IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause Nos. G 41, 43, 44, 45, 61, 62, 63 of 2018
(Consolidated Proceedings)
LACV22, 44, 45, 46, 62, 63, 64/2018

BETWEEN

1. **HS**
2. **RG**
3. **YD**
4. **YJ**
5. **MT**
6. **AC**
7. **AR**

Appellants

AND

IMMIGRATION APPEALS TRIBUNAL

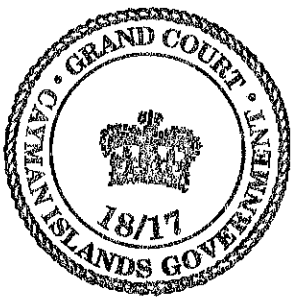
Respondent

IN OPEN COURT

Appearances: Mr. Alastair David of HSM Chambers on behalf of the Appellants
Mr. Michael Smith, Crown Counsel on behalf of Attorney General's Chambers

Before: Hon. Justice Ingrid Mangatal

Heard: **6 and 7 November 2018**



Further Submissions Invited by the Court Received: **11 April 2019**

Draft Judgment Circulated: **6 May 2019**

Judgment Delivered: **10 May 2019**

HEADNOTE

Asylum - Refugee Convention - Cayman Islands Constitution Order and Bill of Rights -Immigration Law 2015 Revision - Legal Aid Law 2015 Revision – Whether S.84(6) of the Immigration Law Incompatible with the Constitution – Whether sections 4 and 5 of the Legal Aid Law Incompatible with the Constitution – What are the standards and criteria that should be explained and communicated to refugees by Tribunal in their decisions.

JUDGMENT

Introduction

1. This is an unusual matter. It involves persons whose country of origin is Cuba and who are seeking asylum here in the Cayman Islands. They seek asylum on the basis that they are refugees. The ***Convention relating to the Status of Refugees done at Geneva on the 28th July, 1951 and the Protocol to the Convention***, (***"the Refugee Convention"***) under which the Cayman Islands have obligations, defines what is meant by *"refugee"*. A *"refugee"*, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted by reason of race, religion, nationality, membership of a particular social group, or political opinion.

2. This is a very complex area of law, and usually decisions have to be made and issues contemplated under difficult and pressing conditions. Properly considering asylum claims and making sound well-reasoned decisions is one of the Cayman Islands' fundamental responsibilities under the Refugee Convention. As stated frequently in the learning, it is axiomatic that asylum claims must be considered with the most anxious scrutiny.

3. Whilst I appreciate that ideally, decisions on asylum claims should be made as quickly as possible, as far as Counsel on both sides and the Court have been able to trace, there are no written local judgments dealing with asylum law. I therefore have felt it necessary to take some time to analyse these issues and hopefully discuss some guidance and relevant points for future use by the Tribunal. However, of course the principles will continue to evolve with time and experience.

CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 18/17

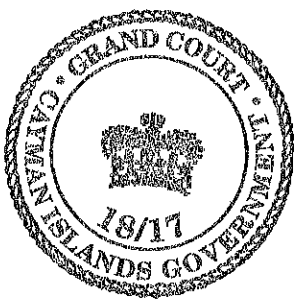
4. In or about May 2018, administratively and by consent an order was made (by Gunn J (Actg.)), that these seven matters be joined and heard together, and setting a two day hearing.

5. The seven matters involve asylum appeals from the decisions of the Immigration Appeals Tribunal (**"the Tribunal"**) and were heard by this Court in November 2018.

6. The Tribunal's decisions took place in 2017. Mr. David, who appears for all seven of the Appellants, and who will be referred to simply by their initials in order to maintain their privacy, prepared a Skeleton Argument ("SKA") on their behalf. Counsel takes the position that while each of the claims are separate and distinct matters, the decisions all share fundamental flaws. He seeks that the Court remits these appeals back to the Tribunal, so that a proper consideration of them can take place. Based upon changes to the law, discussed below, if the matters are remitted, they will be remitted for consideration by a different tribunal, i.e. the Refugee Protection Appeals Tribunal.

Summary

7. The Appellants contend that the decisions in respect to all of them have the following similar flaws:



i. The decisions of the Tribunal all amount to a breach of natural justice or should be regarded as procedurally unfair, or contrary to section 19(1) of ***the Bill of Rights*** (***"the BOR"***).

ii. The wrong legal tests have been applied (or the correct tests have not been applied) in all the Appeals, for example in regards to the standard of proof as to what constitutes a "*refugee*".

iii. The Appellants could not obtain legal aid for their claims of asylum and therefore did not receive a fair trial.

iv. Section 84(6) of the ***Immigration Law (2015 Revision)*** is incompatible with Part 1, Section 3 of the Cayman Islands ***BOR***.

The Law

8. I here set out what are the most relevant provisions of the Law as it concerns asylum and refugee claims. The ***Immigration Law (2015 Revision) ("the Law")*** in the definition section, section 2 provides the following meanings of "*refugee*" and "*Refugee Convention*":

> ""*refugee*" *bears the meaning ascribed to that expression in the Refugee Convention*"
> "*Refugee Convention*" *means the Convention relating to the Status of Refugees done at Geneva on the 28th July, 1951 and the Protocol to the Convention*".

9. Section 11 established the Tribunal, as follows:

> "***Immigration Appeals Tribunal***
> *11. (1) For the purposes of this Law, there is established an Immigration Appeals Tribunal which shall consist of the following members-*
> *(a) a Chairman;*
> *(b) up to five deputy Chairmen; and*
> *(c) a panel of persons, all of whom shall be appointed by and hold office at the pleasure of the Cabinet.*
> *(2) The Chairman shall be an attorney-at-law of at least seven years call to the bar; and each deputy Chairman shall be an attorney-at-law of at least five years call to the bar.*
> ....."

