Easter Term
[2025] UKPC 22
Privy Council Appeal No 0095 of 2023

JUDGMENT

Attorney General of the Cayman Islands and another (Appellants) *v* Joey Delosa Buray and another (Respondents), Zanna Me-Waakie Jones Hunter intervening (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Sales
Lord Hamblen
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
28 April 2025

Heard on 3 February 2025

Appellant
Tom Hickman KC
Will Bordell
(Instructed by Attorney General's Chambers (Cayman Islands))

Intervener
Manjit S Gill KC
Alastair David
(HSM Chambers (Cayman Islands))

LORD LEGGATT:

1. In deciding whether to grant permanent residence to foreign nationals, the Cayman Islands operates a points system. The merits of an application for permanent residence are evaluated by awarding (and deducting) points based on the applicant's personal and occupational attributes and potential value to the community. Primary legislation provides that permanent residence is only to be granted to all applicants attaining a specified number of points or more, applying the criteria set out in the points system. The issue on this appeal is whether the Court of Appeal was right to make a declaration that this statutory provision is incompatible with section 9 of the Bill of Rights, Freedoms and Responsibilities contained in Schedule 2 to the Cayman Islands Constitution Order 2009, which protects the right of every person to private and family life.

The immigration points system

2. The immigration legislation has been revised several times during these proceedings, but none of these changes is material. The Board will refer to the 2022 Revision of the Customs and Border Control Act ("the Border Control Act"), the 2021 Revision of the Immigration (Transition) Act ("the Immigration Act") and the 2019 Revision of the Immigration Regulations ("the Regulations"), which were the versions cited in argument on this appeal.

3. The basic scheme of the legislation, so far as relevant, is as follows. The right to enter, remain or reside in the Cayman Islands is governed by section 93 of the Border Control Act. When read with the definition (in section 2 of the Act) of the term "land", this makes it an offence for any person to go to, be, remain or reside in any place in the Islands without specific permission of an officer, except for a person:

> "(a) who is Caymanian; or
>
> (b) who is not a prohibited immigrant and satisfies an immigration officer that the person is –
>
> (i) authorised to carry on a gainful occupation under the relevant provisions of the [Immigration Act],
>
> (ii) a person named in a work permit as a dependant of the licensee;

(iii) a person who is exempted under the relevant provisions of the [Immigration Act] or a dependant of such a person; or

(iv) a person who has permission to reside or to remain permanently in the Islands under the relevant provisions of the [Immigration Act]"

4. Picking up the category listed in section 93(b)(i), the provisions of the Immigration Act which determine who is authorised to carry on a gainful occupation in the Cayman Islands are contained in Part 7. Within Part 7, section 55(1) of the Immigration Act limits such persons, so far as relevant, to any person who: (i) is a Caymanian; or (ii) has acquired permanent residence with a right to work; or (iii) is authorised to carry on gainful occupation by a work permit. Section 53, to which the Board will return, specifies persons exempted from these requirements. Reading section 93 of the Border Control Act with Part 7 of the Immigration Act, their combined effect is therefore (ignoring immaterial exceptions) that, for a foreign national to reside lawfully in the Cayman Islands, he or she must fall within one of these categories:

(i) a person who has been granted permanent residence; or

(ii) a person authorised to carry on gainful occupation by a work permit (or named as a dependant in such a work permit); or

(iii) a person exempted under the relevant provisions of the Immigration Act (or a dependant of such a person).

5. Sections 56 to 58 of the Immigration Act make provision for the grant and renewal of work permits. Work permits are issued for defined periods of time and may be renewed, but subject in general to a "term limit" of nine years. When the term limit expires, the worker must leave the Islands and may not be granted a further work permit (allowing the person to return to the Cayman Islands to reside and work) until at least one year has elapsed after he or she has left the Islands: see section 66(1).

6. Under section 37(1) of the Immigration Act, individuals who have been legally and ordinarily resident in the Islands for at least eight years may apply for permission (for themselves and any spouse or civil partner and dependants) to reside permanently in the Islands. Section 37(2) provides that "[f]or the purpose of assessing the suitability of an applicant for permanent residence, a points system shall be prescribed by the Cabinet".

