Hilary Term
[2023] UKPC 9
Privy Council Appeal No 0066 of 2022

JUDGMENT

Justin Ramoon (Appellant) *v* Governor of the Cayman Islands and another (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
3 MARCH 2023

Heard on 18 November 2022

Appellant
Hugh Southey KC
Prathna Bodden
(Instructed by Simons Muirhead & Burton LLP and Samson Law (Cayman Islands))

Respondent
Paul Bowen KC
Reshma Sharma KC
Tim Johnston
Claire Allen
(Instructed by Attorney General's Chambers (Cayman Islands))

LORD LLOYD-JONES (with whom Lord Reed, Lord Hodge, Lord Briggs and Lord Kitchin agree):

1. This appeal raises, in particular, the question whether a closed material procedure ("CMP") is available before the courts of the Cayman Islands, in the absence of any statutory basis.

The facts

2. On the evening of 1 July 2015 the appellant and his half-brother, Osbourne Douglas, travelled together by car to an area in George Town, Grand Cayman, near the Globe Bar. Douglas entered the Bar where the victim, Jason Powery, was present. Douglas spent a minute or two encouraging young people in the Bar who were close to Powery to move away. The appellant then entered the Bar where Douglas gave him a handgun. Douglas then left the Bar and moved the car a short distance. The appellant went up to Powery and shot him once in the head at short range. He then aimed the gun at and attempted to shoot a witness, Jerome Hurlston, who was standing close by, but the gun did not fire. The appellant then left the Bar, got into the car and was driven away by Douglas.

3. On 26 May 2016, the appellant and Douglas were both convicted of murder and possession of an unlicensed firearm. The murder was described by the trial judge, Quinn J, as "a very public execution of the most evil nature … chillingly clinical in its planning and execution". The Court of Appeal in the judgment appealed from observed that "[t]he facts of the murder bear all the hallmarks of what is described in an anonymous Prison Service affidavit as 'a notorious local gang known as the Central Military Killers (CMK)'."

4. On 19 December 2016 the appellant and Douglas were sentenced to life imprisonment with a minimum term of 35 years and 34 years, respectively, with concurrent sentences of 10 years imprisonment for the firearm charge. In the case of the appellant, one additional year was added to his minimum term compared to Douglas to reflect his previous conviction for possession of an imitation firearm.

5. The appellant and Douglas were sent to HMP Northward, the only male prison in the Cayman Islands, to serve their sentence.

6. Their appeals against conviction and sentence were dismissed by the Cayman Islands Court of Appeal (Criminal Division) (CICA) on 7 December 2018.

7. On 21 June 2017, following warrants of reception signed by the Lord Chancellor in the United Kingdom, orders were signed by the United Kingdom Secretary of State for Foreign and Commonwealth Affairs ("the Secretary of State") removing the appellant and Douglas to prisons in the United Kingdom, pursuant to powers conferred by the Colonial Prisoners Removal Act 1884 ("the 1884 Act"). On 22 and 28 June 2017 notices of concurrence were signed by the then Governor of the Cayman Islands. It is the decision of the Governor to "concur" with the removal orders by the Secretary of State which was challenged in an application for judicial review which has resulted in this appeal.

8. Douglas was transferred to the United Kingdom on 22 June 2017 and the appellant was transferred on 28 June 2017. They were given no prior warning and were not invited to make representations before the decision to transfer them was taken.

9. As a consequence of their transfer, the appellant and Douglas became entitled to apply to have their minimum term reconsidered by the High Court in England and Wales. William Davis J subsequently ordered that their minimum terms be reduced by 3 years to reflect the hardship of serving their sentences in the United Kingdom.

10. Both the appellant and Douglas challenged by way of judicial review the Governor's decision to concur with the Secretary of State's decision to remove them. Following the dismissal of their applications by Wood J (Ag.), they both appealed to the Court of Appeal who dismissed their appeal. Only the appellant now pursues an appeal before the Board.

11. Brief reasons for the Governor's decisions to concur with their transfer were set out in a letter dated 27 September 2017 from the Attorney-General's Chambers to the appellant in response to pre-action correspondence. The letter stated:

> '… while detained at HMP Northward, [the appellant] 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 your client... It was considered that, as long as [he] remained there, [his] activities would continue to present a serious and tangible threat to public safety and national security in the Cayman Islands.'

12. The letter went on to explain that the appellant had been given no prior warning of the transfer because this would have had the "potential to undermine the objectives of the removal", that alternatives to transfer had been considered but were not feasible and that the impact on the appellant's and his family's private and family life had been taken into consideration.

13. The letter also explained that most of the underlying material relied upon when the removal decisions were taken was considered too sensitive to be disclosed to the appellant and Douglas before their transfer to the United Kingdom. In due course that material was the subject of public interest immunity ("PII") certificates and a successful application was made by the respondents to withhold those documents from disclosure on PII grounds. However, certain relevant information was disclosed to the appellant, initially in the letter of 27 September 2017 and thereafter by way of redacted affidavit evidence from the Attorney-General's Chambers, the Royal Cayman Islands Police Service, HM Cayman Islands Prison Service and the Governor's Office, plus further unredacted evidence from the current Governor, HE Martyn Roper who took office in October 2018, which indicated that the decision had been taken on public safety and national security grounds. The evidence was to the effect that:

> (1) Douglas was considered to be the leader and the appellant a "senior and influential member" of a criminal gang, the CMK.
>
> (2) Clear intelligence in the Cayman Islands showed that the appellant and Douglas had been involved from within HMP Northward in the orchestration of serious gun crime and the importation of guns and drugs from Jamaica.
>
> (3) They had attempted to intimidate staff at the prison.
>
> (4) There was 'credible intelligence' that they were planning an escape.
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> (5) The Royal Cayman Islands Police Service and the Prison Service had concluded HMP Northward was not a fit place in which to confine either the appellant or Douglas. There were concerns that if Douglas was removed but the appellant was left on the Island, the appellant would take over his brother's criminal operations.
>
> (6) Means of avoiding the removal of the appellant or Douglas to the United Kingdom, such as imprisonment in Bermuda or bringing in staff from the United Kingdom, were considered but rejected.

(7) The need for removal became pressing after an apparent gang-related attack on the house of the mother of the appellant and Douglas in June 2017, which caused the authorities to fear that the brothers would retaliate amidst heightened gang tension.