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

10. Section 17 of ***the Law***, deals with appeals from the Tribunal as follows:

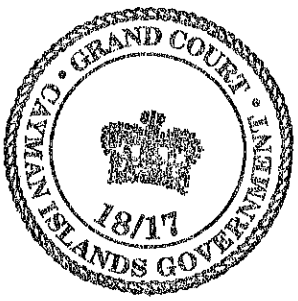
*"**Orders of Immigration Appeals Tribunal and appeals from its decisions***

17. (1) On an appeal, the Immigration Appeals Tribunal may make such order, including an order for costs, as it thinks fit.

(2) An appeal may be made to the Grand Court from the Immigration Appeals Tribunal on a point of law only."

11. Part VI of ***the Law*** deals with the subject of "*Entry and Landing*". Sub-section 72(1) addresses "*Detention of persons who have been refused permission to land, etc.*". It provides as follows:

"72(1) Under the authority of an immigration officer-



(a) A person who may be required to submit to examination under section 70(1), pending his examination and pending a decision to give or refuse him permission to land;

(b) A person to whom permission to land has been refused;

or

(c) *A prohibited immigrant on any vessel not intending or not seeking permission to land,*

may be temporarily detained at some place approved by the Cabinet for such purpose, and while so detained, shall be deemed to be in legal custody and not to have landed, and a person on board a vessel may, under the authority of an immigration officer, be removed for detention under this subsection.

..."

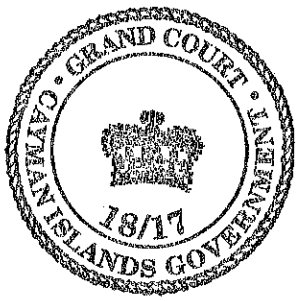
12. Part VII addresses "*Asylum*", and sections 84-86 provide as follows:

*"**PART VII - Asylum***

Application for asylum

84. (1) A person who is in legal custody under section 72(1) or a person to whom permission to remain in the Islands has been granted

under section 67(1) or 72(2) may apply to the Chief Immigration Officer for asylum, and in considering such application the Chief Immigration Officer shall have regard to the Refugee Convention and any directions given by the Governor relating to asylum applications.



(2) For the purposes of this Part, a person is eligible to apply for asylum if-

(a) he is at least eighteen years of age or is an unaccompanied minor;

(b) he is in the Islands; and

(c) the application for asylum has been made by him at a place designated by the Governor.

(3) A person specified under subsection (4) may also apply for asylum for his dependent children under eighteen years of age that are with him in the Islands.

(4) A person whose application under subsection (1) has been successful shall be granted leave to remain indefinitely in the Islands and the right to work for any employer in any occupation.

(5) The Chief Immigration Officer may revoke a person's indefinite leave granted under this section if someone of whom he is a dependent ceases to be a refugee as a result of –

(a) voluntarily availing himself of the protection of his country of nationality;

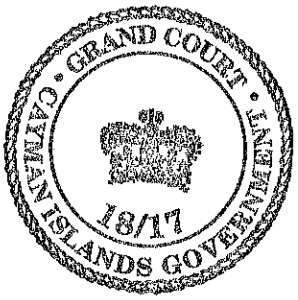
(b) voluntarily acquiring a lost nationality;

(c) acquiring the nationality of a country other than the Cayman Islands and availing himself of its protection; or

(d) Voluntarily establishing himself in a country in respect of which he was a refugee.

(6) Notwithstanding section 14, a person whose application for asylum has been refused may appeal to the Immigration Appeals Tribunal, within fourteen days of his being notified of the decision, against the refusal on the grounds that requiring him to leave the Islands would be contrary to the Refugee Convention.

(7) *Neither an applicant for asylum nor an appellant against the decision of the Chief Immigration Officer shall be required to leave the Islands pending the outcome of his application or appeal; and, for the purposes of this section, an application or appeal is pending-*



(a) beginning on the date when it is submitted or instituted; and

(b) ending on the date when the applicant or appellant-

(i) is formally notified of the outcome of the application or appeal; or

(ii) withdraws or abandons the application or appeal.

(8) *Where an application is made for asylum, it shall be recorded by the Chief Immigration Officer who, if satisfied that the application was made as soon as reasonably practicable after the applicant's arrival in the Islands, shall-*

(a) on being satisfied that for obvious and compelling reasons the applicant cannot be returned to his country of origin or nationality, grant him exceptional leave to remain in the Islands; and

(b) make arrangements for his support, accommodation and upkeep.

(9) *The grant of exceptional leave under this section-*

(a) does not confer on the grantee any right of gainful occupation in the Islands; and

(b) may be revoked, varied or modified by the Chief Immigration Officer.

(10) *Where an applicant under this Part is to be deported to a country of which he is a national or citizen and-*

(a) he does not possess a passport or other travel document, and

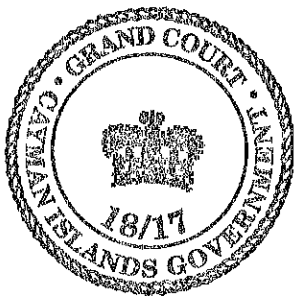
(b) the country to which he is to be deported requires the Chief Immigration Officer to provide identification data in respect of the applicant as a condition of the admission of the applicant to that country,

the Chief Immigration Officer shall provide the requested data but shall not disclose whether the applicant had sought asylum.

(11) The Governor's deportation order in respect of a person who has been refused asylum may require the master of a vessel-

(a) to remove the person from the Islands; and

(b) to bear the cost of such removal, including the cost of providing escorts to and from the receiving country.



