisers, the Secretary of State and the Governor that the Plaintiffs posed a risk to national security and public safety. Even if the underlying material could be disclosed, those judgments were all based on a range of information, little of which is susceptible to an established standard of proof, and the court is required to give due deference to the experience and expertise of the persons making those judgments. That would be the case even where the court is exercising a jurisdiction to make primary findings of fact rather than its jurisdiction in judicial review: see ***Begum*** and ***Secretary of State v Rehman*** [2003]1 AC 153 ("***Rehman***"). The approach contended for by the Plaintiffs simply revives an argument that had already been dismissed and abandoned by the Plaintiffs before the Board. The court should not follow it. The only question for the court is whether the interference with the Plaintiffs' rights was justified by reference to the Governor's assessment of risk to national security and public safety informed by those judgments.

165. It is noted that both the Privy Council and the Court of Appeal had frontally addressed the arguments raised by Mr Southey in these proceedings regarding the exclusion of the underlying material on PII grounds. His argument is, indeed, a restoration of the arguments he raised on appeal, which were roundly rejected by the Court of Appeal and the Privy Council. In treating with Mr Southey's argument regarding undisclosed material, the Privy Council, in its judgment, stated at para. 53:

> "*Before the Court of Appeal Mr Hugh Southey KC on behalf of the appellants submitted that in the absence of a CMP the court would be unable properly to assess the justification and proportionality of the decisions and, since the burden is on the respondents to establish that the undisputed interference with their rights was justified and proportionate, the consequence must be that without the material which formed the basis of the decisions they must fail to discharge that burden.* ***This submission was rejected by the Court of Appeal, correctly in the Board's view. Sir Alan Moses (at paras 97-98) gave a number of reasons for this conclusion***." (Emphasis added)

166. The Board then set out the Court of Appeal's reasons for rejecting Mr Southey's argument with which their Lordships agreed. In outline, the reasoning of the Court of Appeal at paras. 97-103 of the CICA civil appeal judgment, accepted by the Board, was as follows:

(a) Such a decision in favour of the Plaintiffs deprives the Respondents of the opportunity to rely on material, which it is known would support the Respondents' open case, namely, that the Plaintiffs as leaders of the CMK gang continued to pose a threat to national security and public order on the Islands, including an immediate danger of escape and the use of weapons. It would be contrary to what is already known to proceed on the basis that there was no evidence to support the Respondents' case. Carter J's judgment at para 83 as to the claims to PII makes this clear (para 98).

(b) There is plainly a conflict between the interests of the public in the Islands and the interests of the Plaintiffs. In such a conflict, the protection of the public should prevail, all the more so where national security is at risk. There is evidence of the risk to national security given by the Governor and endorsed in the judgment of Carter J (Ag.) (para 99).

(c) The Plaintiffs' liberty is not at stake in this case. The court could not close its eyes to evidence that it knows speaks of the danger that the removal of the Plaintiffs is designed to obviate. To decide in favour of the Plaintiffs because of the withholding of material on PII grounds would be to ignore the need to safeguard national security and to protect the Islanders (para 102).

(d) Simply quashing the decisions to remove the Plaintiffs would lead to an impasse, with the Governor and Secretary of State remaking the same decision upon the return of the matter to them by the court (para 103).

167. That having been said, the Privy Council then observed at para 53 that:

> "*On the present appeal, Mr Southey has expressly abandoned the position he took below and limits himself to the submission that,* ***if no CMP procedure is available, the judicial review should be remitted to the Grand Court where it should be decided on the basis of the material which has been disclosed***." (Emphasis added)

168. After considering Mr Bowen's argument regarding the treatment of the case in the absence of the PII material and the availability of a CMP, the Privy Council opined that this is unlikely to be a case in which the withholding of disclosure on grounds of PII would make the claim un-triable, in the sense that it prevents a fair trial of the issues [55]. The Privy Council then referred to the redacted PII judgment of Carter J (Ag) and drew attention to certain matters therein to which this court has had regard (see para [56] of the PC judgment). Among those matters was that the judge had the assistance of a special advocate performing the role of *amicus curiae* for the purpose of the exercise. He represented the interests of the Plaintiffs.

169. Included in their Lordship's consideration also was the judge's division of the documents for which PII was claimed into two categories, namely, those available to the Governor at the time she made the decision to transfer, and the Respondents' unredacted affidavits and the material specifically referred to in those affidavits. Some of the material specifically referred to in the Respondents' unredacted affidavits were documents that were not before the Governor when she made the impugned decisions. Those documents were ruled irrelevant as they neither supported the Plaintiffs' case nor undermined the Respondents' case. They were unnecessary for the fair disposal of the proceedings (para 56(3) of the PC judgment).

170. Carter J (Ag) had indicated that among the material, prima facie, disclosable were redacted copies of the submission that was made by the Governor to the Secretary of State seeking the removal of the prisoners to the United Kingdom as well as the gist of the allegations upon which the decisions to transfer the Plaintiffs were partially made. The Board detailed the gist of the allegations recorded by Carter J (Ag) as well as her conclusions regarding the material before her (para 56(4) of the Board's judgment).

171. Carter J(Ag), for her part, had further observed at several portions of her judgment that:

> "*42. There is no issue that the first Respondent is entitled to claim that there is sensitive material in this case which should be withheld from the Plaintiffs as he has done by the issuance of the PII Certificate. In this instance the risk to national security encompassed the risk that the defendants may try to escape from HMP Northward. This was the assessment of the First Respondent. There is no question that a court should not seek to undermine the executive's assessment on matters such as national*

> *security because it is recognized that such assessment will be based on facts for which the decision maker has special knowledge or a special responsibility as it relates to that area for which in this case he is uniquely responsible.*
> ….
>
> *[81] I am satisfied that of the materials from the redacted affidavits that may have been referred or may have been before the Governor at the time she made the decision, some of these have been disclosed to the Plaintiffs. Others [sic] material which may have not been ordered disclosed by this court are documents properly not disclosed and are properly to be PII protected.*
>
> *[82] … There were documents relating to the Plaintiffs' transfers that were regarded as high-level documents on the* ***Conway v Rimmer and Whittaker v Waller*** *scale that were properly to be PII protected.*
>
> *[83] The risk to third parties and informants in this matter is high.* ***This court must be careful to ensure that the disclosure of the identity of persons who provided information to the police of the Plaintiffs' activities will not result in them being harmed. The risk to those persons outweighs the need for disclosure especially in these instances when, as this court has concluded, the information that will be withheld as a result will not advance the Plaintiffs' case in any material way.*** *These are matters the disclosure of which could lead to the identity of informants*." (Emphasis as in the original)

172. After a consideration of the findings and conclusions of Carter J(Ag), the Board then stated (para 57) "*In the Board's view, it is a telling feature of the present case that there was no appeal against the PII ruling of Carter J (Ag)*".

173. Their Lordships then concluded (para 59):

> "*59. In the present case the judge examined all the documents for which PII was claimed. The instruction of a special advocate as amicus curiae in the PII process was an additional assurance that the respondents' case for PII was rigourously tested and that the interests of the parties were protected. In the Board's view, there is no reason to suppose that the present case is an exceptional case*

> *in which the PII ruling has resulted in a situation where, without disclosure of the PII material, the court is unable fairly to decide this dispute. On the contrary, there was here extensive disclosure and, in addition, gisting of documents. Moreover, so far as the threat posed by [the Plaintiffs] is concerned, there was compelling evidence of their dangerousness arising from their conviction for a particularly cold-blooded gang killing. The Board does not consider it necessary to remit this matter to Carter J (ag) for a decision as to whether her PII ruling renders the judicial review proceeding untriable.* ***It can see no unfairness in [Ramoon's] claim for judicial review proceeding to trial on the basis of the material which is now available as a result of the PII exercise***." (Emphasis added).

174. In light of the Board's pronouncements, some of which are extracted above, and its treatment of the same submissions of Mr Southey regarding the undisclosed underlying material, I have no option but to reject his arguments in these proceedings. Mr Bowen is correct that he has rehashed the same arguments rejected by the higher courts as having no merit. I am bound by those decisions, even though on my own analysis, I have found the arguments to be unmeritorious.

175. It is safe to conclude from the reasoning of both the Court of Appeal and the Privy Council and on my own analysis that this court cannot ignore the fact that some of the supporting material on which the Governor relied to concur in the transfer of the Plaintiffs had been withheld on PII grounds. The court cannot ignore that the undisclosed material existed at the time of the decisions and that, at face value, it contains information that would support the Respondents' case regarding the risk allegedly posed by the Plaintiffs. Indeed, as the Board opined, a decision in favour of the Plaintiffs due to the absence of the underlying material would deprive the Respondents of the opportunity to rely on material **that it was known would support their case** (for emphasis). I accept the unchallenged word of Carter J (Ag) that the undisclosed information she ordered withheld on PII ground could not materially assist the Plaintiffs, in any event. Therefore, it is difficult to envisage how the Plaintiffs would be prejudiced by the absence of the underlying material on which the risk assessment was made. From every indication, it would be unfair to the Respondents if this court were to proceed as if the undisclosed information on PII grounds does not support their case.

176. While I do appreciate that there is an imbalance between the information that was available to the Governor at the time the decisions were made and that which is now available to the court, I believe there is enough before this court on the open evidence, including the gist of the undisclosed underlying material, for it to fairly decide the applications. The participation of the Special Advocate in the PII hearing has led me to conclude that it is safe to rely on the gist of those undisclosed material. For that reason, disclosing the PII material is unnecessary to dispose of the claim fairly. Therefore, the Respondents' justification defence has been evaluated despite the absence of all the material available to the Governor.

177. The other aspect of Mr Southey's submissions regarding the material withheld on PII grounds that must be addressed is that this court has to reach binding findings of fact regarding the underlying facts on which the risk assessment was based before the decisions can be found to be proportionate and justified. Therefore, because the material is not disclosed, the credibility of the Respondents' assertion cannot be established. King's Counsel further submitted that aspects of the Respondents' justification for the transfers are mere assertions and are not proved to be based on credible evidence. In this regard, Mr Southey contended that if it is accepted that the primary reason for the transfer is the Plaintiffs' continued engagement in criminality, then that is a "hard-edged" question of fact on which the Respondents bear the burden of proof.

178. If he is wrong about that, he said, then the fact of continuing criminality relied on as the reason for the transfer is, at the very least, a question of fact as to whether there was evidence that suggested criminality. King's Counsel further noted that the need for fact-finding in a national security context is consistent in human rights cases and so, even though national security is in issue, the State needs to prove specific facts on a balance of the probabilities (***CG Bulgaria*** app 1365/07 (2008) 47 EHRR 51 and ***Home Secretary v Rehman*** cited). For all these reasons, he submitted, the court is not in a position to place any weight on the underlying facts on which the risk assessment was based in the proportionality balancing exercise.

179. The Respondents have not accepted this position. Mr Bowen, on their behalf, submitted that the assessment of future risks, such as those to be made under the 1884 Act, does not involve "hard-edged" questions of fact that would have required the removing authority, and this court to be satisfied as to the truth of the facts relied on to any particular standard of proof for proportionality

to be determined. The relevant facts, he said, are whether the Plaintiffs posed a risk to national security and public safety of the Cayman Islands that warranted their removal for their safer custody. Mr Bowen submitted that there is no burden on the Respondents, who bear the burden of proof, to establish the truth, credibility or reliability of the underlying facts on which the risk assessment was made and the decisions taken to remove the Plaintiffs.

180. I have considered the competing contentions and the applicable law in addressing the question of the approach to fact-finding in assessing proportionality in this case. I am drawn to the logic in Mr Bowen's arguments on this issue on the strength of the authorities and for other reasons outlined below.

181. I have commenced the assessment of this sub-issue with the recognition that it has already been established that the Respondents are required to establish the justification they have alleged, on a balance of probabilities, in keeping with the standard of proof in civil proceedings. Regarding the question of proportionality, however, the authorities have established that there are situations in which the onus and standard of proof might not assume significance in determining proportionality. This is so in cases where there are agreed facts or where the determination of proportionality does not necessarily involve the resolution of disputed facts and fact-finding. The court in ***Quila,*** at para. 44, noted that "in an evaluation which transcends matters of fact [it is] not apt to describe the requisite standard of proof as being, for example, on a balance of probabilities".

182. In ***Ali v Secretary of State*** (SC(E)) [2016] 1 WLR 4799, the court held that the onus of proof is on the State to justify an interference but questions of onus are unlikely to be important where the relevant facts have been established. Therefore, where there are disputed facts, the incidence of the onus and standard of proof may assume greater importance than where there are no disputed facts.

183. Also, the Privy Council in the ***Jamaican Bar Association*** **case**, at para 27, in dealing specifically with the question regarding the standard of proof, expressed its reluctance to become engaged in the supposed relevance between the civil and criminal standards of proof in the context of that case. This, their Lordships explained, was because the standards are concerned with the proof of disputed facts, not with the interpretation of statutory language or the evaluation of demonstrable

justification. In that case, the Board noted that there were no contentious issues of primary fact to which a standard of proof "could sensibly" be applied.

184. There is, therefore, strong authority for the view that the onus and standard of proof relative to the asserted facts, which underly the impugned decisions in this case, will only be materially relevant if there are disputed questions of fact concerning the issue to be determined and which would necessitate fact-finding by this court. Therefore, the question to be asked and answered is: Are the underlying facts, on which the Governor based her risk assessment and granted her notices of concurrence, "hard-edged questions of fact", which must be proved on a balance of probabilities?

185. ***Al-Sweady*** is one of those authorities that has assisted with this enquiry. The case has established that where there are "hard-edged" questions of fact in issue, the correct approach for the court is to ensure that the truth of the matter in issue is established. This may necessitate disclosure and cross-examination of witnesses, which would warrant fact-finding. The court identified five main areas of factual disputes between the parties that were regarded as "hard-edged" questions of facts. That meant that determining those questions of fact (fact-finding) was bound to be crucial in deciding which party would be successful.