14. Redacted copies of the submissions made to the Secretary of State and the Lord Chancellor, which were before the Governor at the time she gave her concurrence, were disclosed, with copies of the warrants authorising the transfers. The notice of concurrence signed by the Governor was also disclosed. However, this material was not disclosed to the appellant or Douglas before their transfer to the United Kingdom.

15. Other than the submissions made to UK Ministers there was no contemporaneous document detailing the factors taken into account by the Governor. Brief reasons were, however, given in the letter of 27 September 2017 and, in due course, a redacted affidavit from the Governor's Office dated 30 September 2019 was prepared and disclosed, which detailed the decision-making process and the material before the Governor when she took her decision, with the exception of the PII material.

16. One of the factors identified in the submission to UK Ministers was that HMP Northward had been designed as a medium security prison and was therefore not able to house the appellant securely. In both the letter dated 27 September 2017 and the submission to UK Ministers it was stated that consideration would be given to the return of the appellant and Douglas to the Cayman Islands if the security conditions improved. In an affidavit filed on behalf of the respondent on 30 September 2019, it was stated that a full rebuild of HMP Northward was required and that a full business plan was expected at the end of 2019. In a further affidavit dated 12 March 2021 it was said that an outline business case was presented to Cabinet on 9 February 2021. A rebuild of HMP Northward has yet to take place. Evidence from the present Governor is to the effect that a prison rebuild would not necessarily eliminate the risks posed by the appellant.

17. The appellant described, in an unsworn statement dated 25 September 2017, a close relationship with his partner and their young son, who was 2 years of age when the appellant was removed, and his wish as a father to be part of his son's life as he grows up. The appellant spoke of his mother, brothers and step-father to whom he said he is very close. The appellant's family are all resident in the Cayman Islands.

18. The appellant also confirmed that the daily telephone calls and weekly visits he was able to have from his family whilst he was in the Cayman Islands, were not

possible following his removal to the United Kingdom. Previously, he was able to telephone several times a day, at a low cost in comparison to the international calls that he was now having to make from the United Kingdom.

19. To date, the authorities have enabled family members of the appellant and Douglas to make one trip to the UK to visit them. This took place in September / October 2019 when the two brothers were moved to the same prison and six family members were able to visit them every day over a two-week period. The travel and accommodation arrangements for the family cost CI$25,000, paid for by the Cayman Islands Government. Further funded trips have been offered but, as yet, have proved impossible because of Covid-19. Like other foreign national prisoners in the United Kingdom, the appellant has been allowed free telephone calls once a month, unlimited cash on his phone card and flexible hours for those calls.

20. Notwithstanding those measures, and the reduction of their minimum terms by 3 years, the respondents accept that, by serving their sentence in the United Kingdom rather than in the Cayman Islands, the appellant and Douglas have suffered and will continue to suffer a significant interference with their private and family life.

<u>The legal proceedings</u>

21. The appellant and Douglas applied for judicial review on 21 and 28 September 2017, respectively. Permission to apply for judicial review was granted on 7 and 14 December 2017. They were granted legal aid to pursue the applications.

22. On 11 June 2019, Carter J (ag) determined, contrary to the submissions of the respondents, that the Cayman Islands was the appropriate forum for the hearing of the judicial review. This decision was not appealed.

23. On 2 July 2020 Carter J (ag), accepting the submissions of the appellant and Douglas, ruled that no CMP was available in the Cayman Islands (“the CMP Judgment”).

24. On 19 October 2020 Carter J (ag) ruled that most of the documents relied upon by those making the impugned decision were to be withheld from disclosure on PII grounds (“the PII Judgment”). PII was upheld, among other reasons, on grounds of national security and the threat to third parties. The material withheld comprised 185 separate documents and filled 3 lever arch files. Mr Ashley Underwood QC had been appointed as Special Advocate to represent the interests of the appellant and Douglas

at the hearing on whether there would be CMP and PII hearing. He was given access to all the withheld material and made representations on that material to the judge in a closed or ex parte hearing from which the appellant, Douglas and their legal representatives were excluded. He also made submissions during the open sessions.

25. The appellant did not appeal the PII Judgment.

26. The application for judicial review then came on for hearing before Wood J (ag) who dismissed the application on 28 May 2021, giving his reasons on 29 November 2021. Because no CMP was available, in reaching his decision Wood J (ag) did not have access to the PII material.

27. The appellant and Douglas appealed and the respondents filed a respondents' notice. The parties agreed that the reasons given by Wood J (ag) for dismissing the applications for judicial review were inadequate. On the hearing of the appeal the Court of Appeal, like Wood J (ag) at first instance, did not have access to the PII material.

28. The Court of Appeal addressed the following issues:

> (1) Whether the Bill of Rights ("the Bill of Rights") enacted by the Cayman Islands Constitution Order (2009/1379) applies to the Governor's decisions pursuant to the 1884 Act;
>
> (2) Whether the 1884 Act was 'in accordance with the law' for the purposes of the right enjoyed by the appellant and Douglas to respect for their private and family life under section 9 of the Bill of Rights;
>
> (3) On the respondents' application to vary the CMP Judgment of Carter J (ag), whether a CMP was available;
>
> (4) The options available to the court, should a CMP not be available. The appellant and Douglas submitted that the application for judicial review should be allowed; the respondents submitted that the applications should be dismissed, stayed or struck out;
>
> (5) Whether the respondents had failed to take into account family ties when making the decisions as to removal;

(6) The extent to which the appellant and Douglas could rely on a failure to build or rebuild a prison with necessary security in the Cayman Islands.

29. The Court of Appeal dismissed the appeal in a judgment delivered on 27 April 2022 and order dated 17 May 2022, deciding these issues as follows:

(1) The Bill of Rights applies to the Governor's decisions pursuant to the 1884 Act and to the determination of the applications for judicial review and the appeals. This issue was conceded by the respondents and is not the subject of appeal to the Board. The respondents also accepted that the decision to remove the appellant and Douglas interfered with their rights enshrined in the Bill of Rights and therefore must be justified by the respondents and must be proportionate. The evidence showed there has been a significant impact on the rights of the appellant and Douglas.