(12) Where a person who has applied for or intends to apply for asylum is desirous of voluntarily leaving the islands for a country in which he hopes to take up residence, the Chief Immigration Officer may render to him-

(a) advice and other help in relation to his proposed journey; and

(b) financial assistance to defray the cost of his travel and upkeep.

(13) For the purposes of this Part, the Governor may give directions to the Chief Immigration Officer in relation to the consideration of applications for asylum and promulgate rules for the hearing of appeals under subsection (6), and such directions and rules shall be published in the Gazette.

Limitations on rights of appeal under section 84

85. Section 84 does not entitle a person to appeal against a refusal of an application if-

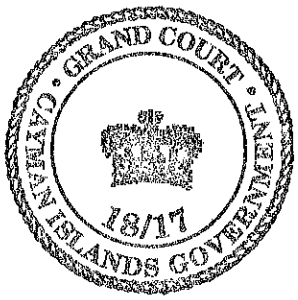
(a) the Governor has certified that the appellant's departure and exclusion from the Islands would be in the interest of national security; or

(b) the reason for the refusal was that he was a person to whom the Refugee Convention did not apply by reason of Article 1(F) of that Convention,

and the Governor has certified that the disclosure of material on which the refusal was based is not in the interest of national security.

Helping Asylum –seeker to enter the Islands

86(1) A person who-



(a) Knowingly and for gain, facilitates the arrival on the Islands of an individual; and

(b) Knows or has reasonable cause to believe that the individual intends to apply for asylum under section 84(1),

commits an offence.

(2) Subsection (1) does not apply to anything done by a person acting on behalf of an organization which-

(a) aims to assist individuals seeking asylum pursuant to the Refugee Convention; and

(b) does not charge for its services."

(My emphasis)

13. The power to make a deportation order against a person whose application for asylum has been unsuccessful, resides in the Governor. Section 89 of ***the Law*** , provides as follows:

*"**Part VII - Deportation***

……

Power of Governor to make, revoke, vary or modify a deportation order and duty to report to Secretary of State

89. (1) Subject to sections 87 and 88, the Governor may, if he thinks fit, make a deportation order in respect of any person who is-

(a) a convicted and deportable person;

(b) a destitute person;

(c) a prohibited immigrant who has entered the Islands contrary to this or any earlier law:

(d) a person whose permission to land and to remain or reside in the Islands or any extension thereof has expired or has been revoked and who fails to leave the Islands; or

(e) a person whose application for asylum has been refused under section 84.

(2) Where the Governor considers that a person is an undesirable person, or that his presence in the Islands is not conducive to the public good, he may make a deportation order in respect of such person.

(3) The Governor-

(a) may, at any time, revoke a deportation order and may vary or modify its terms so as to permit the person in respect of whom it is made, to enter and land in the Islands for such purpose and subject to such conditions as may be specified; and

(b) shall report any deportation order made, varied or modified by him, to the secretary of State for Foreign and Commonwealth Affairs."

(My emphasis)

14. In 2018, the ***Immigration (Amendment) Law, 2018***, was passed. The marginal note to section 2 reads as follows:

"Amendment of section 2 of the Immigration Law (2015 Revision)- definitions"

15. The section itself reads as follows:

"2. The Immigration Law (2015 Revision), in this Law referred to as the "principal Law", is amended in section 2 by inserting, after the definition of the word "refugee", the following definition- "Refugee Protection Appeals Tribunal" means the Refugee Protection Appeals Tribunal established under section 84A."

16. Section 84A, which provides for the *"procedure for appeals"*, provides as follows:

*"**Refugee Protection Appeals Tribunal***

84A(1) There is established a Refugee Protection Appeals Tribunal for the purpose of hearing appeals from decisions by the Chief Immigration Officer to refuse applications for asylum under this Part.

(2) The Tribunal shall consist of a Chairman, a Deputy Chairman and three other members, all of whom shall be appointed by, and hold office at the pleasure of the Cabinet.

(3) The Chairman shall be an attorney-at-law of at least seven years' call to the bar and the Deputy Chairman shall be an attorney-at-law of at least five years' call to the bar.

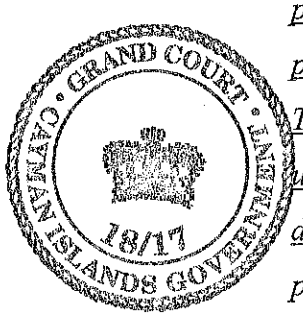
....

Appeals from decisions of the Refugee Protection Appeals' Tribunal

84D. An appeal may be made to the Grand Court from a decision of the Refugee Protection Appeals Tribunal on a point of law only."

17. The Refugee Convention defines what is meant by "*refugee*". An Introductory Note by the office of the United Nations High Commissioner for Refugees (UNHCR) in Geneva, December 2010, provides useful guidance at page 3, as follows:

> *"The 1951 Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. In contrast to earlier international refugee instruments, which applied to specific groups of refugees, the 1951 Convention endorses a single definition of the term "refugee" in Article 1. The emphasis of this definition is on the protection of persons from political or other forms of persecution. A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being*



persecuted by reason of race, religion, nationality, membership of a particular social group, or political opinion.

The Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement. Convention provisions, for example, are to be applied without discrimination as to race, religion or country of origin. Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination. The Convention further stipulates that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules. Prohibited penalties might include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum. Importantly, the Convention contains various safeguards against the expulsion of refugees. The principle of non-refoulement is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("refouler") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.

Finally, the Convention lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment. Such rights include access to the courts, to primary education, to work, and the provision of documentation, including a refugee travel document in passport form. Most States parties to the Convention issue this document which has been widely accepted as the former "Nansen passport", an identity document for refugees devised by the first Commissioner for Refugees, Fridtjof Nansen, in 1922."