186. The court reasoned that if the usual approach was adopted in the case by resolving the dispute of fact in favour of the defendants without embarking on a fact-finding exercise, the State would have succeeded, and that would have had the more far-reaching consequence that a defendant would always succeed if sued for infringement of human rights which was in dispute. In the circumstances, the court opined that a different approach was needed because "hard-edged" questions of fact represented an important exception to the general rule precluding the court from substituting its views in judicial review cases. The court found it necessary to allow cross-examination of the makers of witness statements on those "hard-edged "questions of fact. The court stated that it envisaged "that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties **relating to the jurisdiction of the ECHR and the engagement of its Articles.**" (emphasis added)

187. In ***Kent Constabulary*****,** the court also explored the issue regarding the appropriateness of fact-finding in judicial review proceedings alleging human rights breaches, albeit within the context of disclosure. Beatson LJ, stated several noteworthy points on this issue at paras. 58-61 of the judgment. He opined that the judicial review procedure under the Civil Procedure Rules is not designed or well-suited to hear witnesses and decide disputed questions of fact, albeit that it would in some cases be necessary, such as where the question before the court is a jurisdictional fact or when determining whether there had been a breach of one of the rights under the Convention. While there is a need for intense scrutiny of the decision, and proportionality has to be judged objectively by the court, it is not a merits review. Although it is for the court itself to assess proportionality, the process is essentially evaluative rather than one determining 'hard-edged questions of fact'. This is one reason the court's starting point would generally be to give appropriate weight to the conclusions of the person who had access to special sources of information and who had been given responsibility for a topic. The court is to consider the state of the available material. Its task is not to determine the truth or falsity of the allegations. In the vast majority of cases, there would be no need to make findings of fact when assessing their reliability.

188. In ***Abortion Services*** [2023] AC 505 Supplemental at para 30, Lord Reed, PSC reiterated that determining whether an interference with Convention rights is proportionate is not a fact-finding exercise. It involves, he said, "the application in a factual context (often not in material dispute) of the series of legal tests together with a sophisticated body of case law and may also involve the application of statutory provisions or the development of the common law". His Lordship referenced the dictum of Lord Bingham of Cornhill in ***A v Secretary of State for the Home Department*** [2005] 2 AC 68 at para 44 that the ECtHR does not approach questions of proportionality as questions of pure facts, nor should domestic courts do so. Similarly, in the ***Jamaican Bar Association case***, the Privy Council made it clear beyond debate that the standard of proof has no relevance where the issue relates to the evaluation of demonstrable justification.

189. From the pronouncements of the courts in the cases above, it seems safe to say that, in the instant case, where the remaining issue for determination is whether the interference is reasonably justifiable in a democratic society, and around which there is no material dispute of fact, there would be no need for fact-finding and the standard of proof would have no relevance.

190. I have not rested my conclusions on this sub-issue simply on the foregoing statements of principle distilled from the cases cited above. I have gone further and examined the different strands of justification advanced by the Respondents within the context of other principles deduced from other authorities in treating with the Plaintiffs' submission. Within this context, ***Rehman*** stands out as an integral authority that provides useful guidance regarding the approach that must be taken to a risk assessment by a public authority. The House of Lords addressed, in detail, the issue regarding the Secretary of State's entitlement to make a deportation order on the basis that Mr Rehman had endangered national security and that he was a danger to national security.

191. The Commission had found that the Secretary of State did not prove the facts relied on to establish the alleged threat to national security to "a high civil balance of probabilities". The Court of Appeal found that the Commission was wrong to so find. Before the House of Lords, it was contended on this point that the Court of Appeal erred in rejecting the Commission's ruling that the Secretary of State had to satisfy it, "to a high civil balance of probabilities", that the deportation of the appellant was made out on public interest grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so.

192. Lord Slynn of Hadley at paragraph 21 repeated the reasoning of Lord Woolf MR in the Court of Appeal decision in ***Rehman*** ([2000] 3 WLR 1240, 1254, at para 44), where Lord Woolf MR said:

> "*However, in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a danger to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion*."

193. Lord Slynn of Hadley in the lead judgment of the House agreed with Lord Woolf, MR on this point and stated his reasons for doing so in these terms at para 22:

> "*22. Here the liberty of the person and the practice of his family to remain in this country is at stake and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof.* ***But that is not the whole exercise. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgement or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability"****. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good*." (Emphasis added).

194. At para 29 of the judgment, Lord Steyn, in agreeing with Lord Slynn, rejected the submission that the civil standard of proof applied to the Secretary of State and the SIAC. He opined that on the contrary, the task of the Secretary of State was to "evaluate risks in respect of the interests of national security."

195. Lord Hoffmann, for his part, similarly agreed with the Court of Appeal's reasoning on the point regarding proof of the underlying facts on which the risk to national security was based. He noted that the final decision as to whether the person was a danger to national security was "evaluative looking at the evidence as a whole and predictive looking to future danger". According to Lord Hoffmann at para 56:

> "*56. In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is*

> *sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee*."

196. In ***R (Pearce) v Parole Board*** [2023] AC 807, the Supreme Court of England and Wales gave in-depth consideration to the court's pronouncements in ***Rehman*****,** among other cases. In ***Pearce***, the focus was on the Parole Board's functions under section 28(6) of the Crime Sentences Act 1997 to determine whether it was no longer necessary for the protection of the public that a prisoner should be confined. At para 14 of its judgment, the court identified the "central issue" in the appeal as "whether the Parole Board, in making its decision, was confined to acting only on facts which it (or some other competent body) had found to be proved on the balance of probabilities, or whether there can be circumstances in which despite the absence of fact-finding, it is entitled to take a complaint or allegation into account when confronting the statutory question".

197. Lord Hodges DPSC and Lord Hughes, in the lead judgment of the court, explained Lord Slynn's pronouncements in ***Rehman*** at para 22 of that judgment (see above). They noted that Lord Slynn, in referring to the requirement of fairness that past acts should be proved, "was saying no more than" if on such an exercise, specific past activity was to be relied on as having occurred, that activity must be proved to have happened. According to their Lordship, Lord Slynn "was, explicitly, not saying that this was the only basis on which a decision as to future risk could be arrived at".

198. Their Lordships opined that "when one comes to assessing risk the unproven possibility that a fact may be true is a factor which can in some circumstances properly be taken into account" (para 61). They then concluded that notwithstanding the differences between the Parole Board's role in ***Pearce*** and that of the SIAC in ***Rehman***, the above-stated pronouncements of Lord Slynn and Lord Hoffmann in ***Rehman*** support the view that a decision-maker, when assessing future risk, is not as

a matter of law compelled to have regard to only those facts which individually have been established on the balance of probabilities. The decision-maker, from the assessment of the evidence as a whole, can take into account, alongside the facts which have been so established, the possibility that allegations which might not have been so established may be true (para. 72).

199. The Supreme Court, after a thorough review of various cases, including those involving the making of care orders in respect of children under section 31(2) of the Children Act 1989, opined that "even in that specific context, there is no general rule that an unproven fact can never be considered by way of an assessment of risk (at paras 47-64). At para 62, their Lordship reasoned:

> "*These clearly expressed decisions demonstrate, beyond argument, first that In re H cannot be an application of a universal legal principle that* ***an unproven fact can never figure in legal reasoning, and second, that to the contrary, when one comes to assessing risk the unproven possibility that a fact may be true is a factor which can in some circumstances properly be taken into account***." (Emphasis added)

200. The court then summarised its conclusions from the cases it had reviewed in several statements of principle at para 65 of the judgment, the most relevant one for immediate purposes being that in assessing the risk of future behaviour, it is not necessary to consider each allegation of past behaviour individually and decide whether it is established on the balance of probabilities. Depending upon the legal context, the court can assess risk by weighing up the possibility that an allegation or several allegations may be true having regard to the whole material before it: see ***Rehman*** para 56, per Lord Hoffmann; ***In re O*** [2004] 1 AC 253, paras 12 – 13 and 27, per Lord Nicholls.

201. The court further went on to treat with the evidential status of allegations in the Parole Board's assessment. It stated that the central question was whether there was anything in the legal context of the Parole Board's role, when it addressed allegations of past criminal or otherwise risky behaviour, which confined the matters that the Board may take into account to proven facts of past behaviour, while excluding from consideration in any circumstance the possibility that the proven unproven allegations might be true. At para 73, the court responded to that question in the negative, effectively stating that there is nothing in the statutory framework under which the Parole Board

acted that confines what the Board may take into account to proven facts of past behaviour. The court opined:

> "*…The question at all times is one of statutory interpretation. The statutory remit of the Board … is that it may not direct the release of the prisoner unless it is satisfied that it is no longer necessary for the protection of the public that he should be confined. There is no further express statutory specification as to how the Board satisfies itself of this test. Nonetheless, the statutory provision does not stand alone; it is to be interpreted in the context of the general law*."

202. The court concluded, in so far as is immediately relevant, that (a) there was no general legal rule that in making a risk assessment, the Parole Board was obliged to adopt a two-stage process of making findings of fact on the balance of probabilities and then treating only those matters on which it has made such findings of fact as relevant to the assessment of risk, and (b) there is no rule of substantive fairness, akin to a legitimate expectation, which required the Parole Board to have regard only to found facts in its assessment of risk.

203. In the context of that case, the court concluded that section 28(6) of the Crime (Sentences) Act 1997, under which the Parole Board acted, did not contain an implicit requirement that in determining whether it was no longer necessary for the protection of the public that a prisoner should be confined, the Parole Board had to disregard the possibility that an allegation against the prisoner which had not been established as true on the balance of probabilities might be true. The court reasoned that there is no general legal principle that in making a risk assessment, a court of law or the Parole Board could have regard to evidence or information only if it is established as a fact by admission or on the balance of probabilities. Further, the public law concept of fair proceedings does not require that only facts so established are to be considered in a risk assessment. Therefore, there is no requirement to be implied into the statute that the Parole Board must disregard the possibility that an allegation, which has not been established as true on a balance of probabilities, may be true.

204. The court found evidence of facts connected with the allegation of criminal behaviour, which the Parole Board could have used or used as a basis for assessing whether the prisoner posed a

significant risk to the public. The weight to be attached to evidence, it said, was a matter for the Parole Board subject always to a challenge on the ground of public law irrationality.

205. In similar vein, Lord Reed in ***Begum*** considered the statutory provision that gave the Secretary of State and not the Special Immigrations Appeals Commission ("SIAC") the power to decide to make a deprivation order. He reasoned that the Secretary of State (the primary decision maker) must satisfy the statutory condition that deprivation was conducive to the public good. The statute did not require the SIAC (the reviewing body) to be satisfied of that. There was no statutory indication that Parliament intended that discretion to have been exercised by the SIAC.

206. Lord Reed explained at para. 70 of the judgment that in applying the relevant principles to discretionary decisions, the SIAC must consider the nature of the discretionary power in question and the Secretary of State's statutory responsibility for deciding whether the deprivation was conducive to some public good. Lord Reed noted that some aspects of the Secretary of State's assessment may not be justiciable; others will depend, in many, if not most, cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are "incapable of objectively verifiable assessment". The SIAC had to give the Secretary of State's assessment appropriate respect for reasons of "**institutional capacity (notwithstanding the experience of the members of the SIAC) and democratic accountability**" (emphasis added).

207. The principles established in ***Rehman***, ***Pearce*** and ***Begum*** were considered and applied in ***U3 v Secretary of State for the Home Department*** [2023] EWCA Civ. 811. The court undertook an in-depth review of the functions of the SIAC when it heard an appeal against a decision of the Secretary of State to deprive a British citizen of her nationality on the ground that she was a risk to national security. The court delved into the differences in approach between an appeal and judicial review as a starting point. In speaking of judicial review, Lady Justice Elisabeth Laing, who delivered the judgment on behalf of the court reasoned, among other things, that in the human rights field, the proportionality of a decision may call for examination in a judicial review proceeding, but an enquiry into the proportionality of a decision should not be confused with a "full merits" review.

208. After considering cases such as ***Rehman*** and ***Pearce***, Lady Justice Elisabeth Laing stated at para. [177]:

> *"In so far as the appeal was a challenge to the Secretary of State's assessment that at all relevant times, U3 was a danger to national security, SIAC understood those authorities as requiring it to review the assessment by the Secretary of State of the interests of national security within the limits described in those authorities, rather than substituting, for that of the Secretary of State, its view about the danger posed by U3. The Secretary of State's assessment was the starting point for SIAC's consideration of the appeal."*

209. Her Ladyship then opined that in closely examining all the evidence to see whether the assessment was mistaken, the SIAC had to, and did, bear in mind, among other things, that an assessment is not based on findings on the balance of probabilities that particular things have happened, or that particular things have been thought, but on an overall consideration of all the material, so as to evaluate future risk. Questions concerning national security risks posed by U3 at the date of the decision were questions for the Secretary of State, with which the SIAC could only interfere on limited grounds.

210. In summary, Her Ladyship concluded that the SIAC could and, in some cases, must make findings of fact based on its own assessment of the evidence on the appeal. As long as it respects the limit of the ***Rehman*** approach, it may make whatever findings of fact it considers, in its expert judgment, it is able to make and which are appropriate in the appeal it is considering. In the end, the court found that the SIAC did not err in making findings of fact based on its assessment of all the evidence on appeal. The SIAC was also correct in refusing to substitute its own assessment for that of the Secretary of State but instead to review the Secretary of States' assessment to see whether it had a rational basis.