(2) The 1884 Act was "in accordance with the law" and the appellant and Douglas's corresponding ground of judicial review was dismissed. The Court of Appeal held that the terms of the 1884 Act were sufficiently precise. There was no need to introduce a policy to govern the exercise of the Governor's discretion. The procedures available to the appellant and Douglas to challenge the transfer were and are sufficiently precise. The appellant appeals against this conclusion before the Board (Issue (3) below).

(3) A CMP was available and the respondents' application to vary the order of Carter J (ag) was allowed. First, the alternatives to a CMP were unsatisfactory. The rights of the appellant and Douglas could only be justly and fairly vindicated by an effective judicial review which is not possible unless the court considers the justification for and 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. Secondly, the appellant and Douglas had an express right under section 26 of the Bill of Rights to challenge the decisions and to have their challenge determined fairly by the court; again, this was not possible without a CMP. In light of these matters, the Court of Appeal concluded that a CMP could and should be ordered. The appellant appeals against this conclusion before the Board (Issue (1), below).

(4) It was not necessary for the Court of Appeal to resolve completely the question of what was to be done if no CMP was available. However, it held that it was not open to the court to allow 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. There might be a "substantial reason for concluding" that the applications should be stayed (para 116), although all the alternative options of allowing, dismissing, staying or striking out the applications were unsatisfactory. Consideration of those unsatisfactory alternatives compelled the conclusion that a CMP was available. Given the court's conclusion, the respondents' application to stay or strike out the applications was dismissed. The respondents cross-appeal this decision in the event that the Board concludes the Court of Appeal erred so that no CMP is available (Issue (2) below).

(5) Although there was little contemporaneous evidence that had been disclosed of the reasons for the impugned and other associated decisions, and although the disclosed part of the redacted submissions to UK Ministers as to the need to remove the appellant and Douglas disclosed no reference to their children or their families, the respondents had taken into account the family ties of the appellant and Douglas when making the decisions as to removal and the corresponding ground of judicial review was dismissed. The appellant appeals against this decision: issue (4), below.

(6) The appellant and Douglas 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.

(7) The other grounds of judicial review before the Court of Appeal, in particular that the decisions were a disproportionate and unfair interference with the right to private and family life, were also remitted for determination by the Grand Court following a CMP.

The issues on this appeal

30. On this further appeal to the Judicial Committee of the Privy Council by the appellant, the following issues arise:

(1) 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.

(2) 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.

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

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

Statutory provisions

31. The Colonial Prisoners Removal Act 1884 (47 and 48 Vict. c. 31) ("the 1884 Act") provides in material 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 herein-after mentioned either –
>
> …
>
> (d) that by reason of there being no prison in the said British possession in which the prisoner can properly undergo his sentence or otherwise the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect; or,
>
> (e) that the prisoner belongs to a class of persons who under the law of the said British possession are subject to removal under this Act;
>
> 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.

5 Removing authority.

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

6 Evidence of act of government of British possession or Secretary of State.

(1) The concurrence of the Government of a British possession, and any requisition by the Government of a British possession, may be given or made by the Governor in Council or such other authority as may be from time to time provided by the law of that possession, but shall be signified by writing under the hand of the Governor or of the Colonial Secretary or of any other officer appointed in this behalf by the law of that possession.

(2) Any writing purporting to give such concurrence or make such requisition, and to be signed by the Governor or Colonial Secretary or other officer for the time being, shall be conclusive evidence that the concurrence of or requisition by the Government of the British possession has been duly given or made according to law; and any writing purporting to be under the hand of a Secretary of State, and to order the removal of a prisoner from a British possession, shall be conclusive evidence that such order has been duly given by the Secretary of State, and every such writing as above in this section mentioned shall be admissible in evidence in any court in Her Majesty's dominions without further proof."

32. The Bill of Rights provides in relevant part as follows. Section 1(2)(a) states that the Bill of Rights:

> “recognises the distinct history, culture, Christian values and socio-economic framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom; …”

Section 6(1) provides:

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

Section 7(9) provides:

> “All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.”

Section 9 provides:

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

Section 19 provides:

> "(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."

Section 26(1) provides:

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

Issue 1: Whether the Court of Appeal erred by concluding that the Grand Court had jurisdiction to hold a CMP or, if such jurisdiction existed, that the jurisdiction could properly be exercised.

33. The principal issue which arises on this appeal is whether a CMP is available on the hearing of the judicial review. Whereas a conventional PII procedure might involve the withholding of certain documents on public interest grounds and the trial thereafter proceeding only on the basis of the documents which have been disclosed, a CMP would involve the court deciding the case having taken into account closed materials and submissions which one party has not seen. A CMP may or may not necessitate the appointment of a special advocate. A CMP has been described in the following terms:

> "A procedure in which: (a) a party is permitted (i) to comply with his obligations for disclosure of documents, and (ii) to rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'); and (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed

> material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."
> (Preliminary issue in *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, para)

34. In the United Kingdom, statutory authority to hold a CMP in civil proceedings is now conferred by sections 6-14 of the Justice and Security Act 2013. In the law of the Cayman Islands there is no statutory basis for a CMP.

35. The question whether a CMP may be employed in the absence of statutory authority was considered by the Supreme Court of the United Kingdom in *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531. There, the claimants alleged that the Security Service and other organs of the state had been complicit in their detention and ill-treatment by foreign authorities at various locations abroad, including Guantanamo Bay. The causes of action pleaded included false imprisonment, trespass to the person, conspiracy to injure, torture and breach of the Human Rights Act 1998. In an open defence the defendants admitted that the claimants had been transferred and detained but they put in issue the alleged mistreatment and denied any liability for the claimants' detention or alleged mistreatment. The defendants informed the court that they wished to rely on material contained in a closed defence which they would be obliged in the public interest to withhold from disclosure. The defendants argued for parallel open and closed hearings, open and closed judgments and the appointment of special advocates to represent the interests of the claimants in the closed hearings. The claimants objected to this course, contending that a conventional public interest immunity (PII) exercise should be carried out ex parte by a judge in relation to the closed material. In reply the defendants pointed to the difficulties that would be caused by the vast amount of sensitive material in their possession and the enormous scale of any PII exercise. Silber J held that it could be lawful and proper for a court to order that a CMP be adopted in a civil claim for damages. The Court of Appeal (Lord Neuberger of Abbotsbury MR, Maurice Kay and Sullivan LJJ) allowed the claimants' appeal and held that the court has no such power in an ordinary civil claim for damages. On a further appeal, the Supreme Court firmly set its face against the availability of a CMP, holding (Lord Clarke of Stone-cum-Ebony dissenting) that only Parliament could introduce a CMP as a replacement for the existing common law process for dealing with claims for PII in ordinary civil claims for damages and that it was not open to the courts to do so.