7. The points system is set out in Schedule 2 to the Regulations. Points are awarded on the basis of nine factors. These factors and the maximum number of points referable to each are: occupation (30 points); education, training and experience (25 points); local investments (30 points); financial stability (30 points); community minded / integration into the Caymanian community (20 points); history and culture test (20 points); possessing close Caymanian family connections (100 points); demographic and cultural diversity (10 points); age distribution (10 points). Detailed rules govern the allocation of points for each factor. Points may be deducted from the total (up to a maximum of 100) for criminal convictions, certain health issues, administrative fines levied in relation to statutory offences, lack of a reasonably funded pension plan and other "mitigating factors".

8. Section 37(3) of the Immigration Act provides:

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

It is this statutory provision which the Court of Appeal declared to be incompatible with section 9 of the Bill of Rights.

9. Where an application for permanent residence is refused, there is a right of appeal, under section 21 of the Immigration Act, to the Immigration Appeals Tribunal. There is a further right of appeal from a decision of that tribunal to the Grand Court on a point of law only: see section 23(2). If the application for permanent residence is refused and either the applicant does not appeal or loses their appeal, the person must leave the Islands: see section 37(4).

The claimants' applications for permanent residence

10. The first claimant, Mr Buray, is a national of the Philippines. He came to the Cayman Islands on a work permit in February 2008. In January 2017 he applied for permanent residence. The Chief Immigration Officer refused his application because he had scored only 61 points. Mr Buray appealed to the tribunal, which decided that it should consider his application afresh taking account of further information provided by Mr Buray. On reassessment he scored 74 points. As this was still less than the minimum score of 110 points required for the grant of permanent residence, his appeal was dismissed. A request for reconsideration of the decision on the ground the Board had failed to consider his right to private life was rejected.

11. The second claimant, Mr D'Souza, is an Indian national. He came to the Cayman Islands on a work permit in November 2009. In November 2018 he applied for permanent residence. The Caymanian Status and Permanent Residency Board rejected his application, finding that he had scored 99.5 points and therefore fell short of the minimum score required of 110 points. Mr D'Souza appealed to the tribunal, which dismissed his appeal.

These proceedings

12. Each of the claimants appealed from the adverse decision of the tribunal to the Grand Court. In each case the primary ground of appeal was that the tribunal had failed to consider the claimant's private life and section 9 of the Bill of Rights. Section 9 is in materially similar terms to article 8 of the European Convention on Human Rights. It 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 –
>
> …
>
> (e) to regulate the right to enter or remain in the Cayman Islands."

13. The two appeals were heard together by the Grand Court (Walters J) and were dismissed. In rejecting the argument that the claimants' rights to private life had not been considered, the judge held that "due and reasonable consideration" was given to those rights through the points system. In reaching that conclusion, the judge emphasised that the criteria by which points are awarded are detailed, publicly available and predictable, enabling individuals admitted on work permits to assess for themselves whether or not they are likely to qualify for permanent residence and to manage their private and family lives accordingly.

Decision of the Court of Appeal

14. The claimants appealed to the Court of Appeal. The appeals were dismissed for reasons given in a judgment of the court (Goldring P, Martin JA and Field JA) delivered on 30 March 2023. The court nevertheless made a declaration that section 37(3) of the Immigration Act (quoted at para 8 above) is incompatible with section 9 of the Bill of Rights.

15. As summarised in the court's judgment (para 38), the claimants' main argument in the Court of Appeal was that either the points system itself is incompatible with their rights protected by section 9 of the Bill of Rights because it does not permit consideration of those rights or that, even if that system does incorporate consideration of those rights, it is an incomplete code because it does not permit any consideration of those rights outside the points system.

16. In considering whether the claimants' rights under section 9 were infringed, the court adopted the five-stage approach outlined by Lord Bingham (in the context of article 8 of the European Convention) in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368, para 17: "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

17. The Court of Appeal rejected an argument that the terms on which the claimants were permitted to enter and reside in the Cayman Islands for a fixed period in the knowledge that they must then leave unless they attained the requisite number of points meant that they could not develop a private or family life protected by section 9 (paras 56 and 63). The claimants had each submitted evidence that they had made close friends and developed business relationships in the Cayman Islands. The court considered that their evidence was sufficient to show that requiring them to leave the Islands had an impact on their private life of a significance which amounted to interference with their section 9 rights (para 66).