211. In the light of the law, as distilled from the foregoing authorities**,** the first point of departure in conducting the judicial review of the decisions is the statutory framework within which the Governor gave her concurrence to remove the Plaintiffs. The central legal question that confronted the Governor was whether on the facts and circumstances disclosed to her from the various sources on which she relied, it was expedient to remove the Plaintiffs for their safer custody under the 1884 Act given the risk they posed to national security and public safety and the inability of HMP Northward to secure them. This was a decision for the Governor in the exercise of her evaluative judgment and not for this court, which has no special knowledge of those matters. In her assessment, discretion and judgment, she considered it was expedient to remove them for their safer custody. She based her decision on established and proved facts, as well as on allegations of continued criminality derived from intelligence. The latter had not been objectively verified in their truth and veracity.

212. Having considered the statutory framework against the backdrop of the learning derived from the authorities, it is clear that the Governor was exercising an evaluative judgment on matters that were not all capable of objectively verifiable assessment, such as the level and nature of the risk posed by the Plaintiffs, the effectiveness of the means available to address it (HMP Northward) and the acceptability or otherwise of the danger that could result (the harm to the Cayman Islands). This was the evaluative executive discretion or judgment to be exercised by the Governor within the legal framework of section 2(d) of the 1884 Act in her capacity as the government official responsible for internal security of the Islands. Accordingly, the exercise of the Governor's discretion, in so far as she relied on the underlying material that the court has not seen, was not based on findings of facts that particular events had happened but rather, on an overall consideration of and global approach to the available material in evaluating future risk, that is, what might happen.

213. In making that assessment, the Governor was not making a decision that the Plaintiffs had, in fact, endangered national security and public safety but rather whether they were likely to present a danger to national security and public safety. The question for her was the nature and extent of this future risk. As such, the decision she had to make transcended matters of fact and so no fact-finding was required to which any standard of proof could sensibly apply. It means the Governor would not have been required to look at each allegation in the intelligence report and ask whether it had been proved or proved to any requisite standard. She was required to examine all the available facts and allegations before her as a whole (proven and unproven), and consider, in relation to each Plaintiff, whether she believed he posed a threat to national security and public safety in the light of the capacity of the prison to house them securely. She was not required to conduct a fact-finding assessment as a tribunal of fact determining facts in issue.

214. As the court stated in ***R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs*** [2016] UKSC 3, at para 50 of the judgment:

> *"…The position of a decision-maker trying to assess risk in advance is very different from that of a decision-maker trying to determine whether someone had actually done something wrong. Risk cannot simply be assessed on a balance of probabilities. It involves a question of degree."*

215. In the light of the relevant authorities, the Governor, in giving her concurrence to the decisions to remove the Plaintiffs within the ambit of the 1884 Act, need not have been satisfied of the credibility of the information provided to her by way of intelligence. In adopting and applying the statement of principle in ***Pearce*****,** I would state that the statutory framework within which the Governor exercised her discretion in making the decisions "did not contain an implicit requirement" that in determining whether it was expedient to remove the Plaintiffs for their safer custody in the interest of national security and public safety that she had to disregard the possibility that an allegation against each Plaintiff, which had not been established as true on the balance of probabilities might be true. It was for her acting jointly with the Secretary of State to satisfy the statutory condition for the removal of the Plaintiffs, which was a judgment call. Therefore, fact-finding and the standard of proof would not have been relevant to the Governor's evaluation of risks based on the undisclosed underlying material on which she relied in making the impugned decisions.

216. Likewise, in such a situation, fact-finding and the standard of proof are not relevant to the review exercise to be conducted by this court in so far as it concerns the risk assessment conducted by the Governor based on the undisclosed underlying material. The question for this court is whether it was open to the Governor to have reasonably and holistically made the risk assessment she did on the information presented to her by way of intelligence and other established facts. In other words, this court must be satisfied that there was sufficient material before the Governor on which she could have reasonably concluded that the facts presented to her in the underlying intelligence-based material, on which the Plaintiffs' risk assessment was made, were possibly true. There is no onus on her to prove that those undisclosed underlying facts are, in fact, true.

217. In the premises, the crucial question for this court for resolution does not relate to jurisdictional issues or whether there has been an infringement of the Plaintiffs' rights around which there is a legitimate dispute as to fact. The question is about reasonable justification. On the strength of the relevant authorities, no fact-finding is necessary by this court in resolving that issue. Accordingly, there is no legal obligation on this court to satisfy itself that the allegations contained in the underlying material derived from the intelligence on which the Governor based the decisions are true and are so to any standard of proof.

Conclusion on the sub-issues

218. In concluding on the sub-issues, I would state that the substantive proportionality question has been examined with due regard to the principles regarding the burden and standard of proof, the proportionality test, the standard of review and the approach to assessing proportionality and treating with the underlying material withheld from disclosure on PII grounds. The court is also guided by the reasoning and conclusions arrived at regarding the Timing and Prison Upgrade/Rebuild Issues, which have been applied to the ensuing analysis.

Proportionality and justification

219. I now turn to examine the case advanced by the Plaintiffs that the interference with their constitutional rights is disproportionate and unjustifiable and the Respondents response in seeking to justify the interference.

(a) The long distance of the transfers

220. The Plaintiffs contend that their removal to a country thousands of miles from their family in a significantly different time zone has had severe adverse consequences on rights to respect for their private and their family life. This interference, they say, has rendered the decisions disproportionate and unjustified in contravention of modern human rights law and thus in breach of the Cayman Islands Constitution. According to them, the distance of the transfer (which is greater than in any other reported case), and the impact it has had, is enough to ground a violation of section 9.

221. Counsel for the Plaintiffs observed that in the modern jurisprudence of the ECtHR, there is no case involving Article 8 arising from transfers of prisoners at a far distance in which no violation was found. In support of their arguments, they drew support from several cases such as ***Vintman v Ukraine*** and ***R (on the application of Stevenson) v Governor of Wakefield Prison*** [2015] EWHC 1014 (Admin) and ***Fraile Iturralde v Spain*** (2019) Application No 66498/17.

222. The Respondents do not agree that violation of section 9 is established merely on the far distance of the transfer and the adverse impact the transfer has had on the Plaintiffs. The transfer, they say, can, nevertheless, be found not to violate section 9 of the Bill of Rights despite the hardships faced by the Plaintiffs because it is reasonably justified in a democratic society for one or more of the reasons limiting the rights under section 9(3) which have been invoked by the Respondents.

223. Both sides have drawn on cases in support of their respective cases and have sought to distinguish those relied on by each other. It is not necessary to detail the facts and decisions in all those cases. It suffices to say, for present purposes that, having reviewed them within the context of the opposing views of the parties, I accept the Respondents' position that the abnormal distance of the transfer and the resultant adverse impact on the Plaintiffs and their children's family life is not sufficient, without more, to establish a violation of section 9 as contended by the Plaintiffs.

224. It is settled on the case law that detaining the Plaintiffs in a prison so far away from their home, which drastically affects their contact with their family, does not automatically mean a violation of section 9, but it may amount to such violation. I accept to be an apt starting point in treating with this question, the guiding principle stated in ***Polyakova*** at para. 89 that:

> "*Regarding visiting rights, the State does not have a free hand in introducing restrictions in a general manner without affording any degree of flexibility for determining whether limitation in specific cases are appropriate or indeed necessary… national authorities are under an obligation to prevent the breakdown of family ties and provide prisoners with a reasonably good level of contact with their families, with visits organised as often as possible and in as normal manner as possible."*

225. Accordingly, in those cases in which violation of Article 8 was found, there was more than just a consideration of the distance and impact on the transferred prisoner but also a consideration of whether the State had "applied the restriction in a general manner without affording any degree of flexibility for determining whether the limitation" in the specific case of the prisoner was "appropriate or necessary". This would include a fair consideration and assessment of the personal circumstances of the particular prisoner on whom the limitation is to be placed and the justification for the limitation. Indeed, my work is made much lighter by the observations of the Court of Appeal at paras 84 and 85 of the CICA civil appeal judgment and the Respondents' submissions on the point which I accept and will adopt.

226. Therefore, from the reasoning of the Court of Appeal and the submissions of the Respondents, it is fair to conclude that the authorities have demonstrated that violation has been found where automatic decisions are made in the absence of a fair process, which would involve the absence of (a) individual assessment of the personal circumstances of the prisoner, (b) objective justification

for the transfer, (c) legal facility or opportunity for an effective challenge to the limitation and (d) a balancing exercise of the rights and interests of the prisoner with that of the community. See, for instance, ***Polyakova; Khodorkovskiy v Russia*** (2014) 59 EHRR 7; ***Vintman v Ukraine***, ***Rodzevillo v Ukraine*** (2016) App No 38771/05; ***Piechowicz v Poland*** (2015) 60 EHRR 24 and ***Danilevich v. Russia***, Application no.31469/08 (2021). Conversely, no violation had been found in cases in which a fair procedure existed and was deployed in introducing the limitation; the legal framework was in accordance with the law; there was individual assessment of the transferred prisoner's circumstances; an effective means of legal challenge was available; the restrictions were shown to be objectively justified; and suitable means of mitigation existed. The Respondents have cited numerous cases in demonstrating this point, which the Plaintiffs' sought to distinguish on various grounds. The cases include, ***X v United Kingdom*** App. No. 5712/72 (1974) ECssnHR; ***(Richards) v SSHD*** [2015] EWHC 4280 (Admin) ("***Richards***"); ***PK v United Kingdom***, 19085/91 9 December 1992 (ECssnHR); ***Messina v Italy*** (2000) App No 25498/94; ***Ocalan v Turkey (No 2***) (2014) App Nos. 24069/03, 197/04, 6201/06 and 10464/07; ***Serce v Romania*** *(2015) App No 35049/08*; and ***Palfreeman v Bulgaria*** *(2017) App No 59779/14*.

227. The core contention of Mr Southey, in response to the Respondents' reliance on these cases, is that the cases are distinguishable. In his view, some do not reflect the modern jurisprudence of the ECtHR regarding distance as they are older and, therefore, of limited value. None of them, he says, is concerned with moving a prisoner from their family in circumstances where they offended within their jurisdiction and the distance over which they are transferred is as long in this case. In simple terms, Mr Southey's contention is that the distance in this case, which is longer than in any other case cited, has, in itself, rendered the interference abnormal and, accordingly, disproportionate. Therefore, in his view, there is no contemporary case in which the ECtHR has not found a violation where the distance in question is as long as in this case.

228. While there might be more than one reason for disagreeing with Mr Southey's position, I consider it sufficient to single out for particular mention in this context, the case of ***Richards***, which, like this case, involved the transfer of a prisoner from the Cayman Islands to the United Kingdom under the 1884 Act, a decade or so ago. The removal was adjudged to be justified by the High Court of England and Wales (Simler J) on the basis that the Cayman Islands did not have a high-security accommodation that could accommodate the claimant given his high-risk status. This, the learned

judge concluded, had distinguished Mr Richards' case factually from other cases on which he relied (para 20). The learned judge further opined that it is only in exceptional cases that detention far from home will infringe Article 8 (para. 22).

229. Given the basic similarities between ***Richards*** and the instant case, emanating as they do from the same jurisdiction and by virtue of the exercise of powers under section 2(d) of the 1884 Act for the same reason that there is no high security accommodation on the Island to accommodate them given their status as high-risk prisoners, I place significant reliance on the observation of Simler J that ***Richards*** did not fall to be treated as an exceptional case. Essentially, his detention in the United Kingdom, a far distance from his home prison, without more, was not a violation of Article 8.

230. Following the resolution of the various issues in the appellate process and the pronouncements of their Lordships at the Privy Council against the backdrop of the principles extracted from the authorities relied on by the parties, the long distance of transfer cannot be determinative of the issue of proportionality. Accordingly, I would hold firm to the view that the removal of the Plaintiffs to the United Kingdom, at such a far distance, which, admittedly, resulted in the substantial interference with their family life and the life of their family, including their children, is not sufficient for the court to find a violation of section 9, without further analysis. There must be further analysis given the limitations imposed on the rights by section 9(3) and the Respondents' reliance on the justificatory criterion provided for in that subsection. Therefore, whether the decisions to transfer the Plaintiffs were objectively justified must be examined in keeping with the applicable law.

Whether the decisions are objectively justified – applying the proportionality test

231. During the currency of the proceedings before the court, relevant information was disclosed to the Plaintiffs regarding the decisions to concur in their removal in addition to the pre-action letters from the Attorney-General's Chambers. A large portion of the information garnered from the intelligence, however, cannot be disclosed on PII grounds and this right to withhold those materials from the Plaintiffs and the court has been sanctioned by the PII and CMP Judgments of Carter J (Ag), which remain undisturbed as there was no appeal against the PII judgment and the CMP judgment was upheld by the Privy Council. The court, however, had ordered disclosure by way of

gist or in redacted form. Hence, the form and manner of evidence adduced by the Respondents in seeking to advance their case.

232. Between September 2019 and December 2019, critical information relative to the decisions to transfer the Plaintiffs was disclosed in the form of unredacted, redacted, anonymized, signed or unsigned affidavits from the Attorney General's Chambers, the RCIPS, HMCIPS and the Governor's Office.

233. These affidavits were filed to provide evidence relative to among other things, (a) the reasons for the withholding of information from disclosure on PII grounds; (b) setting out the reasons of HMCIPS for requesting the transfer of the Plaintiffs under the 1884 Act; and (c) providing details of the decision-making process and the reasons for the decisions. The evidence specifically treated with such matters as the disciplinary records of the Plaintiffs for the periods they were incarcerated in HMP Northward; the security arrangements at HMP Northward Prison; the inadequacy of the security arrangements to securely hold prisoners such as the Plaintiffs; consideration given to the upgrade of HMP Northward; and arrangements for the facilitation of contact between the Plaintiffs in the United Kingdom and their families who reside in the Cayman Islands.