36. Lord Dyson, in his judgment with which Lord Hope of Craighead, Lord Brown and Lord Kerr of Tonaghmore agreed, based his reasoning on certain features of a common law trial which are fundamental to our system of justice. First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. This open justice principle is not a mere procedural rule; it is a fundamental common law principle (*Scott v Scott* [1913] AC 417; *Al Rawi* at para 11). Secondly, the principle of natural justice applies, with the result that a party has a right to know the case against him and the evidence on which it is based and has the opportunity to respond to any such evidence and to any submissions made by the other. Further, the other side may not advance contentions or adduce evidence of which he is kept in ignorance (*Kanda v Government of Malaya* [1962] AC 322; *Al Rawi* para 12.) In addition, parties should be given an opportunity to call their own witnesses and to cross-examine opposing witnesses (*Al Rawi* para 13.) Lord Dyson emphasised that, unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and the natural justice principles.

37. Lord Dyson noted that Parliament had reacted to the threat of terrorism by introducing a form of CMP, including the use of special advocates, for use in certain categories of case, for example by enacting the Prevention of Terrorism Act 2005 and the Counter-Terrorism Act 2008. While the court had an inherent power to introduce procedural innovations in the interests of justice, such as the PII procedure itself, this power was subject to certain limitations.

> "The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice. To put the same point in a different way, the court must exercise the power to regulate its procedure in a way which respects these two important principles which are integral to the common law right to a fair trial." (*Al Rawi* at para 22)

38. Lord Dyson considered that there was a compelling analogy with *R v Davis* [2008] AC 1128 where the House of Lords held that the judge at a criminal trial could not permit witnesses to give evidence for the prosecution under conditions of anonymity. The common law right to be confronted by one's accusers, an essential element of a fair trial, could not be abrogated by the courts and any such abrogation was a matter for Parliament. In the same way,

> "The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it." (*Al Rawi* at para 35)

While a special advocate system might mitigate these flaws and weaknesses to some extent, it could not cure them. In particular, in many cases the special advocate would be hampered by not being able to take instructions from his client on closed material (at para 36).

39. In rejecting a submission that the adoption of a CMP at common law would be a development of the common law of PII, Lord Dyson contrasted the two procedures on a number of grounds, the first of which is particularly relevant to the present case.

> "First, no form of closed material procedure can properly be described as a development of the common law of PII, although there is no objection to the use of special advocates to enhance the PII process: … In many ways, a closed procedure is the very antithesis of a PII procedure. They are fundamentally different from each other. The PII procedure respects the common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court. …" (at para 41)

40. Lord Dyson explained that a closed procedure would cut across the fundamental principles of the right to a fair trial and the right to know the reasons for the outcome. It would complicate a well-established procedure for dealing with the problem, the PII procedure. It would be likely to add to the uncertainty, cost, complexity and delay of all stages of the litigation. The decision as to when it might be necessary to use such a procedure should be left to Parliament which could act after full consultation and proper consideration of the sensitive issues involved (at paras 45, 46, 48).

41. *Al Rawi* was a civil claim for damages founded in tort and the Human Rights Act 1998. Lord Dyson was clearly correct in his view (at para 62) that there could be no principled basis for distinguishing between ordinary civil claims and claims for judicial review. However, he did acknowledge (at paras 63-65) two narrowly defined categories of case where a departure from the usual rules of procedure had been held to be justified.

> (1) If the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise. (See Baroness Hale of Richmond in *Secretary of State for the Home Department v MB* [2008] AC 440, para 58.)
>
> (2) Where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. In such cases questions of disclosure are commonly dealt with by confidentiality rings. Lord Dyson noted, however, that he was not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party.

42. The uncompromising stance taken by the Supreme Court in *Al Rawi* against the availability of a CMP was qualified, but only to a limited extent, by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38; [2014] AC 700. Bank Mellat applied to set aside the Financial Restrictions (Iran) Order 2009, made pursuant to the Counter-Terrorism Act 2008 ("the 2008 Act"), which prohibited all persons operating in the financial sector in the United Kingdom from participating in any business relationship with the Bank. The judge, Mitting J, adopted a CMP and produced an open and a closed judgment. This procedure was expressly authorised by rules of court, applicable to the High Court and the Court of Appeal, made pursuant to the 2008 Act. In the same way, on appeal the Court of Appeal considered the closed judgment of Mitting J. On a further appeal, the question arose whether it was open to the Supreme Court to adopt a CMP.

43. A majority of the Supreme Court (Lord Hope, Lord Kerr and Lord Reed dissenting) held that such a power was to be derived from the Constitutional Reform Act 2005 which created the Supreme Court. The reasoning of Lord Neuberger's leading judgment (at para 37) runs as follows. The provision that an appeal lies to the Supreme Court against "any" judgment of the Court of Appeal (section 40(2)) must extend to a judgment which is wholly or partially closed. In order for an appeal against a wholly or

partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure. Such a conclusion is reinforced by the power accorded to the court by section 40(5) to "determine any question necessary … for the purposes of doing justice" as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material. On this basis the majority concluded that the Supreme Court had power to entertain a CMP on appeals against decisions of the courts of England and Wales on applications brought under section 63(2) of the 2008 Act (see para 47).

44. Lord Neuberger clearly viewed the Supreme Court's adoption of a CMP with grave reservations.

> "… [A]ny judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However, such distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question." (at para 51)

45. Lord Neuberger went on to explain (at paras 64-66) that, by a bare majority with those in the majority all having real misgivings, the court had decided that it should accede to the proposal to have a CMP. As part of this procedure the members of the Supreme Court read the closed judgment of Mitting J. In the event, however, they concluded that this had been a pointless exercise, there being nothing in the closed judgment which could have affected the reasoning of the Supreme Court in relation to the substantive appeal, let alone which could have influenced the outcome of that appeal.