18. The real question, in the court's view, concerned the proportionality of the decision (para 67). In addressing that question, the Court of Appeal applied the "by now traditional" fourfold test, which they took from *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19, and *R (Aguilar Quila) v*

Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621, para 45. (Many more authorities to like effect could be cited.) There was no dispute about the first three elements of the test. It was accepted that the legislation has a legitimate aim, namely, the regulation of the right to enter or remain in the Cayman Islands; that the measures designed to meet that aim are rationally connected to it; and that the measures are no more than are necessary to accomplish it. The crucial element of the test was the fourth: whether the measures strike a fair balance between the rights of the individual and the interests of the community (see paras 39-41 and 67).

19. The court's conclusion on whether such a fair balance had been struck in the present cases was unequivocal (see para 68):

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

This conclusion was reiterated later in the judgment, with the court observing that "these are paradigm cases in which a Board or Tribunal on appeal would be justified in saying that no issue under section 9 arises other than under the points system" (para 85).

20. The Court of Appeal did not, however, regard this conclusion as the end of the matter. They considered that, although in most cases the operation of the points system would give adequate protection to applicants' section 9 rights, it would not do so in every case (paras 80 and 83). To ensure compliance with the Bill of Rights in every case, the legislation needed to allow for consideration of section 9 rights outside the points system in those exceptional cases where this is warranted by the particular circumstances of an individual applicant (paras 71-79). The Court of Appeal considered whether there is power to grant permanent residence outside the points system in such cases under section 53(1)(b) of the Immigration Act (discussed below). They concluded that section 53(1)(b) does not confer such a power (paras 81-82).

21. The upshot in their view was that "the legislation and the points system do not provide a comprehensive code which would provide for the issue of proportionality to be determined in every case in accordance with section 9 of the Bill of Rights" (para 83). The Court of Appeal concluded, at para 87, that:

> "… the absence of any provision which allows for consideration of section 9 factors other than within the points system, and the legislative exclusion of any possibility of granting permanent residence other than under that system are … incompatible with section 9 of the Bill of Rights. We are required by section 23(1) of the Bill of Rights so to declare."

22. Thus, the Court of Appeal, as well as dismissing the claimants' appeals, made an order that:

> "Section 37(3) of the [Immigration Act] is declared incompatible with section 9 of the Bill of Rights."

Declarations of incompatibility

23. Section 23 of the Bill of Rights, under which this declaration was made, is in these terms:

> "**Declaration of incompatibility**
>
> **23**. (1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.
>
> (2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.
>
> (3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility."

24. Sections 24 and 25 are also relevant:

> "**Duty of public officials**
>
> **24**. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified.
>
> **Interpretive obligation**
>
> **25**. In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part."

This appeal

25. The Attorney General of the Cayman Islands appeals as of right against the declaration of incompatibility made by the Court of Appeal. The claimants have not sought to cross-appeal against the decision of the Court of Appeal dismissing their appeals and have not participated in this appeal – a decision which is entirely understandable given that its outcome cannot affect their own ability to reside in the Cayman Islands.

26. When it became clear that neither claimant would contest the appeal, an application to intervene was made by Ms Zanna Me-Waakie Jones Hunter, another individual whose application for permanent residence has been refused. So as to ensure that the Board would hear argument in opposition to the appeal, permission to intervene was granted "solely to argue (contrary to the appellant's case) that the Court of Appeal was right to make the declaration of incompatibility, but at no risk as to costs". The Board is grateful to counsel who appeared for the Intervener for their written and oral submissions.

Declaring incompatibility in hypothetical cases

27. Although put last in the grounds of appeal, the Board considers that, logically, the first issue raised is whether, having dismissed the claimants' appeals on the ground that the decisions to refuse them permanent residence were proportionate and consistent with section 9, the Court of Appeal was right to consider whether the points system could be relied on to produce a decision consistent with section 9 in every other case. The Attorney General submits that the Court of Appeal was wrong to do so and to examine, as they did, the compatibility of the points system with section 9 on a basis that was purely hypothetical.