234. In keeping with their position regarding the appropriate time at which proportionality should be assessed, the Respondents have based their justification on national security and public safety grounds based on the material available to the Governor at the time of the decisions. They have, nevertheless, provided updated material available to them after the decisions were made, in the event the court were to conclude that updated material is relevant to the assessment of proportionality as contended by the Plaintiffs.

235. The court has already decided on the Timing Issue, which will now be applied. As already decided, the relevant time for assessing proportionality is when the decisions were made to transfer the Plaintiffs and upon their removal from the Islands, given the role of the Governor in the decision-making process and the status of the Plaintiffs in the United Kingdom as transferred life prisoners. Therefore, the Respondents cannot rely on later occurrences to justify the challenged decisions in the same way the Plaintiffs should not be allowed to generally rely on updated developments in the United Kingdom to impugn the Governor's decisions. The court has to be mindful of *ex post facto* justification for the decisions coming from the Respondents as well as *ex post facto* challenges to the Governor's past decisions. Permitting *ex post facto* justification and allegations would be

objectionable on grounds of unfairness. Therefore, the court has tried to be quite careful in treating with evidence regarding updated developments adduced by both sides.

(*i*) ***Whether the measure pursued a legitimate aim which was sufficiently important to limit a fundamental right***

236. The need for the Respondents to satisfy the first criterion regarding whether the measure was in pursuit of a legitimate aim necessitates a resolution of the question of whether the claim of a threat to national security and public safety is made out. This is considered critical because Mr Southey has contended during the course of this hearing that the claim regarding the risk to national security is exaggerated as the alleged criminal activities of the Plaintiffs would constitute nothing more than ordinary criminality, which would not justify their transfer on national security or public safety grounds. Apart from those assertions, it is, more importantly, incumbent on the court to scrutinise the claims of risk to national security with great intensity and caution.

237. I commence this aspect of the enquiry with a review of the material that was before the Governor at the time the decisions were made. The Respondents' evidence reveals that when the Governor signed the notices of concurrence for the Plaintiffs' removal, she had (i) information on the Plaintiffs' convictions; (ii) copies of the submissions made to the Secretary of State for Justice and the Minister of State for Overseas Territories (the "United Kingdom authorities"); (iii) information that cannot be disclosed on PII grounds; and (iv) a summary of intelligence on each of the Plaintiffs.

(i) Information on the convictions

238. At the time of the decisions, the convictions of the Plaintiffs for murder and the circumstances surrounding their convictions were well-established. The circumstances of the murder for which they were convicted were described in the sentencing remarks of the trial judge, Quin J, and accepted by the Court of Appeal and Privy Council as involving "a very significant degree of planning and premeditation" and was "a very public execution of the most evil nature and could be accurately described as chillingly clinical in its planning and execution" (paras 112-114 of the Court of Appeal criminal judgment).

239. Regarding the murder, the Court of Appeal concluded its judgment in these words at para 118:

> *"We add this. These appellants wore no disguise. They openly had with them a gun. They were not unknown to at least some (if not most) of those present in the area of the Globe Bar. They plainly did not believe that anyone would dare to give evidence against them. That says much about these appellants."*

240. The Privy Council also made similar observations regarding the Plaintiffs' convictions for murder at para 59 of the PC judgment, where it stated:

> *"... so far as the threat posed by [Ramoon] and Douglas is concerned, there was compelling evidence of their dangerousness arising from their conviction for a particularly cold-blooded gang killing*."

241. For this murder, they were, at the time of the decision, sentenced to serve mandatory life sentences of imprisonment with lengthy minimum terms before eligibility for parole of 34 and 35 years.

242. The Plaintiffs' convictions and sentences for the murder were vital considerations for the removing authority in conducting its risk assessment regarding the threat posed by the Plaintiffs. These were indisputable established facts on which the Governor could have properly relied.

(ii) *Previous convictions and offending history*

243. The Respondents have also relied upon the criminal records of the Plaintiffs, a summary of which was provided to the Governor on 13 June 2017. Ramoon had 13 convictions in addition to the index offences. Osbourne Douglas had 11 in addition to the index offences. The record shows that both commenced their criminal offending as teenagers. Ramoon was charged with the offence of possession of an imitation firearm with intent in 2010 on facts described in the CICA criminal appeal judgment at para 116. The facts as reported are that Ramoon *"went to the home of another person with what appeared to be a gun. He pointed the gun at the head of the occupant, who saw bullets in the chamber. He thought the gun was loaded. There was a struggle. The gun fell to the ground with a metallic sound. It was never found. That is why the offence was charged as an imitation firearm."*

244. The Plaintiffs' previous records are established past facts that would have been known to the RCIPS and HMCIPS, who provided information to the Governor. There is no dispute about this. The Plaintiffs' previous offending history was, therefore, relevant to the consideration of their

convictions and risk assessments. They were persons with an undisputed criminal history at the time the decisions were made. It cannot be denied that their criminal history would have been material to any consideration of their risk and categorisation as prisoners.

(iii) The Plaintiffs' status as Category A prisoners

245. Associated with their convictions and sentences was the Plaintiffs' status as Category A prisoners. Category A prisoners are defined as prisoners whose escape would be highly dangerous to the public, the police or the security of the State, and for whom the aim must be to make escape impossible. The definition is concerned with the prisoner's dangerousness if he escaped, not how likely he is to escape (see ***National Offender Management Service (UK), The Review of Security Category – Category A/ Restricted Status Prisoners*** issued on 10 June 2016). The evidence is that the designation of Category A status is predicated on several considerations, which include the nature of the offence for which the prisoner is convicted and sentenced, the perceived level of risk posed to the public should the prisoner be at large, and his response to custody.

246. The Plaintiffs' status as Category A prisoners was an additional pertinent consideration in the risk assessment, particularly, in the context of the information available to the decision-makers of the immediate threat of a planned escape from custody. On the basis of the Plaintiffs' status as Category A prisoners alone it would have been reasonable for the Governor to conclude that their escape would have been highly dangerous to the public and security of the nation.

(iv) Submissions to the United Kingdom authorities

247. The submissions made to the United Kingdom authorities were the only contemporaneous documents indicating the reasons for the decisions. The terms of the submissions were, however, reflected in the contents of the Attorney-General's letters of response to the Plaintiffs in September 2017, which has already been detailed. In summary, the unredacted portions of the submissions disclosed as part of the open evidence, in so far as is immediately relevant, reveal these facts:

(a) The Plaintiffs' murder convictions and sentences (set out above).

(b) Douglas was the leader of Cayman's Central Gang and Ramoon was a senior and influential member of the same gang.

(c) They were considered highly dangerous in the local community. Intelligence had shown they had been involved in the orchestration of serious gun crime and the importation of guns and drugs from within prison. They also attempted to intimidate staff at HMP Northward.

(d) The Cayman Islands' prison authorities were finding it increasingly difficult to accommodate the Plaintiffs securely. HMP Northward was designed as a Category C detention facility. The prison has a single fence and is located by the side of a public road. As a result, there are significant difficulties in preventing contraband, including mobile phones from reaching the prisoners.

(e) The consequences would be severe for the Cayman Islands' national security (for which the United Kingdom Government retains responsibility) and its reputation as a safe and secure tourist destination and place to do business.

(f) The Cayman Islands' law enforcement agencies agreed that the only viable way to mitigate the risk to the Islands' national security posed by these prisoners was for them to be transferred under the 1884 Act. Given over-crowding in prisons in the other Caribbean Overseas Territories, the lack of a prison with a suitably secure wing and the resultant concerns about dealing with potentially challenging Category A prisoners, it was believed that the only credible option was to relocate both prisoners to the United Kingdom. The Overseas Territories Division’s Regional Prisons Adviser agreed with this assessment.

(g) The prisoners’ removal to the United Kingdom would also provide time for improvements to HMP Northward. Once security is considered adequate the return of the prisoners could be considered.

(h) It was anticipated that Douglas' relocation to the United Kingdom would help break his grip over his criminal network and lower the risk to national security in the Cayman Islands. It was considered inevitable that Ramoon would take his place at the head of the gang if Douglas was removed on his own.

(i) Consideration was given to the impact on the prisoners and their families but collectively it was concluded that the risk of harm to the local community was greater (Ramoon had a child that visited). Any disruption to the prisoners’ family relationships would be mitigated by the fact that the United Kingdom system allows foreign nationals to make regular

telephone calls abroad (with a limited number at public expense) although this would need to be closely controlled. Additionally, if a close family member expressed a particular need to see the prisoners following their transfer, the Cayman Islands Government would consider offering financial assistance.

(v) Intelligence relating to both Plaintiffs and information that cannot be disclosed on PII grounds

248. There was also the underlying material garnered from intelligence, a significant portion of which has not been disclosed as a result of the order of Carter J (Ag) excluding them on PII grounds. The gist of the underlying material reveals, among other things, that the police and prison service had provided:

(a) "compelling intelligence" showing that while incarcerated at HMP Northward, the Plaintiffs continued to be involved in gang-related criminality, including conspiracy to murder, the smuggling of drugs, firearms and hitmen into Cayman, the smuggling of drugs into HMP Northward and the making of threats against prison staff and assaults on other inmates.

(b) "reported intelligence" linking them both to intimidation and manipulation of staff, threats of violence to staff, reports of plans to escape and the use of weapons.

(c) intelligence that both Plaintiffs were known to exert considerable negative influence on younger, impressionable prisoners and to use this negative influence for personal advantage.

(d) intelligence that prior to the Plaintiffs' removal to the United Kingdom they, particularly Osbourne, were arranging the importation of controlled drugs, firearms and illegal immigrants into the Cayman Islands.

(e) intelligence that both Plaintiffs entered the prison system for the first time at 15 years old; they were both members of the CMK Gang- a notorious local gang; Douglas was the leader, and Ramoon, a senior influential member.

249. Among documents subsequently disclosed following the PII ruling was an affidavit of Governor HE Martyn Roper (affidavit dated 4 December 2019) in which he deposed that he had reviewed the material available at the time his predecessor made the decisions in 2017, which indicated further details of the intelligence available at the time the decisions were made. That, he stated, led him to agree with the decisions. He deposed to further details that reportedly led to the decisions:

> *"Despite their conviction and imprisonment, the [Plaintiffs] had continued to engage in serious criminal activity. Intelligence revealed that they had, or were seeking to obtain, high-powered automatic weapons; they had criminal associates with the knowledge and propensity to use them, including professional 'hitmen' brought by boat from Jamaica; a track record of murdering and attempting to murder gang rivals and witnesses and of making threats of harm, including to a senior prison officer. There was intelligence that they exercised control over other inmates and might be able to influence prison officers through threats. A series of tit for tat gang killings and shootings involving the Plaintiffs was threatening to escalate, including an incident in which the Plaintiffs' mother's house was shot up by a rival gang using automatic weapons. There was credible intelligence that they were planning an escape. [Passage redacted]…*

250. The court accepts that the undisclosed material excluded on PII grounds cannot advance the Plaintiffs' case in any material way, and neither would it undermine the Respondents' case (PII judgment of Carter J (Ag) para 83). The court cannot reject the gist of the underlying material. Therefore, available for the consideration of the court, is the gist of allegations against the Plaintiffs, which I have already accepted is supported by the underlying undisclosed material based on the judgments of Carter J (Ag), the appellate courts and the role of the special advocate in the PII hearing. Therefore, I am obliged to take the gist of the undisclosed material into account when assessing proportionality. They form part of the body of facts which the Governor could have properly regarded as possibly true in the exercise of her evaluative and predictive judgment in arriving at the challenged decisions.

(vi) The Plaintiffs' membership in the CMK Gang

251. As is seen above, the material before the Governor, when she made her decision, also alleged that the Plaintiffs were members of the notorious CMK gang. According to the Respondents, although the motive for the murder of Jason Powery was said by the Court of Appeal to be unknown (Court

of Appeal criminal judgment at para 63), they assessed that this was a gang-related murder. The evidence is that Douglas is known by the authorities to be the leader of the gang, and Ramoon is a senior and influential member of the same gang. Both are considered to be "*highly dangerous in the local community"*. As the evidence has shown, this information regarding their alleged gang membership and continuing criminal activities was garnered from intelligence that has not been disclosed on PII grounds (see para 83 of PII judgment of Carter J (Ag)).

252. Furthermore, a photograph of a large tattoo with the letters "*CMK*" on Ramoon's back was among the material disclosed to the Plaintiffs and forms part of the open evidence. The Respondents submitted that the "obvious implication" of this tattoo is that the marking, "CMK", references Ramoon's membership in that gang. According to the Respondents, there has been no explanation for this tattoo, and nothing emerged from the PII process to contradict the conclusion that it is indicative of his membership in the gang. Accordingly, this court should accept the authorities' assessment that the Plaintiffs were gang members.

253. The Plaintiffs have denied being members of any gang as well as being involved in criminality as alleged. They emphatically deny the Respondents' claim that they are a threat to national security and public safety.

254. Regarding the labelling of the Plaintiffs as gang members, I find that it was open to the Governor based on the material before her, some of which form part of the open evidence in this case, to conclude in the assessment of the risks that the Plaintiffs were gang members and that the offence of murder for which they were convicted in 2016 was gang-related. The court accepts that there was underlying undisclosed material that supports the gist of the intelligence reports adduced into evidence that the Plaintiffs were members of the CMK gang and continued to be involved in criminality despite their incarceration.

255. Also, Ramoon's CMK tattoo would have provided compelling evidence from which the Governor could have concluded that he was a member of the CMK gang and assessed his risk on that basis along with, among other things, his participation with his brother in the 2016 murder in conjunction with his own criminal history.

256. As already established in the court's statements regarding the approach to be taken in assessing the intelligence-based material (under the PII Issue), the Governor, in acting on that intelligence, was not obliged to make findings of fact to ascertain the truth of the matters contained in the reports and to do so to any standard of proof. She was not called upon to act as a judicial body but to exercise her executive judgment and discretion in assessing the future risks posed by the Plaintiffs based on reports from her specialist advisers in her capacity as the government official with sole responsibility for internal security.