46. The third in this trilogy of Supreme Court decisions on CMPs is *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1; [2018] AC 236. Pursuant to two warrants issued on an ex parte application to a justice of the peace under sections 8 and 15(3) of the Police and Criminal Evidence Act 1984 ("PACE"), the police searched the claimant's home and premises and seized some of his property. When the claimant sought disclosure of the written applications for the warrants he was provided with a redacted copy. The magistrates' court refused his application for an unredacted copy, upholding the Chief Constable's claim for PII. The District Judge produced an open judgment for refusing the application for disclosure and a closed judgment which was provided to the Chief Constable. The claimant brought an application for judicial review of the

issue and execution of the warrants. The claim was settled by consent and the warrants were quashed. However, prior to consenting, the Chief Constable applied inter partes under section 59 of the Criminal Justice and Police Act 2001 ("the 2001 Act") for retention of the seized property. Judge Bright QC, in the Crown Court sitting at St Albans, granted the application, ruling that the police were entitled to rely on the withheld information in support of the application. In a second judicial review claim, the claimant sought the return of the seized material on the grounds that the section 59 order should be quashed because it was impermissible to rely on the withheld information in its support. The Divisional Court of the Queen's Bench Division decided not to hold an ex parte hearing and that it did not need to consider the withheld information. It gave judgment dismissing the claim for judicial review on the basis that the Crown Court in coming to its decision was entitled to rely on the withheld material, that being the sole ground of challenge.

47. On an appeal to the Supreme Court, Lord Mance, in a judgment with which the other members of the court concurred, concluded, first, that the statutory scheme entitled a magistrates' court, on an ex parte application for a search and seizure warrant under sections 8 and 15(3) of PACE, to rely on information which in the public interest cannot be disclosed to the subject of the warrant. (paras. 26-27) Lord Mance then addressed (at paras 38-43) the second question whether the Crown Court, on an application made inter partes under section 59 of the 2001 Act to retain unlawfully seized material, can operate a closed procedure to have regard to information which for public interest reasons is not disclosable. Section 59(7) requires the Crown Court, when deciding whether to authorise retention, to put itself in the shoes of a hypothetical magistrates' court being asked, immediately after the return of the property, to issue a fresh warrant with a view to seizure of the property. Such a magistrates' court would have been entitled on the hypothetical ex parte application to have regard to information placed before it by the constable which on public interest grounds could not be disclosed to others. The Crown Court could not fulfil its role without having regard to such information. The public interest would preclude its disclosure on an inter partes hearing. Parliament must therefore be taken to have intended that in these circumstances the Crown Court would, so far as necessary, be able to operate a CMP. Lord Mance observed that the situation before the court was analogous to that in *Bank Mellat* where the Supreme Court took into account that an appeal to it against a wholly or partially closed judgment could not be effective unless it also had the power to hold a CMP (para 42). Lord Mance then turned, thirdly, to the question whether in proceedings for judicial review of the legality of a search warrant issued ex parte under section 8 and 15(3) of PACE it is permissible for the High Court to have regard to evidence on which the warrant was issued which is not disclosed to the subject of the warrant (paras. 44-59). Once again he concluded, by a similar process of reasoning, that it is:

> "… I consider that the scheme authorised by Parliament for use in the magistrates' court and Crown Court, combined with Parliament's evident understanding and intention as to the basis on which judicial review should operate, lead to a conclusion that the High Court can conduct a closed material procedure on judicial review of a magistrate's order for a warrant under section 8 of PACE or a magistrate's order for disclosure, or a Crown Court judge's order under section 59 of the [2001 Act]." (para 59)

48. In the Board's view, the reasoning in *Haralambous* is closely analogous to that in *Bank Mellat*. In both cases, the limited encroachment on the principle stated in *Al Rawi* depends on Parliament having expressly established a statutory scheme whereby lower courts are authorised to follow a CMP. In both cases it is a necessary inference that Parliament must have intended that a court hearing an appeal from such a decision or reviewing the legality of such a decision should have the power to conduct a CMP in order that it might fairly perform its function. Neither case supports any greater inroad into the principle stated in *Al Rawi*.

49. In the present proceedings, it has been contended on behalf of the respondents that there is an analogy between the position of the Governor, considering material which it would be contrary to the public interest to disclose, and that of the lower courts in *Haralambous*. It is submitted that since the original decision maker, the Governor, was entitled to see undisclosable material, the court in order to conduct an effective judicial review must also be able to do so and that this can only be achieved by a CMP. This submission was rejected by Sir Alan Moses in the Court of Appeal. In the Board's view he was right to do so for the reasons he gave. There is no analogy between the wide powers of the Governor and the express statutory authority to conduct ex parte hearings conferred on the magistrate in *Haralambous*. As Sir Alan put it, the process by which the executive reaches a decision as to whether to exercise a power conferred by statute is far removed from an ex parte application to a court. Moreover, the respondents' submission proves too much. If accepted, it would follow that whenever a decision maker in coming to his decision had taken account of material for which PII was properly claimed the door would be opened for a CMP. Far from being a limited exception to *Al Rawi*, this would be a negation of the principles stated there.

50. Nevertheless, the Court of Appeal concluded that a CMP was available in the present case. It considered that the unsatisfactory nature of the alternatives identified by the parties, if a CMP were not available, compelled this outcome. Sir Alan Moses identified and dismissed as unsatisfactory the following options. First, the appellant

and Douglas contended that the inability of the court to assess the justification and proportionality of the respondents' decisions without the material which formed the basis of the decisions would result in the respondents failing to discharge their burden and their appeal would have to be allowed. Secondly, the respondents contended that the appeal would have to be dismissed. In particular they submitted that to assess the justification and the proportionality of the decision when the respondents were unable to rely on most of the material on which the decision was based would constitute a fundamental flaw in the process of judicial review. Third, it was said that the necessity of non-disclosure of the confidential material could lead to a strike out or a stay of proceedings on the ground that a fair trial was not possible, as in *Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 WLR 1786. (See also *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765, per Lord Reed at para 135.) A similar analysis was carried out by Ouseley J in *AHK v Secretary of State for the Home Department (No 1)* [2012] EWHC 1117 (Admin) at paras 57-64. In the present proceedings the Court of Appeal concluded (at para 146) that no judicial review of the removal decision could be considered effective and just, unless the court considers the justification and proportionality of the decision on the same basis and on the same information as that which was considered by the Governor.