(My emphasis)

18. Article 16 of the Refugee Convention provides that a refugee shall have free access to the courts of law on the territory of all Contracting States.

19. As Lord Bingham expressed it in ***Secretary of State for the Home Department v AH (Sudan) and Ors*** [2007] UKHL 49, at paragraph 5, the humanitarian object of the Refugee Convention, is *"to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is."* (My emphasis)

20. Lady Hale in the ***AH(Sudan)*** case, at paragraph 30, provided useful guidance on the approach to be made by the Court in looking at an experienced tribunal's decision, as follows:

> *"...This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution: it is probable that in the understanding and applying the law in their specialized field the tribunal will have got it right: see Cooke v Secretary of State for Social Security [2001] EWCA Civ 734,... para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent Tribunal had indeed confused the three tests or neglected to apply the correct relocation test. ..."*

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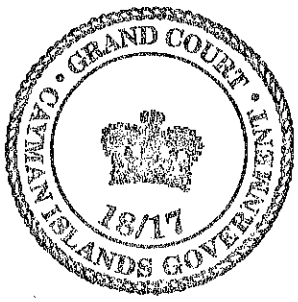
21. At paragraphs 32, 33 and 43 of that decision, Lord Brown of Eaton-Under- Heywood, discusses the matter as follows:

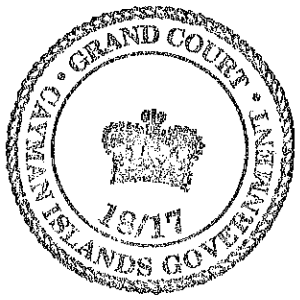
"32. Millions living in the poorer countries of the world suffer terribly from poverty, from famine, from floods, from ill-health, from various human rights abuses. Many in addition suffer, or at any rate, have a well-founded fear of persecution. But such as suffer this additional fear, provided only that they can escape to a richer and safer country, are in a sense, the lucky ones. For them the risk of persecution is often in reality amongst the least of their problems, less threatening than the direr risks they face from ill-health and extreme poverty. Yet once they achieve refugee status, not merely are they safeguarded from return home but they secure all the manifold other benefits provided for under the Refugee Convention.



33. To secure these benefits, however, an asylum-seeker must fall strictly within the definition of "refugee" set out in article 1A(2) of the Refugee Convention. This is not a Convention designed to meet all humanitarian needs - far from it, perhaps understandably, given the countless millions who would otherwise be entitled to its benefits. Consider the range of those excluded from its protection. As was observed in the Australian case of A v Minister for Immigration and Ethnic Affairs [1998] INLR 1, 18:

> *"No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention."*

Nor are those involved in civil war. Nor those persecuted for non-Convention reasons. Nor those affected by ill-health, even if their return home would dramatically shorten their life expectancy- see N v Secretary of State for the Home Department [2005] 2 A.C.



296, holding AIDS sufferers to be outside the protection even of article 3 of the ECHR. Nor is refugee protection extended to those who have no present fear of persecution- circumstances in their home country having improved-(Adan v Secretary of State for the Home Department [1991] 1 A.C. 293), not even if there exist compelling reasons arising out of their previous persecution for them not to be returned home (R (Hoxha) v Special Adjudicator) [2005] 1 WLR 1063).

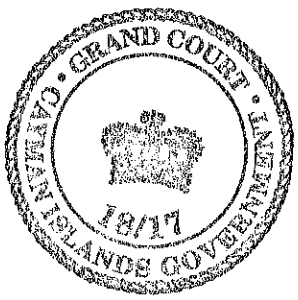
....

43. *I too regard the Court of Appeal's approach to have been wrong. There was no sound basis here for overturning the Tribunal's decision. Certainly, as Lord Bingham (at para 11) and my noble and learned friend Baroness Hale of Richmond (throughout her opinion) indicate, the Tribunal's determination could have been clearer....I too conclude... that so expert and experienced a Tribunal cannot readily be supposed to have committed any of these errors sought to be inferred from its sometimes infelicitous drafting...."*

(My emphasis)

22. ***The Cayman Islands Constitution Order 2009*** contains a Bill of Rights, Freedoms and responsibilities ("***the BOR***"). Section 5 of the Constitution Order addresses existing Laws, and provides as follows:

> ***"Existing Laws***
>
> ***5-*** *(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*



(2) The Legislature may by law make such amendments to existing law as appear to it to be necessary or expedient for bringing that law into conformity with the Constitution or otherwise for giving effect to the Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.

(3) In this section "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman islands immediately before the appointed day."

23. The following sections of ***the BOR*** are likely to be relevant to the issues involved in these cases:

*"**Part I***

BILL OF RIGHTS, FREEDOMS AND RESPONSIBILITIES

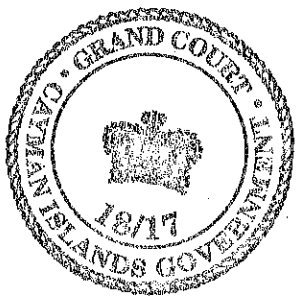
Guarantee of Rights, Freedoms and Responsibilities

Whereas all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law:

1- (1) This Bill of Rights, Freedoms and Responsibilities is a cornerstone of democracy in the Cayman Islands.

(2) This Part of the Constitution-

(a) recognizes 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;



(b) confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and

(c) does not affect, directly or indirectly, rights against anyone other than the government except as expressly stated.

(3) In this Part "government" shall include public officials (as defined in section 28) and the legislature, but shall not include the courts (except in respect of sections5,7,19 and 23 to 27 inclusive).