257. The ultimate question confronting the Governor, at the material time, was whether there was no suitable penal facility to safely secure the Plaintiffs in the Cayman Islands, and if so, whether they should be removed to the United Kingdom for their safer custody in accordance with section 2(d) of the 1884 Act. For that purpose, she was only required to determine whether there was a possibility that the information regarding the alleged criminal activities of the Plaintiffs was true and not whether they were, in fact, true.

258. As established by the relevant authorities, the Governor, in evaluating the information and conducting her risk assessment, was entitled to take into account established or proven facts of past activities (such as the Plaintiffs' convictions for murder and their previous offending) as well as information regarding matters that were allegedly occurring or have not yet occurred and which have not been established to be true (the material based on intelligence). This is because, as I have already concluded, the assessment of risks within the framework of section 2(d) of the 1884 Act would have been evaluative and predictive regarding future risks and would have transcended matters of fact. In those circumstances, the court cannot insist on strict proof of every fact or information relied on in the risk assessment.

259. The court's task on review is not to determine whether the underlying facts on which the risk assessment was based are true and provable but rather to assess whether the Governor would have been entitled to regard them as possibly true. So, despite the Plaintiffs' denial of gang membership and continuing involvement in criminal activities while incarcerated, the court will have to pay deference to the Governor's treatment of those matters in her risk assessment in her role as the primary decision-maker. There is nothing in the statutory scheme within which she acted that

imposed on the court that responsibility regarding risk assessment and the determination of the adequacy of the prison facilities.

(vii) The inadequacy of the security arrangements at HMP Northward and consideration given to its upgrade

260. The evidence has also shown that the Governor had before her information concerning the condition of HMP Northward to effectively and safely house the Plaintiffs as Category A prisoners. There is open evidence substantiating what was contained in the submissions to the United Kingdom authorities regarding HMP Northward. The indisputable evidence from the HMCIPS is that HMP Northward was and remains the only adult male prison establishment in the Cayman Islands. It is described as a low-security estate. They say it "does not conform to the standards of physical and dynamic security that would meet the requirements of a Category A high-security estate or Category B prison". It is not able to "provide assurance of public protection against the threats provided by the most dangerous and high-risk offenders" (prison service affidavit of September 30, 2019).

261. The evidence also establishes that the tactical responses that larger jurisdictions employ for managing prisoners with the profile of the Plaintiffs, such as splitting them up and placing them in separate prisons, could not be deployed in the Cayman Islands given its small size and absence of another prison. As a result, "HMCIPS would not be able to effectively mitigate the internal threats and RCIPS cannot properly mitigate the social threats" (prison service affidavit of September 30, 2019).

262. The submission to the United Kingdom authorities further indicated that the Plaintiffs' removal to the United Kingdom would have provided time for improvements to HMP Northward and that once security was considered adequate, the return of the prisoners could be considered.

263. Mr Southey submitted that the Plaintiffs' submissions about resources are important. He maintained that the problems that are said to exist in relation to the accommodation of Category A prisoners have been known for a number of years, going back to 2009, when Kenneth Richards was removed to the United Kingdom. There is no explanation, he said, for the delay in addressing those problems. One possible explanation, he proffered, is the Cayman Islands Government's unwillingness to

spend money on providing appropriate accommodation for Category A prisoners. Relying on para 113 o*f* ***Polyakova***, King's Counsel maintained that to the extent it is said that resources were an issue, that is no answer to the Plaintiffs' case that their removal was disproportionate and unjustifiable.

264. The Respondents have adduced evidence in response to the Plaintiffs' arguments regarding the suitability of HMP Northward and the failure to provide the resources necessary for the Plaintiffs to remain in the Cayman Islands. Evidence from the Respondents during the course of the proceedings reveals that the current position at HMP Northward cannot be addressed through facility upgrades without a full prison re-build. Upgrading the current facility to make it more secure to accommodate high-risk prisoners, they deposed, would not be cost-effective because of the significant internal environmental changes that are needed to hold high-risk prisoners like the Plaintiffs. Regarding the prison rebuild, the Respondents, through the current Governor, have provided evidence that work is underway to prepare for a substantial rebuild of HMP Northward, but the award of a contract is on hold until the 2024-2025 budget even though a preferred supplier has been identified to carry out the works.

265. The Respondents, through further affidavit evidence, also contended that the "critical risks" in this particular case were not only about the "*physical and dynamic security deficits of HMCIPS"* but also about the capabilities of the Plaintiffs *"to cause significant harm to those working and living in the prison system and also to those members of the community who would/could be affected by their presence"* (affidavit of HE Martyn Roper at [25]).

266. Mr Southey has taken issue with the preceding aspects of the Respondents' evidence on HMP Northward as being *ex post facto* justification. In asking the court to reject them he relied on ***R (United Trade Action Group Ltd) v TFL*** [2022] LLR 172 at para 125.

267. Mr Southey's argument that there is *ex post facto* justification in the Respondents' updated affidavit evidence is rejected by Mr Bowen, who argued that the response is relevant in light of the Plaintiffs' pleadings and submissions regarding the failure to upgrade/rebuild HMP Northward and that lack of resources does not provide a defence or justification.

268. I accept Mr Bowen's contention that the Respondents have adduced the evidence complained of as being *ex-post facto j*ustification in response to the Plaintiffs' pleadings and unrelenting arguments pertaining to HMP Northward. Therefore, the evidence ought not to be rejected as *ex post facto* justification for the decisions. The Respondents are entitled to respond to the case brought against them, and from the very outset, the Respondents have raised concerns about the threat the Plaintiffs posed to the prison staff and inmate population at HMP Northward and that contraband, including telephones, were being smuggled into the prison. Therefore, I find the response of the Respondents on the HMP Northward point to be a part of their "genuine elucidation of the basis for the decision and not an impermissible justification or contradiction after the event": See ***R (United Trade Action Group Ltd) v TFL*** para 125(7).

269. In any event, even if the Respondents ought not to be permitted to rely on the evidence that a new prison would not obviate the risks posed by the Plaintiffs, I find that the court does not have the institutional competence to reject the Respondents' evaluation of the state of the prison and its ability to securely house the Plaintiffs. It was reasonably open to the Governor to accept, upon the advice of the relevant authorities with whom she was in consultation, that HMP Northward was not suitable for the safe custody of the Category A Plaintiffs in the light of the information about them. The Governor as the official with the sole responsibility for the internal security of the Islands was better placed, than this court could ever be, to determine, on the advice of her specialist consultants and advisers, what was necessary for the interests of national security and public safety when considerations were given to the state of HMP Northward and the risk posed by the Plaintiffs. That determination was a matter totally within the institutional competence, discretion, judgment and policy decision of the Respondents. The court is not in a proper position to substitute a contrary view.

270. The Respondents have commended for the court's consideration and adoption the observation of Carter J (Ag) in the PII Judgment at para 42, where she stated, in part, that the "instant risk to national security encompassed the risk that the [Plaintiffs] may try to escape from HMP Northward". This was part of the assessment of the Governor based on intelligence. I would adopt the words of Carter J (Ag) that "there is no question that a court should not seek to undermine the executive's assessment on matters such as national security because it is recognised that such an

assessment will be based on facts for which the decision maker has special knowledge or a special responsibility as it relates to that area for which in this case [she] is uniquely responsible".

271. Later, at para 45 of her PII judgment, Carter J(Ag) referenced the dictum of Lord Slynn of Hadley in ***Rehman*** regarding the determination of the Secretary of State of whether the appellant's deportation, in that case, was in the interests of national security. Lord Slynn stated (para 15):

> "*It seems to me that the appellant is entitled to say that 'the interests of national security' cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom.* ***There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported***." (Emphasis added)

272. His Lordship then continued later in the judgment at para 26:

> "*In conclusion even though the Commission has powers of review both of fact and of the exercise of the discretion,* ***the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problem involved. He is undoubtedly in the best position to judge what national security requires, even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him***." (Emphasis added)

273. The Governor's evaluation of the security standards of HMP Northward was connected to the risk assessment based on the Plaintiffs' convictions for murder, past convictions and offending history, their Category A status and the intelligence reports of continuing criminality. There were ample grounds for the Governor, the Director of Prisons, the RCIPS and other advisers to the Governor to form the view that there was a serious possibility of risk or danger to the security or well-being of the nation created by the Plaintiffs' alleged conduct, past conduct and threat of escape in the light of the unsuitability of HMP Northward to house them as Category A prisoners.

(viii) Prison Disciplinary records

274. In establishing justification, the Respondents also relied on the Prison Disciplinary Records from HMP Northward for both Plaintiffs and affidavit evidence from HMCIPS (dated 30 September 2019). It is deposed that the reports by the wing prison officers recorded *"decent behaviour and conduct"* for the Plaintiffs although they have breached prison rules. It is further deposed that "[*t]he entries are not consistent with the intelligence linking both of them to intimidation and manipulation of staff, threats of violence to staff, and reports of plans to escape and the use of weapons*". There was also the assault by Douglas on Justin Ebanks, the eye witness to the murder in Sept 2016. Intelligence also disclosed that the Plaintiffs were known to exert considerable negative influence on younger, impressionable prisoners and to use the negative influence for personal advantage. They had been convicted of many charges relating to possession of mobile phones while on the high-risk unit.

275. The Respondents have asked the court to note that Ramoon, in his statement, denied this allegation of having been convicted for possession of a mobile phone as "*simply false*". He stated that, *"I have never heard of anyone [having] mobile phone on HRU"*. This, however, was proved to be false by an exhibited adjudication report for 5 October 2016, which shows that Ramoon had pleaded guilty to the charge.

276. Mr Southey contended that the foregoing matters were not part of the decisions for removing the Plaintiffs. The reason given, he said, was continued criminality. He maintained that in the case of Douglas, there has been no proven charge of violence. He has denied most of the allegations against him but has made the point that there is little he can say without further particulars of the allegations. He accepted that he assaulted a witness but that was impulsive. Ramoon has also denied the allegations against him but stated there is little he can say without further particulars of the allegations. He said he did not possess a phone while in maximum security, and he did not recall making threats but threats are often made in prison with there being no intention to carry them out. As already shown, his denial of the phone charge is proved to be untrue and his record speaks to the infractions while he was in custody.

277. It is noted that there is no direct indication that the disciplinary record for each Plaintiff was, by itself, considered by the Governor. There is, however, evidence of intelligence regarding their conduct in prison. The Director of Prisons is a party to these proceedings and the conduct of the Plaintiffs in prison would have been known to HMCIPS and relevant to the Respondents' case. Douglas had himself admitted to assaulting another prisoner. Their conduct at HMP Northward, therefore, cannot be said to be irrelevant in considering whether the risk assessment was reasonable and the Governor was entitled to arrive at the decision she did that the Plaintiffs had to be removed from the Cayman Islands for their safer custody.

278. Further, the categorisation of the Plaintiffs as Category A prisoners is partly predicated on how they responded to custody. The disciplinary records are indicative of that fact, which would have been a relevant matter in determining the capacity of HMP Northward to house them safely in light of the intelligence that they were planning an escape and their alleged involvement in continuing criminality while incarcerated. The Respondents can use them in establishing justification as they were facts known at the time.

(ix) The urgent need for the Plaintiffs' removal

279. The Respondents also attested to the Governor's consideration of an "apparent gang-related" attack on the house of the Plaintiffs' mother on 3 June 2017. This attack, the Respondents contended, led to concerns that the Plaintiffs would retaliate, so the Governor's Office increased its efforts to remove Douglas. Around the middle of June, concerns were raised by the Cayman police and prison authorities about leaving Ramoon on the island given his senior position within the CMK Gang and the risk that he would have taken over his brother's operations, including intimidation of prison staff. His Category A status and circumstances surrounding his commission of the offence of murder with a firearm given to him by Douglas were also weighed in considering the need to remove him.

280. This attack on the mother's house was a legitimate concern as it had implications for the maintenance of law and order on the Islands given the possibility of reprisals. The Governor cannot be faulted in considering this as a matter of critical concern in her risk assessment.

281. I would adopt the approach established in paras 42 and 45 of the PII judgment of Carter J (Ag), while bearing in mind the need to have regard to the context in which the challenged decisions were made. Within this context, this case involves the exercise of the statutory power of the Governor within the broader constitutional framework of her responsibility for the peace and internal security of the nation. The Cayman Islands comprise a small island state substantially dependent on tourism, which means the entry of foreigners on a large scale on its shores. It is also reputed as a leading international financial centre. The proliferation of organised criminal activities involving dangerous gangs, coupled with the likely escape of dangerous prisoners like the Plaintiffs, would have posed a serious risk to the security, life and safety of the people living in and visiting the Islands. HE Martyn Roper, in his affidavit evidence (affidavit 4 December 2019), painted a compelling picture of the threat to national security and public safety that the continued detention of the Plaintiffs on the Islands could potentially have had, given the information that was available to the Governor at the time the decisions were made. After setting out the intelligence available to the Governor at the time of the decisions, he opined:

> *"In those circumstances it is reasonable to conclude that, had the [Plaintiffs] remained in the Cayman Islands and had continued with their criminal activities on the same scale they represented an actual or potential threat to the peace and security of this small island nation. For example, there could have been an escape attempt involving smuggling of firearms into the prison, perhaps supported from outside by gang associates armed with automatic weapons; or a retaliatory or other gang-related incident involving the use of automatic weapons on both sides, that could temporarily have overwhelmed the resources of the RCIPS and led to significant loss of life."*

282. The conclusion that there was a threat to national security and public safety arose from intelligence regarding continuing criminality and the risk of escape from prison. The risk of an escape from custody of Category A prisoners with the Plaintiffs' known and reported profile, in and of itself, was sufficient to raise national security and public safety concerns. Then, there was the apparent gang-related attack on the Plaintiffs' mother's house, which led the authorities to fear reprisal. With access to information and expert advice not available to the court, the Governor would have had, as Lord Slynn stated in ***Rehman***, *"the means at her disposal of being informed of and understanding the problems involved"* at the time the decisions were made. The court enjoys no

such privilege or advantage. Therefore, at the time the decisions were made, the Governor was undoubtedly in a better position to judge what was required in the interests of national security and/or public safety.