51. For reasons set out in relation to Issue 2, the Board does not consider that these accurately represent the options available in this case or that the court is here faced with such a stark and unsatisfactory choice. In particular, the submission before the Court of Appeal on behalf of the appellant and Douglas that in the absence of a CMP the appeal would have to be allowed, a submission which is no longer maintained by the appellant, was roundly rejected by the Court of Appeal. More fundamentally, however, in the Board's view the course followed by the Court of Appeal in this case was not open to it. The decision of the Supreme Court in *Al Rawi* is, of course, not binding on the Judicial Committee of the Privy Council sitting on appeal from the Court of Appeal of the Cayman Islands. Nevertheless, *Al Rawi* possesses the authority of a decision of a Supreme Court comprising eight justices. (Lord Rodger of Earlsferry who had sat on the hearing of the appeal died before judgment was delivered.) Moreover, the Board finds the reasoning of Lord Dyson compelling. In the Board's view, it is simply not open to it to invent a CMP for the Cayman Islands under the guise of the development of the common law. This would be considerably more than an incremental development; it would be a major change involving an inroad into fundamental common law rights. Such a step should be taken, if at all, by the legislature which is better placed than is the judiciary to assess the policy considerations relating to the necessity for such a procedure and the practicalities of its operation. It would also be open to the legislature to define with precision the scope of the exception and to make detailed procedural rules to regulate the procedure.

52. In coming to its conclusion that a CMP was available in the present case, the Court of Appeal (at para 147) also derived support from section 26 (1) of the Bill of Rights which provides that the Grand Court shall determine applications fairly. The Court of Appeal held that in a case such as this a CMP is available so as to enable the court to fulfil its obligation under section 26(1) to act fairly. This provision, however, does not assist any more than would the provision requiring a fair hearing in article 6 of the European Convention on Human Rights. It is well established that it may be necessary to impose "procedural limitations on the use of classified information" (*CG v Bulgaria* (2008) 47 EHRR 51 at para 40). Moreover, the Court of Appeal here overlooked the essential reasoning of *Al Rawi* that a CMP, unlike the law relating to PII, necessarily involves a departure from the principles of open justice and natural justice, principles which are fundamental to the right to a fair trial.

Issue 2: Whether, in the event that the Court of Appeal erred and no CMP is available, the application for judicial review should be allowed, dismissed, stayed or struck out or remitted to the Grand Court for reconsideration.

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 97-108) gave a number of reasons for this conclusion. First, such a decision in favour of the appellant and Douglas would deprive the respondents of the opportunity to rely on material which it was known would support the respondents' case, namely that the appellant and Douglas as leaders of the CMK gang continued to pose a threat to national security and public order in the Cayman Islands, including a threat of escape and the use of weapons. Secondly, where there was a plain conflict between the interests of the public and the interests of the appellant and Douglas, it was clear that the protection of the public should prevail, not least where national security was at risk. Thirdly, simply quashing the decision to remove the appellant and Douglas would lead to an impasse, with the respondents remaking the same decision. 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.

54. On this appeal, the primary case advanced by Mr Paul Bowen KC on behalf of the respondents is that the appellant's substantive fairness and proportionality

grounds can be resolved in the respondents' favour on the basis of open material but, failing that, his secondary case is that those grounds cannot be resolved against the Governor without the Grand Court having sight of the PII material in a CMP. In the absence of a CMP the claim is, he submits, functionally untriable and should be dismissed, stayed or struck out or, alternatively remitted to the Grand Court for that purpose. In making this submission he maintains that the issue only arises in cases where two criteria are satisfied: (1) the burden lies on a public authority to justify an interference with Convention or other rights on grounds that may turn on the PII material, including as here a fairness or proportionality challenge under the Bill of Rights; and (2) the PII material is of such relevance that the proportionality or fairness of the decision cannot be resolved against the decision maker without the court on judicial review having sight of the material. He submits that whether there is sufficient material before the court to try the claim is ultimately a question for the judge hearing the PII application. He submits that cases will lie on a spectrum between those where nothing is disclosed at all and those where only a small or relatively insignificant proportion of the material is withheld. He submits that the former will be untriable without a CMP and the latter will not. He asks that, if there is any doubt about where the present case sits in the spectrum the matter should be remitted to Carter J (ag) in the Grand Court for her to determine whether those grounds are untriable in the absence of a CMP.

55. There may be some cases in which the effect of withholding disclosure on grounds of PII makes a claim untriable, in the sense that it prevents a fair trial of the issues. An example is *Carnduff v Rock* where a registered police informer sued the police to recover payment for information and assistance provided. The defendants denied any contractual liability to make such payments or that the information or assistance had led to the arrests alleged. The Court of Appeal struck out the claim on the ground that a fair trial would require disclosure of information which should in the public interest remain confidential and would require the court to investigate and adjudicate upon that information. (See *Al Rawi v Security Service* per Lord Dyson at paras 15, 50.) The European Court of Human Rights held that the outcome in that case was consistent with article 6 ECHR (*Carnduff v United Kingdom* App No 18905/02, 10 February 2004). Such cases are, however, likely to be exceptional and rare. It seems most unlikely that the present case is such a case.

56. In this regard it is necessary to refer in a little detail to the judgment of Carter J (ag) on the PII application ("the PII judgment"). The Board has seen only the redacted version of the judgment and has not seen the documents held to attract PII. The Board draws attention to the following matters in particular.

(1) The judge approached the issue of PII having directed herself correctly as to the law and having performed the required *Wiley* balancing exercise (*R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274). If it is established that the documents are prima facie disclosable, but disclosure would be likely to cause real harm to the public interest, the court must consider whether the probative value of the documents is so important to a fair resolution of the issues in the action as to outweigh the risk of harm to the public interest.

(2) The judge examined the documents for which PII was claimed. She also had the advantage of the assistance of a special advocate, performing the role of amicus curiae, for the purposes of the PII exercise.

(3) The judge divided the documents for which PII was claimed into two categories:

(i) The material available to the Governor at the time that she made the decision to transfer;

(ii) The respondents' unredacted affidavits and the material specifically referred to in those affidavits.