28. The Board agrees. The Court of Appeal does not appear to have been referred to relevant authority which might have informed its approach. In *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, para 102, Baroness Hale of Richmond (with the agreement of five other members of the UK Supreme Court) said this about the possibility of a declaration of incompatibility under section 4(2) of the UK Human Rights Act:

> "[The power to make a declaration of incompatibility under section 4(2)] applies 'in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right': section 4(1). This does appear to leave open the possibility of a declaration in abstracto, irrespective of whether the provision in question is incompatible with the rights of the individual litigant. There may be occasions when that would be appropriate. But in my view the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims."

See also *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2010] 1 AC 1, paras 17-19.

29. There is a relevant difference between the wording of section 23(1) of the Bill of Rights and section 4(2) of the Human Rights Act. Whereas under section 4(2) of the UK Act the court, if satisfied that a provision is incompatible with a Convention right, has a discretion ("may make a declaration …"), the language of section 23(1) of the Bill of Rights is mandatory: "If in any legal proceedings primary legislation is found to be incompatible with this Part, the court *must* make a declaration …" (emphasis added). But, in the Board's opinion, the absence of a discretion, if a finding of incompatibility is made,

underscores the importance of giving careful consideration to whether the court should make such a finding.

30. The starting point must be that a finding of incompatibility, like any other finding that a court may make, should relate to the facts of the case which the court is called on to decide. This flows from the very nature of the judicial function. Courts are not accorded authority to pontificate on any matter they please. Their essential function is to decide disputes between the parties before them and, where the court finds that the defendant has infringed (or threatens to infringe) a right or legally protected interest of the claimant, to provide a remedy to the claimant.

31. The power to make a declaration of incompatibility must be seen in this light. Its purpose is not to provide machinery for a general review of the statute book aimed at purging it of non-conforming provisions. As Lord Rodger of Earlsferry observed in *R (Rusbridger) v Attorney General* [2004] 1 AC 357, para 58: "It is not the function of the courts to keep the statute book up to date. That important responsibility lies with Parliament and the executive"; and see also para 36 (Lord Hutton) and para 61 (Lord Walker of Gestingthorpe). The purpose of a declaration of incompatibility is to provide a remedy of last resort if no more effective remedy is available. It is true that the remedy does not achieve justice for the claimant because the relevant legislation remains in force and the court must apply it in the claimant's case. But given the constitutional supremacy of the Legislature, it is the most that the court can do to vindicate the claimant's right. By declaring that legislation prevents the court from granting an effective remedy, it invites the Legislature to remove that bar – if not for the claimant in the immediate case (as any legislative intervention is unlikely to be retrospective), then for others in a like position.

32. The nature of the proceedings also defines the question for decision by the court. These proceedings do not raise an issue about the compatibility of legislation with rights protected by the Bill of Rights ab ante, ie in advance of its application to any particular cases, such as arose for example in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505. They are appeals against two particular past decisions not to grant permanent residence in two individual cases. A question about whether primary legislation is incompatible with section 9 of the Bill of Rights would only have arisen if the Grand Court or the Court of Appeal had decided that in either case the refusal to grant the claimant's application breached (or might on further examination be found to breach) his right to respect for private life. In that event it would have become relevant to consider whether the primary legislation which required the claimant's application to be decided in accordance with the points system made the breach unavoidable. If the relevant primary legislation clearly and unambiguously led to that conclusion (so that the interpretive obligation in section 25 of the Bill of Rights does not apply), it would have been appropriate to make a finding, and therefore also a declaration, of incompatibility.

33. A question might then have arisen about the scope of the declaration that ought to be granted. As recently pointed out in *In re JR123* [2025] UKSC 8; [2025] 2 WLR 435, para 92:

> "If, at the point of granting a remedy, the court can see that the Convention rights of any individual who is in the same class of persons as the individual claimant must inevitably be violated by the same provision which has been applied to the claimant, it may be appropriate to grant a declaration that the provision is generally incompatible with Convention rights of that whole class rather than limiting the declaration to say that it is incompatible with the Convention rights of the claimant in the particular circumstances of the case."