283. Although this court is the primary decision-maker regarding the question of the violation of the Bill of Rights, it is not the primary decision-maker regarding the risk posed by the Plaintiffs and the steps to be taken to neutralise or eliminate it. In this area, I have to accord a high degree of deference to the Governor's (and indeed, the Director of Prisons) institutional competence, albeit I am mindful that the court must subject to intense scrutiny any claim of risk to national security which is raised as justification for a breach of a fundamental right. I have considered the pronouncements of the ECtHR in ***CG and others v Bulgaria*** at para 40, in treating with the question of whether there is sufficient factual basis disclosed upon which the removing authority could have properly formed the view that national security was threatened by the alleged activities and proclivities of the Plaintiffs for criminality.

284. In ***CG v Bulgaria,*** it was found that the first applicant's expulsion from Bulgaria amounted to an unjustified interference with the applicant's right to respect for their family life due to insufficient evidential basis on which the threat to national security was alleged and found to have been proved. The court said, in part, at para 40:

> "*The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary…"*

285. At para. 43, the court continued in the same vein regarding treating with a claim by the State of a threat to national security:

> *"… It is true that the notion of "national security" is not capable of being comprehensively defined …* ***It may, indeed, be a very wide one, with a large margin of appreciation left to the executive to determine what is in the interests of that security. However, that does not mean that its limits may be stretched beyond its natural meaning."*** *(Emphasis added)*

286. The court concluded that the national courts, in accepting the State's claim that the first applicant posed a risk to national security, did not subject the executive's claim to "meaningful scrutiny" as required. Essentially, the case establishes the statement of principle that should guide this court, which is that, in assessing whether a claim of threat to national security is made out, the court must "be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable" (***CG v Bulgaria*** at para [57]).

287. The eradication or reduction of crime for the preservation of public safety is a component of national security. The security of prisons is a pertinent consideration as escaped prisoners pose a serious threat to the life, limb and property of others. The decisions were made in this context of a threat posed by prisoners to the Cayman Islands. Therefore, I accept it was perfectly legitimate and appropriate for the Governor to consider the state of HMP Northward in the risk assessment and to conclude that it was inadequate to securely house the Plaintiffs in the light of all the information within her knowledge that has been disclosed to this court. This includes the gist of the allegations contained in the undisclosed material.

288. I am satisfied that the Respondents have provided sufficient evidence to establish that there was some possibility of risk or danger to the national security of the Cayman Islands and the safety of its people, which made it desirable for the public good for the Plaintiffs to be removed from HMP Northward and transferred to the United Kingdom. The decisions cannot be said to have been arbitrary, unreasonable or irrational.

289. In the light of the preceding analysis, I am driven to the conclusion that the national security/ public safety imperatives have been proved to the requisite standard. Mr Southey's arguments that the evidence only pointed to ordinary criminality and no threat to national security is not accepted. Accordingly, I would hold that the measure undertaken under the 1884 Act to transfer the Plaintiffs to the United Kingdom was in pursuit of a legitimate aim or objective, which was to secure the Plaintiffs' safer custody in the United Kingdom in the interests of national security and public safety in the Cayman Islands.

290. The second aspect of the first criterion to be satisfied by the Respondents is whether the stated objective of the measure was sufficiently important to limit the Plaintiffs' fundamental right that has been interfered with. I consider it indisputable that the aim of ensuring the Plaintiffs' safer custody in order to safeguard the national security and public safety of the Cayman Islands is a compelling objective sufficiently important to limit the Plaintiffs' section 9 rights, which have been interfered with.

291. In my view, the Respondents have satisfied the first criterion necessary to establish justification.

(ii) Whether the measure is rationally connected to the objective

292. The second criterion the Respondents must satisfy is that the removal of the Plaintiffs was rationally connected to the objective of preserving national security and public safety by ensuring the safer custody of the Plaintiffs. It is fair to say that it is beyond dispute that this second requirement is satisfied.

(iii) Whether a less intrusive measure could have been used to achieve the objective

293. A more controversial question relates to this third criterion. The Respondents contend that less intrusive measures were not available to ensure the safer custody of the Plaintiffs in the interest of national security and public safety. In addition to the arguments already discussed in treating with the national security enquiry, they pointed to possibilities that were explored as alternatives. For instance, consideration was given to move the Plaintiffs to a prison in Bermuda, another British Overseas Territory, and to transfer prison officers from the United Kingdom to the Cayman Islands. The Respondents' evidence was also that the tactical responses that larger jurisdictions employ for managing prisoners with the profile of the Plaintiffs, such as splitting them up and placing them in separate prisons, could not be deployed in the Cayman Islands given its small size and absence of another prison. The alternatives were, therefore, considered but found unworkable.

294. The Plaintiffs countered by submitting, through their counsel, that there is *ex post facto* reasoning that the rebuild of HMP Northward would not adequately address the risks posed by the Plaintiffs. According to them, the evidence does not explain why the Plaintiffs could not be held in a high-security prison in the Cayman Islands when high-risk prisoners are not normally moved thousands of miles from their homes. They complained that it appears that no consideration was given as to

how other Overseas Territories cope with high-risk prisoners. They argued that the material obtained by the Attorney General suggests that only one prisoner has been transferred from another Overseas Territory, which means other Overseas Territories are coping with high-risk prisoners. Mr Southey pointed to Northern Ireland, which, he argued, "is a small community scarred by terrorism", but which continues to detain prisoners in the sole local high-security prison. There is no evidence that HMP Northward cannot hold prisoners convicted of murder, he said.

295. The consideration of this criterion is closely connected to the court's consideration of the justification of the Respondents based on the unsuitability of HMP Northward. As already indicated in this judgment, the determination regarding the suitability of HMP Northward to house the Plaintiffs was a matter totally within the institutional competence and executive judgment of the removing authority with which I will not interfere. I have already accepted it was open to the Governor to consider the state of HMP Northward in the risk assessment and to conclude that it was inadequate to securely house the Plaintiffs in the light of all the information within her knowledge that has been disclosed to this court.

296. The 1884 Act was promulgated to address this very situation, which faced the Cayman Islands with only one male prison ill-equipped to house dangerous prisoners such as the Plaintiffs. The Governor had the mechanism provided by the 1884 Act to ensure the safer custody of the Plaintiffs, which included transfer to the United Kingdom. That mechanism was deployed in the circumstances after other options were considered but found wanting. Section 2(d) of the Act under which the Governor acted was held by the appellate courts to be in accordance with the law. Accordingly, this court would have no lawful basis to substitute its own views for that of the Governor in deciding to transfer the Plaintiffs to the United Kingdom.

297. In the light of the circumstances that prevailed at the time the decisions were made, especially given the intelligence of a planned escape and the attack on the Plaintiffs' mother's house, which evoked a fear of reprisal, it cannot be said that the Governor acted irrationally when she failed to ensure an upgrade or rebuild of the prison so as to obviate the need to remove the Plaintiffs at the time. It is highly illogical to expect a prison re-build to have been undertaken at the time the events unfolded that led to the Plaintiffs' removal.

298. Furthermore, I accept, as plausible, counsel for the Respondents' argument that any decision for a prison upgrade or rebuild was not within the sole remit of the Respondents. I agree that this was not a decision for the Respondents, but one for the Cayman Islands Government, as it would have involved substantial government expenditure and critical decision-making regarding the allocation of scarce resources. In my view, this is an area in which the Cayman Islands Government should be accorded a wide margin of appreciation. Accordingly, I do not accept that a narrow margin of appreciation should be applied to this question of resources as it relates to HMP Northward, as contended by the Plaintiffs (see ***the Jamaican Bar Association case*** at para. 78).

299. I am led to the conclusion that the Respondents have given reasonable consideration to other available options but, in their judgment, found that none was satisfactory. The transfer was permitted by statute, which is in accordance with the law. The question of what was required in the public interests regarding the perceived threats to public safety and national security posed by dangerous prisoners in the Cayman Islands, is one best left to the Governor and her specialist advisers, including the Director of Prisons. This is a complex and pressing social issue on which the court ought to show deference to the Respondents' decision regarding the best option available to deal with the problem posed by the Plaintiffs, provided it was reasonable.

300. I find that the removal of the Plaintiffs was within the range of reasonable options open to the removing authority and an issue on which it must enjoy a wide margin of appreciation.

301. Accordingly, I would hold that the third component of the proportionality test is satisfied because nothing suggests that at the time the decisions were made to transfer the Plaintiffs, a less intrusive measure was reasonably open to the removing authority and could reasonably have been used as a suitable alternative to minimise the interference with the Plaintiffs' rights guaranteed by section 9 of the Bill of Rights.

(iii) Whether a fair balance has been struck between the Plaintiffs' constitutional rights to respect for family life and the interests of the community

302. This third criterion of the proportionality test to be satisfied arises as the thorniest issue between the parties and for the court's ultimate resolution on the substantive proportionality ground. The question is whether the decisions struck a fair balance.

303. Contemporaneous documentation in the form of the submissions to the United Kingdom authorities illustrates that at the time the decisions were made to transfer the Plaintiffs, specific consideration was given to the impact on their family life, and especially their children's. A balancing exercise was carried out by reference to the available measures that would mitigate the impact on family life, including access to telephone calls and the prospect of family visits funded by the Cayman Islands Government. It was, therefore, considered that certain facilities would be provided to the Plaintiffs by the Cayman Islands Government as well as by the United Kingdom prison regime for them to maintain contact with their family and mitigate the hardships consequent on removal.

304. Based on the information available, the Governor had balanced the rights of the Plaintiffs to respect for family life against the public interests of national security and public safety that the Cayman Islands authorities believed were at stake. The removing authority concluded that national security and public safety were important enough to outweigh the interference with the Plaintiffs' right to respect for family life and that of their children.

305. The burning question that now needs to be analysed is whether the Governor got it wrong. The court is now the primary decision-maker regarding the question whether a fair balance was struck. Therefore, this proportionality review should involve this court's own consideration of weight and balance, as the authorities dictate (See ***Pham v Home Secretary (SC(E))*** [2015] 1 WLR 1591). Regardless of the balance struck by the removing authority, it is ultimately for this court to decide whether a fair balance was struck between the rights of the Plaintiffs and the public interest.

The impact on the Plaintiffs' right to family life – the evidence

306. The Plaintiffs have given detailed evidence of the effect of removal on their family life. In support of their contention, they have provided unsworn statements from themselves and various affidavits, including from their mother and legal representatives, chronicling their experiences from when they were detained in HMP Northward to their detention in the United Kingdom. They have also filed up-to-date evidence and other information regarding recent family interactions and their current conditions of detention to demonstrate the impact of their transfer on their right to family life.

307. The Plaintiffs compare their contact with their family in the Cayman Islands with their contact in the United Kingdom and have concluded that they are worse off in the United Kingdom. The pith

and substance of the case being advanced are succinctly set out in the skeleton arguments of counsel on their behalf. The court has also had regard to the document entitled "ANALYSIS OF FAMILY CONTACT", prepared by the Respondents' counsel and agreed, in principle, by counsel for the Plaintiffs as being useful. The case advanced by each Plaintiff regarding interference with their family rights is examined separately but considered together when it is convenient to do so.

Osbourne Douglas

308. He has a daughter, S, who was seven years old at the time of his transfer from the Cayman Islands (making her approximately 13 years old by the time of the hearing). He also has a younger daughter, JF, with whom he has had no contact. While imprisoned in the Cayman Islands, his mother would bring S to visit as her mother did not visit often. He estimates he would speak daily to his daughter by phone, and she would visit most weekends. His mother, partner, sister and brothers would also visit him regularly at HMP Northward. He would receive those visits weekly. He had daily contact with his family by telephone, often more than once a day. He would see his mother and three siblings most weekends but would speak daily with them by phone. There was a visit from someone in the family every week, and his mother would usually attend HMP Northward every other week for face-to-face visits with him and Ramoon together.

309. Upon his transfer to the United Kingdom, he initially had no contact with any family member for nearly three months. He was permitted to see Ramoon several times a week during association times at HMP Belmarsh, where they were both detained. He only spoke to his family approximately once a week for 5 -10 minutes. He received family visits from Cayman between September and October 2019 for the first time, when six family members visited him, including his daughter, S and his mother. After October 2019, he had no direct family visits but was permitted one free call to family once a month and paid calls. The ability to make paid calls depended upon his mother sending money to him. He had a purple (video) visit with his mother and his daughter S in December 2020. He also had visits with his girlfriend, Nina White, until March 2020, when visits were restricted due to Covid-19.

310. At HMP Northward, there were restrictions on in-person visits from March 2020 to August 2020. From August 2020 to March 2021, visits were permitted with a negative Covid-19 test. Since March 2021, there have been no Covid-19-related restrictions on visiting. Therefore, being in the United

Kingdom during Covid-19 restrictions was more disadvantageous to him. Following Covid-19, monthly 30-minute video calls were permitted (at least for a period). By March 2021, he had one call with his family. However, he also has a girlfriend in England with whom he needs to use video calls to keep in contact.

311. Between 1 January and 3 August 2023, he made 20 telephone calls to Cayman. However, these calls have generally been short. The time difference also made it difficult for him to speak to his daughter. The limitations upon contact mean his bond with his daughter has been damaged.