Of the material that was specifically referred to in the respondents' unredacted affidavits, there were documents which were not before the Governor at the time that she made the decision to transfer ("underlying sensitive material"). The respondents submitted that they did not rely on these documents and that they were before the court simply for determination of whether the court required their disclosure. The judge concluded that these documents were not before the decision maker at the time that she made the decision under challenge. They were not relevant in that they neither supported the [appellant and Douglas]'s case nor did they undermine the respondents' case. Disclosure of these documents was not necessary for the fair disposal of the proceedings. (PII judgment paras 33-38)

(4) The judge then turned to the material that was prima facie disclosable.

(a) The judge noted that pursuant to the duty of candour the respondents had disclosed redacted copies of submissions that were made by the Governor to the Secretary of State seeking the removal of

the [appellant and Douglas] to the United Kingdom as well as the gist of the allegations upon which the decision to transfer the appellant and Douglas were made. The gist read as follows:

> " … compelling intelligence showing that while incarcerated at HMP Northward the [appellant and Douglas] continued to orchestrate gang-related activities 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.
>
> … reported intelligence linking them both to intimidation and manipulation of staff, threats of violence to staff, and to reports of plans to escape and the use of weapons." (PII judgment para 60)

(b) The respondents had also disclosed other documents to the [appellant and Douglas] and, during the course of argument, had agreed to disclose further documents or their gist. (PII judgment para 61)

(c) Having stated at the outset of her judgment that the PII application should be decided independently of the issue of the availability of a CMP, the judge nevertheless observed that the fact that the court did not have the legislative authority to order a CMP led the court to find that it must lean toward greater disclosure, if possible. This was not, however, an overriding factor. (Cf *AHK v Secretary of State for the Home Department (No 1)* [2012] EWHC 1117 (Admin) per Ouseley J at para 47). She also referred in this regard to the following passage in the judgment of Ouseley J in *AHK v Secretary of State (No 2)* [2013] EWHC 1426 (Admin) at para 71, where no CMP was available but where Ouseley J considered that the challenge had gone as far as it could, having regard to the recognised need to protect the material subject to the PII claim:

> "The claimants have been able to bring judicial review proceedings in respect of the decisions. They have been able to test the position by reference to the evidence which is admissible by the application of the PII test, which they said should be applied. The evidence relied on by the SSHD has been tested to see if the PII claim was made out. The court

> then has to consider the claim in the light of what emerges from that process." (PII judgment paras 1, 78)

(d) The court noted that the position of the appellant and Douglas was that even if limited disclosure was made after the PII exercise was concluded, the matter should still proceed to trial. (PII judgment para 80)

(e) The judge held:

> "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 [appellant and Douglas]. Other material which may have been referred to in the unredacted affidavits and for which gists or copies have not been ordered disclosed by this court are documents properly not disclosed and are properly to be PII protected." (PII judgment para 81)

(f) The judge considered that the risk to third parties and informants was high in this case. The court had to be careful to ensure that the disclosure of the identity of persons who provided information to the police of the appellant and Douglas's activities would not result in their being harmed.

> "The risk to those persons outweighs the need for disclosure especially in those instances when, as this court has concluded, the information that will be withheld as a result will not advance the [appellant and Douglas's] case in any material way. These are matters the disclosure of which could lead to the identity of informants." (PII judgment para 83)

(g) The judge concluded:

> "While the result of the PII exercise has led to a significant number of documents being withheld from disclosure, the nature of the challenge brought by the [appellant and Douglas] does lead this court to the view that the [appellant

> and Douglas] should now view the further documents which are to be disclosed arising from the PII exercise and they should be able to proceed to trial on those matters if any where there is a realistic prospect of the court being able to decide the case. The observations of Ouseley J in *AHK v Secretary of State* [(No 2)] are pertinent in this regard and the court would ask the parties to take a robust view of how the matter will now proceed." (PII judgment para 85)

(h) One of the documents for which PII was claimed but which was ordered to be disclosed in the PII judgment was an affidavit sworn by the present Governor, HE Martyn Roper, which provides evidence of the grounds for the removal decision.

> "Despite their conviction and imprisonment, the [appellant and Douglas] 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 [appellant and Douglas] was threatening to escalate, including an incident in which the [appellant and Douglas]'s 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] In those circumstances it is reasonable to conclude that, had the [appellant and Douglas] 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."

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).

58. Where, as in the present case, a plea of PII is upheld, the court seeks to arrive at a compromise between two conflicting public interests: the public interest in maintaining confidentiality and the public interest in the administration of justice. It does so in accordance with established principles and procedures. The *Wiley* balancing exercise seeks to secure, so far as it is achievable, a fair basis for the adjudication of the claim. The impact of upholding a PII claim on the fairness of the proceedings is an integral part of the *Wiley* balancing process. The court seeks to minimise the effect of withholding documents on the administration of justice.

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 rigorously 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 the dispute. On the contrary, there was here extensive disclosure and, in addition, gisting of documents. Moreover, so far as the threat posed by the appellant and Douglas 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 claim untriable. It can see no unfairness in the appellant'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.

Issue 3: Whether the decision challenged was in accordance with the law

60. It was not disputed before the Board or the Court of Appeal that the decision challenged was a significant interference with the rights enjoyed by the appellant and Douglas under section 9 of the Bill of Rights. On this appeal it is contended on behalf of the appellant that the Court of Appeal erred in concluding that the decision was in accordance with law.

61. The essence of the appellant's case, both here and below, has been that the discretion conferred on the Governor by section 2 of the 1884 Act, which merely requires that "the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect", is so broad that it fails to provide adequate legal protection against abuse. This aspect of the plea, which was rejected by the Court of Appeal, is capable of being addressed on this appeal.