34. No such question, however, arose here. It did not arise because the Court of Appeal found that the decisions under appeal did not in either case violate the claimant's right to respect for private life. So there was no breach (or threatened breach) of a right protected by the Bill of Rights which required or justified a remedy, and therefore no question about the proper scope of the remedy.

35. Like Lord Hoffmann in *Nasseri*, para 19, the Board would not exclude the possibility that in a case in which there is, on the facts, found not to have been a breach of a right protected by the Bill of Rights, the court might find that, had the facts been different, a breach of that right would have been required or authorised by primary legislation. Such a finding, although an obiter dictum because not necessary for the decision of the case, would still, if properly made, justify a declaration of incompatibility. But, as Lord Hoffmann said, such cases are likely to be rare. A situation of this kind arose (though not in relation to primary legislation) in *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055. In that case an immigration rule required a foreign spouse or partner of a British citizen, if not from an English-speaking country, to take and pass an English language test as a condition of entry to the United Kingdom. Although the rule allowed for exemptions where "exceptional circumstances" prevented the applicant from meeting the requirement, published guidance stated that financial reasons would not be accepted. The UK Supreme Court held that the rule was capable of being operated in a way that was compatible with the claimants' rights to respect for family life. The court nevertheless invited submissions on whether to make a declaration that the application of the rule, in the light of the guidance, was likely to be incompatible with the rights of a UK citizen or person settled in the UK in cases where it was impracticable without incurring unreasonable expense for his or her partner to gain access to the necessary tuition or to take the test: see paras 60, 103-104.

36. In *Bibi*, although no breach of a protected right had occurred, features of the claimants' cases (their lack of financial means and the distance from where the foreign

spouse lived to the nearest place of tuition and testing centre) made it possible to identify with reasonable precision circumstances in which incompatibility would occur. That was not so here. The Court of Appeal expressly found that there were no features of the claimants' private (or family) lives which could be said to require consideration outside the points system. As the Court of Appeal said, at para 86 of the judgment:

> "If applicants want some particular feature to be taken into account under section 9, which they assert the points system fails to reflect, they must identify that feature, and explain why it is not reflected in the points they foresee will be awarded when they make their case for permanent residence to the Board, or, on appeal to a tribunal. Neither of these appellants did or could do so."

37. In these circumstances the basis for the finding of incompatibility which the Court of Appeal nevertheless made was entirely abstract and theoretical. It did not relate to any feature of the claimants' cases or which the claimants had identified. Nor did the Court of Appeal itself identify even a single example of a possible future case or class of case in which it would or might be necessary, so as to avoid a breach of section 9 of the Bill of Rights, to grant permanent residence to a person whose application did not meet the requirement in section 37(3) of the Immigration Act. Although the Court of Appeal postulated "cases where, exceptionally, the points system does not give sufficient weight to the particular individual circumstances of an applicant" (see para 83), they did not suggest any particular (or even general) circumstances in which this would be so. That is not a sound or satisfactory basis for making a finding of incompatibility.

38. The reasons why it is not appropriate to make a finding and declaration of incompatibility on such an abstract basis are clear. The core reason is the nature of the judicial function and the constitutional and practical unsuitability of court proceedings as a means of deciding questions in the abstract, unmoored from the facts of an actual dispute. Related considerations are: (1) the danger that a finding of incompatibility made on such a basis might turn out to be illusory or non-existent or inaccurately specified; (2) the fact that, as here, the unsuccessful party will have no real interest in contesting any appeal, as the decision does not relate to or affect his or her rights; (3) the risk that a procedure intended to review the legality of a particular decision (here by way of appeal) will be used improperly for a collateral purpose of challenging legislation that is irrelevant to the legality of the decision; and (4) the point made by Baroness Hale (see para 28 above) that adopting such an approach is calculated "to invite a multitude of unmeritorious claims".

39. The Board concludes that the Court of Appeal was wrong to decide whether section 37 of the Immigration Act (and/or the points system) was compatible with section

9 of the Bill of Rights when, even on the most liberal view, that question did not arise on the facts of the cases under appeal to them.

Consideration of rights outside the points system

40. This would be a sufficient reason to allow the appeal. But the Board also agrees with the submissions made by Mr Tom Hickman KC on behalf of the appellants that, even on its own terms, the Court of Appeal's finding of incompatibility was misplaced.