Life

2- (1) Everyone's right to life shall be protected by law.

(2) No person shall intentionally be deprived of his or her life.

(3) A person shall not be regarded as having been deprived of his or her life in contravention of this section if he or she dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as absolutely necessary-

(a) for the defence of any person from violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained ;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or if he or she dies as a result of a lawful act of war.

Torture and inhuman treatment

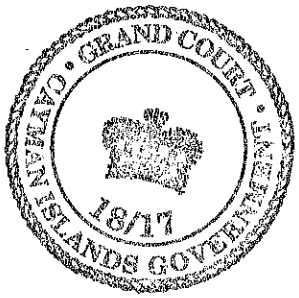
3. No person shall be subjected to torture or inhuman or degrading treatment or punishment.

....

Personal liberty

5.- (1) No person shall be deprived by government of liberty and security of the person.

(2) *The right to liberty does not extend to the following measures taken in relation to a person in accordance with a procedure prescribed by law-*



(a) in the execution of the sentence or order of a court, whether in the Cayman islands or elsewhere, in respect of a criminal offence under any law of which he or she has been convicted or in consequence of his or her unfitness to plead to a criminal charge;

(b) in execution of an order of a court punishing him or her for contempt of that court or of another court;

(c) in execution of the order of a court made in order to secure the fulfillment of any obligation imposed on him or her by law; but no person shall be deprived of his or her liberty merely on the ground of inability to fulfill a contractual obligation;

(d) for the purpose of bringing him or her before a court in execution of the order of a court;

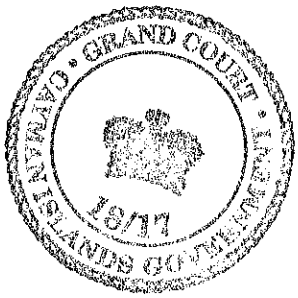
(e) on reasonable suspicion that he or she has committed, is committing or is about to commit a criminal offence under any law;

(f) in the case of a minor, under the order of a court or with the consent of his or her parent or guardian, for the purpose of his or her education or welfare;

(g) for the purpose of preventing the spread of an infectious or contagious disease;

(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into the Cayman islands, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from the Cayman Islands, or for the purpose of restricting that person while he or she is being conveyed through the Cayman Islands in the course of his or her extradition or removal as a convicted person from one country to another.



(j) in execution of the order of a court detaining a person charged with a criminal offence in respect of whom a special verdict has been returned that he or she is guilty of the act or omission charged but was insane when he or she did the act or made the omission.

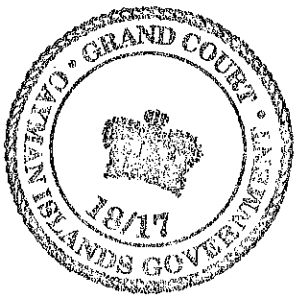
(3) Any person who is arrested or detained has the right to remain silent and shall be informed promptly, in a language that he or she understands, of the reasons for his or her arrest or detention.

(4) Any person who is arrested or detained shall have the right, at any stage and at his or her expense, to retain and instruct without delay a legal practitioner of his or her own choice, and hold private communication with him or her, and in the case of a minor he or she shall also be afforded a reasonable opportunity of communication with his or her parents or guardian, but when a person arrested or detained is unable to retain a legal practitioner of his or her own choice or be represented by a legal practitioner at the public expense in accordance with section 7(2)(d), he or she may be represented, and hold private communication with, such person as the court may approve.

(5) Any person who is arrested or detained-

(a) for the purpose of bringing him or her before a court in the execution of the order of a court; or

(b) on reasonable suspicion of his or her having committed, or being about to commit, a criminal offence, and who is not released, shall be brought promptly before a court; and if any person arrested or detained in such a case as is mentioned in subsection(2)(e) is not tried within a reasonable time he or she shall (without prejudice to any further proceedings that may be brought against him or her) be released either unconditionally or



on reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail.

(6) Any person who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which he lawfulness of his or her detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful, and he or she shall be entitled to compensation for being unlawfully arrested or detained; but a judicial officer shall not be personally liable to pay compensation under this subsection in respect of anything done by him or her in good faith in the discharge of the functions of his or her office, and any liability to pay any such compensation in respect of that thing shall be a liability of the Crown.

.....

Fair Trial

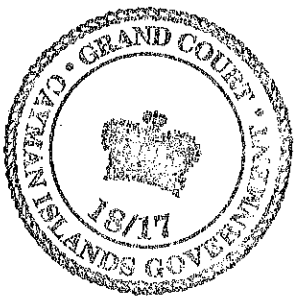
7.- (1) Everyone has a right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.

(2) Everyone charged with a criminal offence has the following minimum rights-

(a) to be presumed innocent until proved guilty according to law;

(b) to be informed promptly, in a language which he or she understands in detail, of the nature and cause of the accusation against him or her;

(c) to have adequate time and the facilities for the preparation of his or her defence;



(d) To defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance and the interests of justice so require, through a legal representative at public expense provided through an established public legal aid scheme as prescribed by law;

(e) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

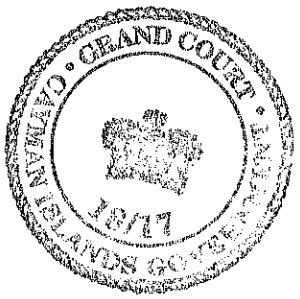
(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; and, except with his or her own consent, the trial shall not take place in his or her absence, unless he or she behaves in the court so as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence, or unless, having had reasonable notice of the hearing and of the nature of the offence charged, he or she is voluntarily absent from the proceedings.

.....

(9) Any 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.