Justin Ramoon

312. At the time of his removal, he had a partner, the mother of his son, ER, who was two months' shy of his second birthday (now eight years old). His mother and all his family, except for an aunt, resided in the Cayman Islands. At HMP Northward, he had frequent visits and maintained regular contact with his family. When able to do so, he would contact his family (mother, stepfather, and two siblings) by telephone every day except for his brother, who is hearing impaired and could not speak on the phone. He was able to call his family between 8:00 am and 9:15 pm. In the High-Risk Unit, a telephone was put through the hatch in the cell door, and it would be rotated from cell to cell. He would speak to his partner four or five times each day. There would be no limit on the time spent on the telephone unless they had been talking for 30-40 minutes and another prisoner wanted to speak. He would also talk to his son daily.

313. His son and his mother would visit him every weekend, while other family members would visit, but not every week. He would speak daily to his mother and three of his siblings. His mother would visit HMP Northward every other week for face-to-face visits with Douglas and him together. His first telephone contact after his transfer was on 19 September 2017. While in the Cayman Islands, he could make daily telephone calls without time limitations. Upon his transfer, it was a struggle in the United Kingdom to make any telephone contact.

314. It took months to get the first short call back to his family, and then technological problems frustrated the attempt at conversation. Three phones were on the block where he was housed, and many prisoners and queues existed. Once at the front of the queue, only 10 minutes was permitted, and then one had to rejoin the back of the queue to get additional calls. He made contact by letter

before telephone contact was established. Calls are expensive, and there are impediments due to the time zone difference. He speaks to his family one to two times per week and has had two video conferences with his son. It is important to him to maintain a relationship with his son and be a part of his son's life no matter what. He does not want his son to grow up without a father like he did. Regarding his nieces and nephews, with whom he is not so close, he would want to get to know them better. He has faced mental and emotional challenges due to being separated from his family.

Both Plaintiffs

315. The HMCIPS agreed to fund one family visit per year for up to six family members, but this was not known at the time of the decision challenge. The first family visit occurred in September and October 2019, with several family members visiting the Plaintiffs. However, subsequent visits were prevented due to Covid-19, and visits to the Plaintiffs only resumed in the Autumn of 2022. During this time, Ramoon received almost daily visits from three family members, while Douglas declined visits. In September 2023, both Plaintiffs received separate visits from five family members on at least five occasions. Notably, Ramoon's son did not visit him during these times. The duration of visits to the Plaintiffs varied, with visits to Douglas being about two hours long.

316. Ramoon has stated that the visits in England are different from the regular ones previously enjoyed in Cayman because they are intense. The Plaintiffs' mother has also described how difficult the visits are and how the visits to Douglas are unlike those in Cayman. The Plaintiffs pointed out that the Respondents have filed evidence that over £10,000 has been deposited in their accounts and of four other prisoners (pC504). However, there is no breakdown identifying how much a prisoner has received or when he received it. The sums deposited do not determine how many calls a prisoner can make, and historic deposits do not necessarily mean that deposits will continue.

317. There is no question that when they were at HMP Northward, they were in better and more frequent contact with their family members who reside in the Cayman Islands than the contact they have enjoyed in the United Kingdom.

The Respondents' response

318. The Respondents presented affidavit evidence concerning the Plaintiffs' contact with their family at HMP Northward and in the United Kingdom. Regarding HMP Northward, the Respondents

explained that prisoners could make calls each day, but they needed credit on their accounts to make calls from the prison. As it relates to access to phones, there were 27 phones for use by 208 prisoners.

319. Regarding contact in the United Kingdom, between September and October 2019, six members of the Plaintiffs' family travelled to the United Kingdom for a two-week visit at a cost of CI$25k. HMCIPS has an agreement to finance the cost of similar family visits once a year. Unfortunately, the 2020 trip was not possible due to Covid-19. On his account, Mr Douglas has 17 telephone numbers, including 10 from Cayman. Between September 2020 and 12 March 2021, Ramoon had approximately 933 calls with friends and family (an average of more than four calls per day). £10,000 was paid into a prison account of Douglas, Ramoon and four other prisoners by Douglas' girlfriend, Nina White. Ramoon had three virtual visits and sent and received letters. United Kingdom prison regime, including Prison Rules, allows foreign nationals free phone calls once every four weeks if there are no social visits, access to phones outside normal hours, no restrictions on pound sterling accounts for foreign nationals, and additional phone accounts for foreign nationals.

Discussion

320. There is no question that the Plaintiffs are affected in their contact with their family, which should be weighed in the balancing exercise. However, their contact with their children deserves to be given deeper consideration and greater weight than their contact with others, given the age of the children and the special need for bonding between children and both parents. Also, I accept, as Mr Southey has submitted, that the restriction on the father-child relationship as a result of the decisions is at a sensitive stage of the children's development, which is in their formative years. This is especially so for Ramoon’s son, E, who was two years old at the time of separation.

321. The Plaintiffs accept the Court of Appeal and Privy Council's conclusion that in making the decisions, the Governor had taken account of the impact of the decisions on the children. They contended, however, that later developments concerning matters concerning the children could not have been known at the material time. One such development being that "contact would end". According to the argument, the fact that contact would end was not identified as being likely in the

decision-making papers. Accordingly, this impact on the Plaintiffs and their children's right to respect for their family life made the interference disproportionate and unjustifiable.

322. A salient starting point in discussing the impact of the separation on the children is a reminder of the context in which the Plaintiffs' right to interact with their children is affected. It is not affected simply upon their removal to the United Kingdom, but started upon their incarceration in the Cayman Islands, following their convictions and the imposition upon them of lengthy sentences. Whether they were removed or not, their contact with their children would have been curtailed by their detention and classification as Category A prisoners, which subjected them to enhanced restrictions in detention. As the Respondents argued through their counsel, "the Plaintiffs' separation from their children was already a necessary and inevitable consequence of their conviction and lengthy prison sentence for offences of the most serious nature…"

323. It is, therefore, the additional interference brought about by the removal to the United Kingdom, and for which the Governor can reasonably be held responsible in concurring with the decision, that is considered in the balancing exercise. The overarching question for determination at this juncture is whether the interests of the children to have more frequent and personal contact with their fathers, which they enjoyed in the Cayman Islands, should trump the national security and public safety concerns of the Respondents that have led to the removal.

324. It is accepted that the relationship between the Plaintiffs and the children with whom they were in contact while detained in the Cayman Islands was adversely affected as contact had become less personal and frequent, consequent on their removal to the United Kingdom. This was reasonably foreseeable. However, the termination of familial contact between the Plaintiffs and their children, complained about in these proceedings, is another matter. It could not have been reasonably foreseen by the Governor at the time the decisions were made that there would no longer be any contact between Ramoon and his son or between Douglas and S.

325. In the case of Ramoon, whose son has not visited him in the United Kingdom, this is not due to any act or omission on the part of the Governor or the Cayman Government but because the child's mother would not permit him to visit. That eventuality, in my view, is not something to be laid at the feet of the Governor in seeking to impugn her decisions. In the case of Douglas, he was never

in contact with one daughter even before his removal and provisions were made and considered for him to maintain contact with the child, S, with whom he was in contact in the Cayman Islands. S had visited him in the United Kingdom and he has had contact with her by video calls. There is no report that the interaction between them has ended, even though it cannot be disputed that contact would have been more difficult.

326. In the light of the expressed willingness of the State to do what it reasonably could to ensure the Plaintiffs maintain contact with their family, including their children, the steps taken to finance visits of close family members, and the means available in the United Kingdom prison system for them to maintain contact with their family and the outside world, it cannot be said that the ending of relationship could have reasonably been envisaged.

327. In assisting the court with the determination of this issue, both sides have relied on the Privy Council case of ***H(H) v Deputy Prosecutor of the Italian Republic, Genoa*** [2013] 1 A C 338, an extradition case. The learning derived from the pronouncements of the Privy Council has guided these deliberations. The Board established that, in proceedings dealing with the separation of a parent from his child, for instance, by extradition, detention or deportation, the child's rights to family life are engaged. The question for consideration is how that interest should be safeguarded. In this regard, the Convention must be interpreted harmoniously with the general principles of international law, including Article 3.1 of the United Nations Convention on the Rights of the Child. It states:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's best interests shall be a primary consideration."*

328. In the instant case, The Privy Council, at para. 69 of its judgment, acknowledged that in the remitted judicial review proceedings, the children's best interests must be taken into account and accorded due weight in the balancing exercise as a primary consideration. However, the children's best interest is not the primary or paramount consideration. Lady Hale made the vital point that the impact upon young children of the removal of their primary caregivers and attachment figures can be devastating and is a factor to be considered (***H(H) v Deputy Prosecutor*** at para 33). Following on her Ladyship's guidance, the court is to identify what the children's best interest requires and ask

whether the strength of any other consideration or the cumulative weight of other considerations outweighs the consideration of their best interest. The court is to weigh the nature and gravity of the interference against the importance of the legitimate aims pursued. The question is whether the public interest in the parents' removal can be met without doing much harm to the children. This requires careful consideration, and the proportionality exercise requires the court to consider whether it can be mitigated.

329. In this case, the degree of latitude to be given to the primacy of the interests of the children in the balancing exercise depends on the human right at stake, the legitimate aim being pursued, which results in the interference, the seriousness of the criminality that led to the interference and the nature of the relationship between the child and the parent in question. As Lord Mance noted in ***H(H) v Deputy Prosecutor*** at para. [90]:

> *"... each case will depend on its own facts and some cases will be more easily resolved than others ... Ultimately it will come down to the exercise of judgment as to where the balance must be struck between ... two powerful and conflicting interests..."*

330. The balancing exercise requires careful examination of the interests of the children in maintaining close contact with their fathers, who are separated from them at a far distance, and the public interest in having the fathers remain at that distance due to the risks they pose to national security and public safety.

331. In ***H(H) v Deputy Prosecutor***, Lady Hale cited the Australian case of ***Wan v Minister for Immigration and Multicultural Affairs*** (2001) 107 FCR 133, in which it was stated at para 32, that:

> *"[The tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative weight of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."*

332. In this case, the best interests of E and S would be to have their fathers in close proximity to them and to be able to see them more often and interact with them more closely. The partial presence of their fathers in their lives within close proximity as in the Cayman Islands, is better for their

development than no contact at all or through contact from such a far distance. It is accepted that Ramoon's son was a toddler when he was separated from his father. The evidence is that he now has no recollection of his father. He is, therefore, seriously affected in his formative years by the absence of his father near to him. Douglas' daughter S is an older child. Her recollection of her father may be better than Ramoon's son. Nevertheless, she, too, would be affected by the lack of closer contact with her father, which she enjoyed while he was at HMP Northward. I am mindful of the strong public interest that children need both parents in their lives.

333. However, the fact that they have their mothers, who appear to be, at least, their primary caregivers or attachment figures, has served to mitigate the harm caused by the distance from their fathers who were not playing such a vital role in their lives at the time they were removed. In this case, the Plaintiffs are not the primary or sole caregivers or attachment figures. So, their removal from their children's lives is not likely to be as devastating as it might have been had they been the sole or primary caregivers or attachment figures.

334. Furthermore, the State has implemented mitigating measures to fund family visits to the United Kingdom. Douglas' daughter had availed herself of that opportunity. There is also the availability of other means of communication within the United Kingdom prison regime, albeit it is accepted that there are limitations to those methods. Admittedly, they render the contact to be of a lesser quality than that which obtained when the Plaintiffs were at HMP Northward but nevertheless they provide an avenue through which contact can be maintained.

335. The Governor had given consideration to the impact on the children and the measures available to mitigate the ill-effects of that impact, but, it was believed that the harm to the community if the Plaintiffs were not removed would be greater than the harm to the children if they were removed. Accordingly, in this exercise, the national security and public safety considerations that compelled the Plaintiffs' removal from the Cayman Islands are weighty competing interests against which the interests of the children must be juxtaposed and weighed. While there is a weighty public interest in having young children exposed to a structured family unit with two loving parents available to them consistently and in close proximity, there is, on the other hand, a weightier countervailing public interest in ensuring that prisoners convicted of serious offences and who continue to pose a danger to the public are safely secured so as to eliminate or minimise that threat.

336. Having considered and accepted that sufficiently good reason existed for the Governor to conclude that the Plaintiffs posed a clear and present risk to national security and public safety, that there was no suitable alternative measure to deal with the risk; and that steps would be taken to mitigate the impact on their relationship with their family, to include their children, I find that the interests of the children in having their fathers remain in the Cayman Islands must give way to the overwhelming weight of the interests of national security and public safety that required their removal. In this case, the right at stake is not the Plaintiffs' liberty which would have been a more important right. While the right to respect for family life is important, it is not as critical as the right to liberty which is usually engaged in cases involving prisoners.

337. In ***H(H) v Deputy Prosecutor***, the majority, in not agreeing with Lady Hale in respect of the separation of one parent in that appeal (PH) from his children, opined that despite the harm to the children in question of their separation from a parent who was a caregiver, which admittedly would have been severe, the interests of the children were overridden by the seriousness of the offences PH had committed. In that situation, both parents were extradited to face proceedings for criminal offending despite the obvious harm to their children their absence might have caused. There were two weighty conflicting interests to be considered, but the public interest in having the parents punished for their serious offending prevailed over the interests of the children.

338. Applying the reasoning of the majority in ***H(H) v Deputy Prosecutor*** and the facts thrown up for consideration in this case**,** I am propelled to the conclusion that in the circumstances of this case, especially having regard to the fact that the Plaintiffs are not caregivers or attachment figures, the interests of the children must yield to the weightier countervailing public interest considerations of public safety and national security. These are public interests of much force and gravity to outweigh the interests of the Plaintiffs' children in this case.