41. The reasoning of the Court of Appeal failed properly to distinguish between the refusal of an application for permanent residence and inability to remain and carry on working in the Cayman Islands. The Court of Appeal focused on the system for deciding applications for permanent residence. They appear to have assumed – for example, in adopting the five-stage test set out in *Razgar* and assessing the claimants' evidence (see paras 16 and 17 above) - that the refusal of the application (unless reversed on appeal) necessarily required the applicant to leave the Islands. On that footing they examined whether the points system can be relied on to give adequate protection to applicants' section 9 rights in all cases and concluded that it cannot. From this they then drew the further conclusion that, to ensure compatibility with section 9 in cases where there would otherwise be a breach of that provision, it is necessary to provide a means of granting permanent residence to someone who does not attain the specified minimum number of points.

42. It was, however, an error to suppose that granting an application for permanent residence would ever be necessary to prevent a breach of section 9 of the Bill of Rights. A refusal to grant permanent residence does not itself prevent the applicant from continuing to enjoy private and family life within the territory. What would do so is removal or deportation. Provided the individual is permitted to remain (and, where relevant, continue to work), it cannot be said that there is a breach of the right to respect for private and family life just because the individual is not accorded a particular type of residence status.

43. This point has been repeatedly made in the jurisprudence of the European Court of Human Rights. For example, in *Sisojeva v Latvia* (2007) 45 EHRR 33, para 91, the Grand Chamber said:

> "… as the Court has reaffirmed on several occasions, article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the

> territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone …"

There are other authoritative statements to similar effect: see eg *Ramadan v Malta* (2016) 65 EHRR 32, para 91. The Board sees no reason why a different approach should apply in relation to section 9 of the Bill of Rights.

44. Thus, it does not follow from a finding that the points system does not, or does not in all cases, incorporate adequate consideration of an applicant's private and family life that the system is defective and that there needs to be a discretion to grant permanent residence to an applicant who has not attained the specified minimum number of points. Such a defect could be cured by a discretion to allow a person whose removal would violate section 9 to remain and continue to work in the Cayman Islands. This need not involve granting a right of permanent residence.

45. Had the Court of Appeal recognised this, they might also have appreciated that the relevant legislation already includes such a discretion. Part 7 of the Immigration Act, mentioned at para 4 above, which deals with "Gainful occupation of non-Caymanians", begins by identifying, in section 53, persons who are exempted from its provisions. Section 53 states:

> **"Persons exempted**
>
> **53**. (1) This Part does not apply to—
>
> …
>
> (b) any person who may, from time to time, be declared by the Cabinet to be exempt for any purpose either unconditionally or subject to such conditions as may be prescribed …"

46. The immediate effect of a declaration by the Cabinet under this provision is to exempt the person concerned from having to satisfy the requirements of Part 7 as a

condition of carrying on gainful occupation in the Cayman Islands. But such an exemption also allows the person to remain and reside in the Cayman Islands. This follows from section 93(b)(iii) of the Border Control Act, quoted at para 3 above, which includes among the categories of lawful immigrants "a person who is exempted under the relevant provisions of the [Immigration Act] or a dependant of such a person".

47. If a request is made to the Cabinet to grant an exemption under section 53(1)(b), the Cabinet has a duty to grant it if refusing to do so would result in a breach of the person's right to respect for private or family life. This follows from the duty imposed on a public official by section 24 of the Bill of Rights (quoted at para 24 above) not 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. (The term "public official", as defined in section 28, includes a public or governmental body and therefore includes the Cabinet.) No primary legislation has been identified which would require or authorise the Cabinet to exercise its power under section 53(1)(b) of the Immigration Act in a way that is incompatible with the Bill of Rights.

48. In short, there is a statutory provision which allows for consideration outside the points system of the right to respect for private or family life protected by section 9 of the Bill of Rights and a duty to exercise the power conferred by that provision to permit a person to remain and continue to work in the Cayman Islands if the person's removal or deportation would violate section 9. There is therefore no incompatibility, as the Court of Appeal believed there to be, between the relevant legislation and section 9 of the Bill of Rights.