62. On behalf of the appellant, Mr Southey submits that once it is shown that section 9 is interfered with, it must be demonstrated that any interference is in accordance with the law and that this requires that there exist safeguards which have the effect of enabling the proportionality of the interference to be adequately examined (*R (P) v Secretary of State for Justice*) [2019] UKSC 3; [2020] AC 185, per Lord Sumption at para 39). This, Mr Southey submits, means that the law must indicate with sufficient precision, clarity and foreseeability the scope of any such discretion conferred on the competent authorities and the manner of its exercise and that there is a need for minimum procedural safeguards. In particular and drawing on the jurisprudence of the European Court of Human Rights, he submits that legal systems must afford adequate legal protection against possible abuses in the field of geographical distribution of prisoners. There is a need for a domestic law that provides for an assessment of a prisoner's individual circumstances and these must be balanced against the interests of the state (*Polyakova v Russia* App. No. 35090/09 ECtHR 7 March 2017, at paras 92, 99, 117). Against this background he complains that section 2 of the 1884 Act is expressed in broad terms. It does not expressly require consideration of proportionality or necessity; expediency is sufficient. There is no secondary legislation or policy that narrows the discretion or specifies matters that need to be considered.

63. Mr Southey is able to rely, in particular, on two authorities both of which were cited by the Court of Appeal. In *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 the European Court of Human Rights reaffirmed (at para 76) that the words "in accordance with the law" require that the law must be accessible. It must

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

> authorities and the manner of its exercise. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed." (para 77).

The same point is made by Lord Sumption in *R(P) v Secretary of State for Justice* (at para 17);

> "A measure is not 'in accordance with the law' if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made."

The further point is made that unless a domestic measure has sufficient clarity and precision for its effect to be foreseeable from its terms, it is impossible for the court to assess its proportionality as applied to particular cases. (See *P* per Lord Sumption at para 39.)

64. The Board agrees with the Court of Appeal that section 2 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, for example by way of a published policy, is not required. As Sir Alan Moses explained (at para 79), the objective identified in section 2, namely the prisoner's safer custody, is a legitimate objective and requires a comparison of the risk to the public or to national security, were the prisoner not to be removed, with the alleviation of that risk on removal. The Board also agrees that it is difficult to see how the test could be defined with any greater precision. (See, with particular regard to threats to national security, the observations of the European Court of Human Rights in *CG v Bulgaria* at para 40.)

65. On behalf of the appellant, Mr Southey objects that it is insufficient to identify a legitimate objective and that the reasoning of the Court of Appeal fails to address the fact that expediency is not the test applied when considering proportionality. However, as the Court of Appeal explained, the terms of section 2 do not remove the need for any court scrutinising the decisions of the removing authority to be satisfied that interference with the prisoner's rights was necessary and proportionate.

66. In this regard it should be noted that, to the extent that the challenge is to the proportionality of the legislative scheme, a claimant faces a high hurdle. By analogy with decisions on the European Convention on Human Rights, if a legislative provision is capable of being operated in a manner which is compatible with fundamental rights, in that it will not give rise to an unjustified interference in all or almost all cases, the legislation itself will not be incompatible with those rights (*R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055, per Lady Hale at paras 2, 60, per Lord Hodge at para 69; *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29; [2016] HRLR 19, per Lady Hale, Lord Reed and Lord Hodge at para 88; *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] 2 WLR 33, per Lord Reed at paras 12-19). As Lord Reed explained in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* (at para 14), the rationale of that approach is that where there is a challenge to a provision in advance of its application to any particular facts, the striking down of the provision is only justifiable if the court is satisfied that it is incapable of being applied in a way which is compatible with Convention rights, whatever the facts may be.

67. When determining whether a power of removal is in accordance with the law, it is also necessary to consider whether there exist adequate safeguards against abuse of the power. There must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined (*R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49 per Lord Reed at para 114). In the present case the Court of Appeal, at para 84, helpfully summarised some of the features which a fair process entails in the context of relocation of prisoners, by reference to the decision of the European Court of Human Rights in *Polyakova v Russia*.

> (1) The law must provide a realistic opportunity to challenge allocation to a particular prison. An individual's circumstances must be assessed (*Polyakova* at paras 100, 101).
>
> (2) The prisoner is entitled to reasons subject to review by an independent body and where the impact on family life is likely to be long-lasting

> particularly searching review by an independent judicial authority (*Polyakova* at paras 108-109).
>
> (3) The system must enable the prisoner to obtain a judicial review of the proportionality of the penal authority's decision to his or her vested interest in maintaining family and social ties (*Polyakova* at para 116).

In the present case the 1884 Act required an individual assessment of the necessity of the appellant's removal by reference to the risk he posed, his family situation and the ability of the prison to detain him safely. The appellant was entitled to and was given reasons for his removal. He has been entitled to bring judicial review proceedings challenging the legality of the interference of his rights under sections 6 and 9 of the Bill of Rights. He has also been entitled to legal representation at public expense. He has been entitled to apply for disclosure of relevant documents, subject to the power of the court to order that sensitive material be withheld on clear and well-established grounds of protection of the public interest. Subject to one matter, the Board considers that these provide adequate safeguards against abuse of the power of removal conferred by section 2 of the 1884 Act.

68. 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 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. They rely on *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 at paras 59-60; *Polyakova v Russia* at para 101; *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123 at para 85; *BX v Secretary of State for the Home Department* [2010] EWCA Civ 481; [2010] 1 WLR 2463 at para 53. 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 review hearing takes place.

Issue 4: Whether no account was taken of the impact of transfer on the appellant's family life and his child's family life with the result that the decision was unlawful

69. The appellant's right to dignity, his right to 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 interests as a primary consideration.

70. The appellant submits that the first respondent failed to take into account his right to family life.

71. The Court of Appeal found as a fact that the first respondent did take that factor into account (CA Judgment, para 154). The Court of Appeal drew attention to the following evidence:

> (1) Letters dated 26 September 2017 and 27 September 2017 from the Attorney General's Chambers which made specific reference to the children of the appellant and Douglas.
>
> (2) Evidence in the affidavit on behalf of the Prison Service dated 30 September 2019 that the Overseas Territories Directorate had made clear that "consideration would need to be given to the [appellant's] right to family life in any transfer".

The Court of Appeal concluded that it was clear that those interests were not ignored.

72. The Board can see no grounds for departing from these primary findings of fact. The question whether appropriate weight was given to these considerations in the proportionality balancing exercise will have to await the hearing of the judicial review.

Conclusion

73. For these reasons, the Board will humbly advise His Majesty that the appeal should be allowed on ground 1, dismissed on grounds 3 and 4 and that the proceedings should be remitted to the Grand Court for the hearing of the judicial review.