339. Given the nature of the relationship between the Plaintiffs and their relatives, it is the children who stand to suffer the most from the interference with their family life. Therefore, the fact that the public interest considerations of national security and public safety are compelling enough to outweigh the children's significant interests means the rights of the adult family members would also be overridden by the same countervailing public interest considerations of the Caymanian

community. I am satisfied that their right must also give way to the public interest that was at stake if the Plaintiffs had remained at HMP Northward.

340. In my view, a fair balance was struck by the removing authority. For that reason, I have attached significant weight to the conclusion of the Governor that the Plaintiffs should be removed in the interest of national security and public safety. I find that the removing authority had carefully weighed the competing considerations and rightly concluded that the interference with the section 9 right was justified on the substantive proportionality ground (see ***Belfast City Council v Miss Behavin Limited*** per Lord Rodger of Earlsferry at para 26).

341. Accordingly, it cannot be said in all the circumstances that the Governor's decision was a disproportionate interference with the rights of the Plaintiffs under section 9 of the Bill of Rights.

Interference with other private rights

(a) mental health and absence of offence-focus work

342. Apart from the impact on their family life through reduced family contacts, the Plaintiffs have raised other consequences that they allege resulted from their detention in the United Kingdom and interfered with their human rights. In this regard, Douglas complained that he found it challenging to instruct his lawyers while detained in England. For example, it took nine months to arrange a video conference with the attorney acting in these proceedings. Further, concerns have been raised about his mental health, and the Respondents are relying on it as a justification for his continuous detention in England. The Respondents have said that Cayman may lack the facilities to care for him. His mother is concerned about him.

343. Ramoon, for his part, complained that he had not caused any disciplinary issues while detained in England. However, the lack of specific programs targeting his offending behaviour has been used as a reason to keep him in a high-security setting. This high-security detention, he said, is then used as justification for his continued imprisonment in the United Kingdom. In his view, this implies that the absence of programs addressing his offending behaviour prevents him from proving that his risk level has decreased enough for him to return to Cayman.

344. The Plaintiffs argued that these matters could not have been considered by the Governor at the time she made her decision.

345. However, without any need for deeper analysis, I conclude that the Plaintiffs' arguments regarding these later developments in the United Kingdom should not be accepted. Having regard to what has been established earlier in resolving the Timing Issue, these matters fall outside the established timeframe for the proportionality analysis. These are situations that did not exist at the time the decisions were made by the Governor in concurring with the removal, and so had no part to play in the decisions. Neither were they direct emanations of the decisions in the immediate aftermath of the removal from the Cayman Islands that could be laid at the Governor's feet. The matters raised all fall within the purview of the United Kingdom authorities under whose jurisdiction the Plaintiffs now fall as transferred prisoners and in respect of which the Respondents have no duty or responsibility.

346. For all the preceding reasons, the considerations pertaining to Douglas' mental health challenges in the United Kingdom and the absence of offence-focus work for Ramoon, which it is said affect their prospects for rehabilitation and return to the Cayman Islands, are accorded no place in the balancing exercise.

(b) Interference with the right of access to lawyers

347. The Plaintiffs have complained that the impugned decisions limited their ability to maintain contact with their lawyers when they were transferred. According to them, this is a further factor that should be taken into account when assessing proportionality, as section 9 (like Article 8) protects that right. For this proposition, they rely on ***Golder v United Kingdom*** (1975) 1 EHRR 524 at [43].

348. The Plaintiffs spoke of the challenges they faced in the immediate aftermath of their removal to communicate with counsel. The Respondents have provided evidence (affidavit from the HMCIPS with an exhibited redacted document) that in July and August 2017, the Governor's office was copied on various correspondence from the then Director of HMCIPS with HMPPS, trying to arrange contact between the Plaintiffs and their respective attorneys and family members. There were delays in arranging telephone contact due to the process of having phone numbers verified as required by HMPPS and problems with incompatible technology for video conferences.

349. The problems faced by the Plaintiffs in contacting their lawyers were outside the control of the Caymanian authorities and, in any event, were not prolonged or resulted in any unfairness to the Plaintiffs in the prosecution of their appeal or preparation of their case challenging their removal. They managed to prosecute their criminal appeal while in the United Kingdom and to commence these proceedings while in the United Kingdom. As such, they were not denied legal representation or access to justice in the Cayman Islands or elsewhere as a result of the Governor's decisions. The problem with contacting counsel is, therefore, not treated as a material consideration of any weight in the proportionality balancing exercise.

Suitability of mitigating measures

350. The Plaintiffs also maintain that the interference with their section 9 rights is disproportionate and unjustifiable because no consideration was given to mitigation at the time of the decisions, and there has been limited mitigation of the impact of the transfer. Having considered the Attorney General's letters to the Plaintiffs' attorneys upon their removal in September 2017 and the evidence of events that unfolded since then, I find this contention of the Plaintiffs to be without merit.

351. Due regard was given to mitigating measures at the time the decisions were made by considering the prospects of state-funded family visits and the measures in the United Kingdom prison regime that allow access to telephone calls and other modes of communication. Steps have also been taken since the decisions to mitigate the impact of the removal, as contemplated, at the time the decisions were made. As the Respondents have demonstrated, without dispute, the Cayman Islands Government has funded annual family visits since 2019 (except for the Covid-19 period over which they had no control) . Douglas had refused visits at one point. The Plaintiffs have also maintained contact with their families and the outside world by other means, including by telephone, video and post. They have the same rights to contact their family as other prisoners in the United Kingdom and enhanced rights as foreign national prisoners to contact family.

352. In my view, no fault can be attributed to the Respondents regarding any alleged absence or insufficiency of mitigating measures. Therefore, the Plaintiffs' contention that the interference is unjustifiable for these reasons is not accepted.

Conclusion on the substantive proportionality ground

353. Having considered the case advanced by the Plaintiffs regarding the substantive proportionality grounds and the justification defence advanced by the Respondents, I am driven to conclude that the Respondents have justified the interference with the Plaintiffs' substantive rights under section 9(1) of the Bill of Rights on national security and public safety grounds pursuant to section 9(3)(a). The Respondents have discharged the burden of proving justification on the substantive ground concerning proportionality.

354. To the extent that the alleged breach of section 6 depended on the grounds alleging a substantive breach of the right to respect for private and family life under section 9(1), I find no infringement of section 6 on the basis alleged by the Plaintiffs under this head. The justification for the interference of the section 9 right means no infringement of section 6. Section 6 warrants no separate assessment in this regard.

ISSUE 2 - THE PROCEDURAL (FAIRNESS) GROUND

Whether the Plaintiffs' removal was unfair and breached section 9 of the Bill of Rights in its procedural aspect because they were not given a realistic opportunity to make representations before their removal ("the fairness ground")

355. In accordance with the List of Issues prepared by the Plaintiffs and commented on by the Respondents, the Plaintiffs are challenging the decision-making process on the ground that it was unfair as it was in breach of section 19 of the Bill of Rights and/or common law fairness and/or the procedural requirements of the Bill of Rights under sections 6 and 9. The Plaintiffs had alleged procedural unfairness on other grounds. However, following the remittal from the Privy Council, the solitary ground remaining for resolution is that the decision-making process was unfair because they were not given advance notice of the decision to transfer them. Therefore, the claim of unfairness due to lack of reasons for the decision, failure to disclose relevant material, lack of access to their lawyers, and the absence of an oral hearing was not pursued.

356. In advancing the unfairness ground, the Plaintiffs placed reliance on ***R(Balajigari) v Secretary of State for the Home Department*** [2019] EWCA Civ 673; [2019] 1 WLR 4647, in which Singh LJ reasoned that where fairness requires an opportunity to make representations, unless the circumstances of the case make it impracticable, it will generally be unfair if the opportunity only arises after a decision had been made.

357. The Respondents' position is simple following the decisions of the Court of Appeal and the Privy Council. Their contention is that this ground adds nothing to the proportionality ground given the Court of Appeal's observation in the CICA civil appeal judgment at para [90] and the Privy Council's judgment at para. [68]. The Court of Appeal had stated that "if the grounds for the [R]espondents' assessment of the risk to national security are well-founded, then to give advance warning would have been absurd." The Board, for its part, noted at para [68] of its judgment:

> *"The one outstanding matter in this regard is the appellant's complaint that his removal was not in accordance with the law because he was not given any advance warning of his removal and had no opportunity to challenge it in advance. In response, the Respondents maintain that there were good reasons of urgency and confidentiality that justified postponing that opportunity until after the decision was taken and that the danger to national security would have been exacerbated by advance warning to the appellant… As Sir Alan Moses observed in his judgment in the Court of Appeal (at para 90), if the grounds for the Respondents' assessment of the risk to national security are well-founded, then to give advance warning would have been absurd. This aspect of the plea will, however, have to be addressed on the basis of the evidence when the remitted judicial hearing takes place."*

358. The Court of Appeal and the Respondents have acknowledged the dictum of Singh LJ in ***R(Citizens UK) v Home Secretary*** [2018] 4 W.L.R. 123[85], which establishes that there may be a need to maintain confidentiality before the decision is taken and put into effect. Having noted the Respondents' explanation that the danger to national security would have been exacerbated by advance warning, the Court of Appeal opined that once the risk to national security is made out, that is, proven to have existed, then it would be absurd to give advance warning. The Privy Council did not criticise that thinking.

359. Having already accepted the justification for the interference of the Plaintiffs' rights on the ground of the risk they were assessed to have posed to national security and public safety by their continued detention on the Islands, I am bound to adopt the conclusion of the Court of Appeal that it would have been absurd to give prior warning of the intention to remove them.

360. In ***BX v Home Secretary*** [2010] 1 W.L.R. 2463, the Secretary of State for the Home Department was considering the modification to a "control order" that would interfere with the controlee's Article 8 rights. Pickford LJ stated that while the Secretary of State was required to consider the controlled person's personal circumstances before the modification decision was made, it is not in every case that he is bound to seek or receive representations from the controlled person before implementing the modification. The learned judge opined that the nature of the security assessment and the evidence on which it is based may be such that the Secretary of State is required to act urgently in the public interest. He continued:

> *"In striking the balance between the public interest and the rights of the individual in such a case, it may not be practicable to seek or to receive representations before acting. This will be the case where notice to the controlled person would itself put at risk the national security interest in the measure to be taken."*

361. The foregoing dictum does establish, as pointed out by counsel for the Respondents, that the urgent requirements of national security and public safety are good reasons for not giving advance warning. I have accepted that those imperatives provided good reasons for no warning to have been given prior to the removal. The gist reveals startling allegations regarding continued criminality and, above all, a plan to escape custody. This was exacerbated by the attack on the Plaintiffs' mother's house, which triggered the fear of a reprisal. In these circumstances, advance notice could have jeopardised the Respondents' plan to have the Plaintiffs removed as well as public safety. The Attorney General's response in the letters of September 2017 to the Plaintiffs' lawyers that "*any forewarning would have had the potential to undermine the objectives of the removal*," says it all.

362. I conclude that any unfairness to the Plaintiffs in not being given advance warning of their removal would be outstripped by the need to safeguard national security and public safety.

363. This conclusion that there is no unfairness is fortified by the fact that the Plaintiffs have not been deprived of an opportunity to make representations and challenge the decisions after they were made to have a reversal of them. This is the purpose of the present proceedings in which their grievances with the decisions have been thoroughly ventilated.

364. In the premises, I conclude that there is no procedural unfairness arising from the failure of the Governor to give advance notice to the Plaintiffs of the intention to remove them and to afford an opportunity for representations to be made concerning their removal. Confidentiality was warranted for the sake of public safety and national security. Accordingly, there has been no unjustifiable violation of the Plaintiffs' rights under sections 6 or 9 of the Bill of Rights, the common law or any other law as contended by the Plaintiffs. The procedural ground, therefore, fails.

CONCLUSION AND DISPOSAL OF THE APPLICATIONS

365. In keeping with the guidance derived from the relevant authorities reviewed (most of which have not been expressly discussed), the court considers that the removing authority, in arriving at the decisions, complied with the dictates of the 1884 Act and the requirements of the general law regarding constitutionality of the measure of removing the Plaintiffs from HMP Northward.

366. The removing authority undertook an individual assessment of the necessity of each Plaintiff's removal by reference to the risk he posed, his family situation and the ability of HMP Northward to detain him safely. Each Plaintiff was entitled to and was given reasons for the removal. The Plaintiffs were, quite understandably, not given advance notice of the decision taken to remove them because of the need for urgent action and confidentiality given the nature of the risk they were believed to have posed. They have brought judicial review proceedings, which they are entitled to do and have been provided sterling legal representation, at public expense, to conduct these proceedings. They have been given disclosure, in so far as the law permits, with the benefit of the input and protection of a special advocate in the PII hearing. In all the circumstances, the Plaintiffs were provided with fair procedures and superbly competent legal assistance to challenge their removal to a distant prison. The decisions have been found by the court to be objectively justified.

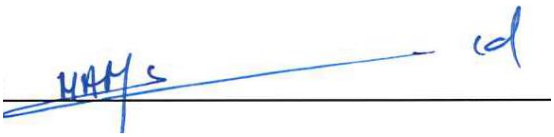
367. Therefore, it can safely be said that the Governor's decisions to concur in the removal of the Plaintiffs to the United Kingdom under the 1884 Act, was in accordance with the law and reasonably justified in a democratic society. The decisions were not unconstitutional on any of the grounds contended by the Plaintiffs. Accordingly, the Respondents cannot be held liable to the Plaintiffs for breach of any constitutional, statutory or common law rights as alleged.

368. For all the preceding reasons, the court makes the following orders:

1. The Plaintiffs' applications for judicial review are dismissed.

2. No order as to costs.

Dated this the 27th day of November 2024



MCDONALD-BISHOP J
ACTING JUDGE OF THE GRAND COURT