49. The Court of Appeal did consider section 53(1)(b) of the Immigration Act. But they did so on an erroneous basis. They took the respondents to be contending that there is "an opportunity to grant permanent residence outside the points system to be found in section 53(1)(b)" (see para 81 of the judgment). The Board agrees with the Court of Appeal that section 53(1)(b) does not afford such an opportunity. But that was not in fact what the respondents were contending, at any rate in their skeleton argument in the Court of Appeal. In their skeleton argument they submitted that it would be wrong to equate a decision to decline an application for permanent residence with removal or deportation from the Cayman Islands; that such a decision means only that the applicant is not granted permanent residence and does not necessarily require that person to leave the Islands; that in considering the possibility that the right to private and family life would be infringed through requiring a person to leave the Islands, the court must look not only at the points system but also at any other avenues available to an individual who seeks to remain in the jurisdiction; and that such other avenues "will always include" section 53(1)(b) of the Immigration Act. As discussed above, in the Board's opinion, those submissions were correct.

50. The Court of Appeal gave two reasons (in para 82 of the judgment) for supposing that section 53(1)(b) does not provide a power to consider rights protected by section 9 outside the points system. Neither reason was valid.

51. The first reason was that section 53(1)(b) "makes no reference to an intention to confer power to consider the cases of applicants who wish to rely on section 9 outwith the points system". This suggests that, because section 53(1)(b) does not specifically say that the power to grant an exemption is available in cases where an applicant for permanent residence wishes to rely on section 9 outside the points system, it does not apply to such cases. That is clearly incorrect. The power conferred by section 53(1)(b) is expressed in the most general terms. It enables the Cabinet to declare "any person" exempt for "any purpose". The words "any person" are not qualified. They include anyone who is an applicant for permanent residence under the points system as well as anyone else who has not applied for permanent residence under the points system, whether because the person is not eligible to apply or simply chooses for any reason not to do so. In a hypothetical case, therefore, of the kind contemplated by the Court of Appeal which could justify consideration of section 9 outside the points system, it would be open to the individual to seek an exemption from the Cabinet permitting them to remain in the Cayman Islands on the ground that their removal would violate the right to respect for private and family life.

52. The second reason given by the Court of Appeal was that "no procedure is provided for either an applicant or the Cabinet to follow". Counsel for the intervener developed this argument in their submissions. They observed that the Attorney General had produced no evidence to show how the process was expected to work, including evidence of how applicants could find out about the process, how an application to the Cabinet could be made, how and on what basis decisions are supposed to be taken and how compliance with section 9 is or would be achieved. They also made the point that the Attorney General had not produced evidence of even a single example of a successful use of section 53(1)(b) by a person seeking permission to remain in the Cayman Islands.

53. In response, the Attorney General applied for permission to adduce new evidence on this appeal addressing these points. That in turn prompted the intervener to apply for permission to adduce evidence from an immigration lawyer taking issue with statements made in the Attorney General's new evidence.

54. The Board declines to admit any of this further evidence for reasons of both timing and relevance. If the evidence was relevant, it could and should have been adduced before the Grand Court. But in fact it is manifestly irrelevant. The contention accepted by the Court of Appeal was that no statutory power exists which, as a matter of law, allows section 9 rights to be considered outside the points system. That contention is rebutted by pointing out that the legislation contains such a power. Whether or not the power is exercised appropriately is a different matter. That question would only be relevant in a

case where the exercise (or failure to exercise) the power was in issue, such as where the claimant was seeking to challenge a removal decision on the ground that he had not been afforded a fair opportunity to be granted an exemption under section 53(1)(b). No such issue arises in the present cases. They are, solely, appeals against decisions to refuse the claimants' applications for permanent residence under section 37 of the Immigration Act. The only relevance of section 53(1)(b) is that its existence on the statute book shows that the Court of Appeal was mistaken in supposing that the legislation does not currently contain a power that would enable section 9 rights to be considered outside the points system.

55. For this reason too, the Court of Appeal was wrong to find and declare that section 37(3) of the Immigration Act is incompatible with section 9 of the Bill of Rights.

Conclusion

56. The Board will humbly advise His Majesty to allow the appeal.