(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court-

(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or the



private lives of persons concerned in the proceedings; or

(b) may be empowered or required by law to do in the interests of defence, public safety, or public order.

.....

Private and family life

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

.....

Lawful administrative action

19. (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.

.....

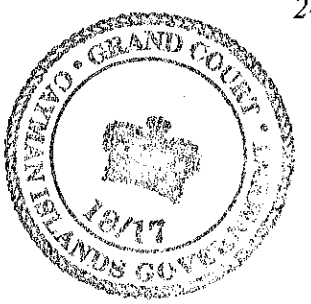
Declaration of incompatibility

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 continuance 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.*

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 authorized 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 to in a way which is compatible with the rights set out in this Part.

Enforcement of rights and freedoms

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

……"

24. Relevant sections of the ***Legal Aid Law, 2015*** are as follows:

"***Interpretation***

2. In this Law-

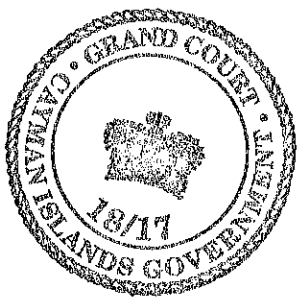
....

"court" means the Court of Appeal, the Grand Court or a court of summary jurisdiction....

"***Statement of purpose***

3. The purpose of this Law is to provide legal aid to persons in respect of civil and criminal matters where those persons are financially unable to secure legal services from their own resources.

Scope of legal aid



4. (1) legal aid may be granted in proceedings before a court in the following cases-

(a) criminal proceedings on indictment;

(b) criminal summary proceedings;

(c) subject to subsections (3) and (5), civil proceedings in the Grand Court or a summary court; and

(d) appeals in criminal and, subject to subsections (3) and (5), civil cases.

(2) For the purposes of subsection (1), legal aid in respect of proceedings before a court extends to any proceedings incidental to such proceedings, including bail proceedings, whether before that or another court.

(3) Legal aid may be granted in family law proceedings but only if those proceedings involve questions of.....

...

(5) Legal aid shall not be granted in the following proceedings-

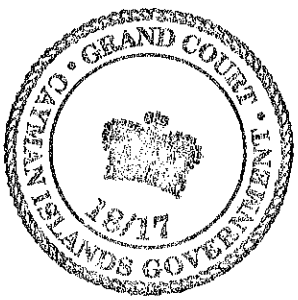
(a) *proceedings wholly or partly in respect of defamation;*

(b) *relator actions;*

(c) *proceedings relating to any election, or;*

(d) *proceedings in respect of other prescribed areas of civil law.*

(6) *Subject to sections 5, 17 and 19, legal aid may be granted to individual natural persons of the following categories-*



(a) *accused persons in criminal trials;*

(b) *persons who are questioned or detained at a police station, correctional institution and other similar place;*

(c) *persons who are bailed to attend at a police station;*

(d) *Appellants (including applicants for leave to appeal) in appeals against conviction or sentence and Respondents to criminal appeals by prosecutors; and*

(e) *parties in civil proceedings and civil appeals, including legal guardians, guardians, guardians ad litem or persons who have power of attorney to act on behalf of children and persons under a physical or mental disability.*

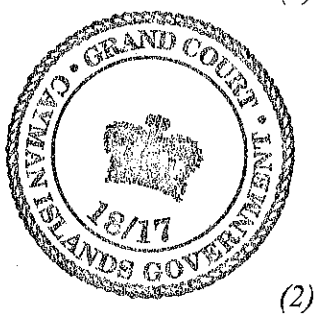
.....

When legal aid certificate may be granted in civil cases

5. *Legal aid in civil proceedings may only be granted if the Director is satisfied, after making inquiries under section 16, that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.*

Part 2 – Appointment and Functions of the Director of Legal Aid and Other Staff: List of Legal Aid Attorneys, etc.

Appointment of the Director



6 (1) There continues to be established a legal aid office of the Judicial Administration and the Chief Officer, after consultation with the Court Administrator, shall appoint a Director of legal Aid to manage such office, to administer legal aid services in the islands and to carry out the functions and duties set out under this Law.

(2) The Director shall be a public officer who is an attorney-at-law of five or more years call to the Bar and shall have such other qualifications as the Chief Justice considers necessary for the performance of the Director's duties under this Law.

.....

(6) The Director shall be supervised in the performance of his duties by the Court Administrator.

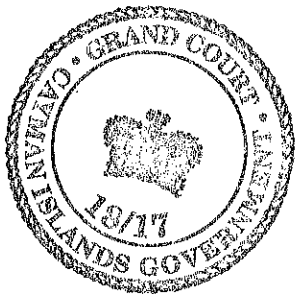
Functions of the Director

7. (1) The Director shall continue to maintain a list of attorneys-at-law who are in active private practice in the Islands, and who have notified the Director that they are able and willing to represent applicants and assisted persons.

(2) The Director may prepare rosters of such attorneys-at-law for the more efficient administration of this Law and such rosters shall also include rosters for attorneys-at-law who are willing to carry out services as duty counsel which services include-

(a) interviewing and advising persons being questioned or detained at police stations or who are charged with criminal offences in the circumstances set out in section and

(b) carrying out other duties as are prescribed.



(3) The Director shall receive and consider every application for legal aid made under section 15 and, subject to the following provisions of this Law and any regulations, shall grant a certificate to an applicant in any proper case, with or without provision for payment of contributions by the applicant.

(4) The Director, deputy director and legal aid counsel shall provide legal representation and give legal advice in such civil matters and in such circumstances as are approved by the Court Administrator, after consultation with the Chief Justice.

(5) Subject to the directions of the Court Administrator, the Director shall be responsible for the day to day administration of the Law.

....

Powers of the Director

9. Subject to this Law and the regulations, the Director may-

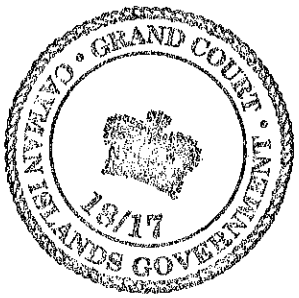
(a) Establish guidelines, procedures and requirements pursuant to which legal and other services may be made available under this Law;

(b) Make public, by means of advertising or otherwise, the nature and extent of the legal services that are available; and

(c) Do all things necessary, incidental or conducive to the attainment of the purposes of this Law.

Minister may give Policy Directions

10. The Minister, after consultation with the Cabinet, may give such general directions as to the policy to be followed by the Director in the performance of his functions as appear to the Minister to be



necessary in the public interest, and the Director shall give effect to any such directions.

.....

Method of application

15 (1) Any person who wishes to be granted legal aid shall apply in writing to the Director.

(2) Every application for legal aid shall be in such form and accompanied by a statutory declaration verifying the facts stated in the application as may be prescribed.

(3) Notwithstanding subsection (1), a person who is detained at a police station, correctional institution or other similar place who has requested the assistance of a duty counsel or a listed attorney-at-law is not required to apply in writing for such assistance but the duty counsel or a listed attorney-at-law shall, as soon as possible after meeting with the person, advise the Director of the assistance given and Director shall make a written record of the details of such assistance.

....

Grants of certificates generally

17 (1) Subject to section 4, a legal aid certificate may be granted to the applicant by the Director if his disposable income is in the prescribed amount or less.

(2) An applicant who-

(a) is charged before a court with any Class A criminal offence; or

(b) is a party to a criminal appeal before a court in connection with any such charge and satisfies the Director that there are reasonable grounds for appeal, shall, if he qualifies for the grant of a certificate under subsection (1), be entitled as of right to have a certificate granted to him by the Director.

(3) An applicant eligible for legal aid under section 4, other than one entitled as of right under subsection (2) to the grant of a certificate, may, if he qualifies under subsection (1), be granted a certificate by the Director in his discretion and in the exercise of that discretion the Director shall, among other things, consider whether it is in the interests of justice to grant legal aid.

(4) In considering whether it is in the interests of justice to grant legal aid under subsection (3) the Director shall consider the following-

(a) whether, if the matter arising in the proceedings is decided against the person, the person would be likely to lose his liberty or livelihood or to suffer serious damage to his reputation;

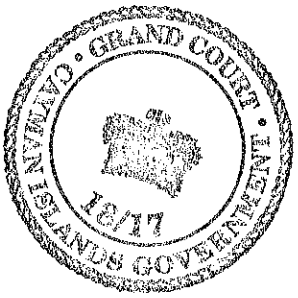
(b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;

(c) whether the person may be unable to understand the proceedings or to state his own case;

(d) whether the proceedings may involve tracing, interviewing, or expert cross-examination of witnesses on behalf of the person; and

(e) whether it is in the interests of another person that the person be represented.

(5) The Director may, in any case of urgency in any criminal proceedings, grant a certificate to an applicant for a temporary period not exceeding twenty-eight days at a time pending the exercise by the Director of his



powers under section 16 and the consideration of the grant to the applicant of a certificate under either subsection 92) or subsection (3)." (My emphasis)

Breach of Natural Justice

25. The Appellants assert that the decisions all follow a standard pattern and share similar, if not the same, language such as to amount to "*ritual incantations*".

26. Mr. David argues that whilst the Tribunal set out the two stage test in all of the decisions, they completely failed to set out the conclusions they had reached and then applied those conclusions to the relevant law.

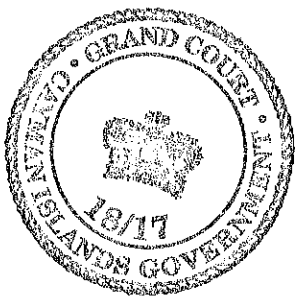
27. It is alleged that in none of the decisions does the Tribunal set out:

    i. The burden and standard of proof.

    ii. The test they are applying for well-founded persecution, i.e. "*a reasonable degree of likelihood*" or "*a real and substantial risk*" of occurrence/ re occurrence - ***R v Secretary of State for the Home Department ex. P. Sivakumaran*** [1988] A.C. 958.

    iii. The meaning of persecution, i.e. as per Lord Hope in ***HJ (Iran) v Secretary of State of the Home Department*** [2010] UKSC 31. Held ""*Persecution*" *within the meaning of the Convention, meant persecution sponsored or condoned by the home state and not such as arose from social or family disapproval or discrimination.*"

    iv. Whether the Tribunal considered the situation if the Appellant was to be returned, i.e. the Cuban Authorities behaviour to known defectors leaving



Cuba as per the UK Country Guidance in the case of ***Fernandez (Dissidents and Defectors) Cuba*** [2011] UKUT 00343 in which it states *"(i) The human rights situation in Cuba is dismal and the Government continues to deny its citizens basic civil and political rights. (ii) The authorities are intolerant of any form of unauthorized opposition to its political agenda and the law is used to criminalise dissent. (iii) The term "dissident" in the context of Cuba does not refer to a homogenous group of people but can refer to anyone engaging in activities regarded by the authorities as contrary to its political agenda. (iv) The "dangerousness" law is used as a political tool against those seen as dissenters or otherwise opposing the regime's political agenda. (v) Those regarded by the Cuban authorities as opponents, dissidents or defectors can be at risk of treatment of sufficient severity to amount to persecution. Whether a particular individual will be at such risk depends upon his background's profile but in general terms an active political opponent who has to come to the attention of the authorities or someone who has been openly disloyal to the regime is likely to be at risk. (vi) This guidance replaces that given in OM (Cuban returning dissident) Cuba [2004] UK AIT 00120 which is no longer to be regarded as providing authority guidance.*

v. Whether prosecution could amount to persecution, ***R (on the application of Tientchu) v IAT C/2000.***

vi. How the Cuban government will perceive the Appellant on his return to Cuba, i.e. imputed political opinion, ***Gomez (Non State Actors: Acero-Garces disapproved) Colombia*** **[2000] UKIAT 00007.**

vii. Where it was that the Appellants' respective claims failed.

28. It was submitted that, it is only in one of the decisions i.e. that of MT, that the Tribunal has passed comment on the credibility of the Appellant. It was submitted that, in relation

to the others, it is not clear whether the Tribunal accepted the Appellants' respective accounts, and if it did not, what were the reasons for not accepting.

29. Reference was made to the decision of Henderson J in ***National Roads Authority v Bodden*** [2014 (2) CILR 47], citing the well-known decision in ***South Bucks D.C. v. Porter*** (No. 2) [2004] 1 W.L.R. 1953. At paragraphs 25-27 (inclusive), Henderson J provides useful guidance as follows:

> *"25. The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough simply to state a result on the principle issues: the parties are entitled to know the reasoning and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this fashion by the House of Lords in South Bucks D.C. v Porter (No. 2)(3) [(2004] WLR 1953, at para. 35):*
>
> > *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration ... A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

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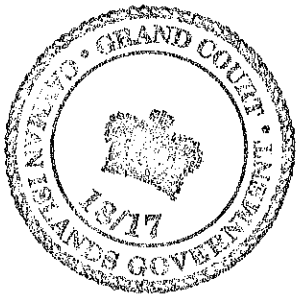


26. *Regrettably, the abbreviated nature of the decision renders impossible any review by me of the implicit finding that the requisite elements of a prescriptive easement had been established. The decision presents no legal analysis at all – it simply states a conclusion. Moreover, it contains no findings of fact which would enable this court to determine that the RAC's conclusion about a prescriptive easement was within the realm of reasonableness.*

27. *The failure of a tribunal to provide adequate reasons for a decision is itself a question of law. Although the NRA has not set out this ground in its notice of appeal, I am satisfied that consideration of the adequacy of the reasons on the appeal does not take the claimants by surprise. They have no doubt anticipated much of what has been said during argument and have not suggested that they are prejudiced by the attack upon the adequacy of the reasons. I shall grant leave to the NRA to amend its notice of appeal to include this ground. My order is that the decision is set aside as inadequate and the claim for compensation is remitted to the RAC for a new hearing and a fresh decision."*
(My emphasis)

30. Further support for the position of the Appellants' that the decision of the board has to be adequate, can be found in the case of ***Re Poyser and Mills Arbitration*** [1964] 2 QB 467 and in particular on page 478 when Megaw J confirmed that,

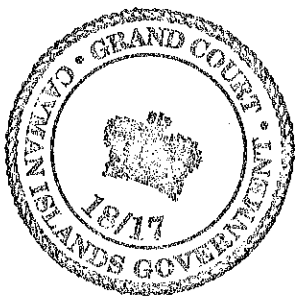
> *"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."*

31. It is contended that after reading any of the decisions currently under appeal, the reader is none the wiser as to:

i. The burden and standard of proof (if it is not the balance of probabilities test);

ii. The directions the Tribunal gave themselves as to:

- The definition of persecution.



- When prosecution can amount to persecution (if they gave themselves a direction at all);

- In relation to the special considerations they have to give in respect to the credibility of asylum seekers - Paragraph 50, R.C Sweden Application no 41827/07

> *"Owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their status and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies".*

- The relevance of past persecution, (paragraph 21, ***Abdelaziz Nenni v Secretary of State for the Home Department*** [2004] EWCA Civ 1077.

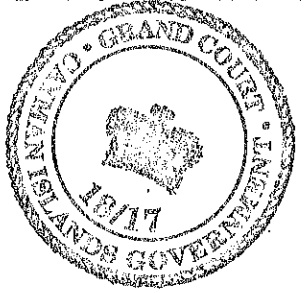
- Imputed or actual political belief.

iii. The likely scenario that the Appellants would face upon their return to Cuba.

iv. Except for the decision in respect of MT, the credibility of the Appellant.

v. What, if any, case law the Tribunal considered.

vi. Where it was that the Appellants' appeals failed.



vii. What findings of fact they had made.

32. It is averred that a clear Judgment setting out the directions that the Tribunal gave themselves is even more important when the Appellants are not represented by attorneys. It is vital that in the circumstances, the Appellants can understand the decision and how it is that the Tribunal reached its conclusions. Sadly, opines Mr. David, the decisions in respects to the Appellants are defective in that they do not comply with the principles of natural justice, nor Section 19 of ***the BOR***.

33. Support for the Appellant's position that the Respondent as a Tribunal have to give a decision which is fully compliant with the laws of natural justice and Section 19 of ***the BOR*** can be found, Mr. David proffered, in the case of ***R v Army Board of the Defence Council, Ex Parte Anderson*** [1991] 3WLR 42 in which the case of ***Ridge v Baldwin*** [1964] AC 40 was quoted with approval in particular at page 185 paragraph G when Lord Reid stated:

> "*The mere fact that the power affects rights or interests is what makes it 'judicial', and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised 'judicially' i.e. fairly, and the fact that the power is administrative does not make it any the less' judicial' for this purpose.*"

34. Merely because Section 18(1) of the ***Immigration Law (2015 Revision)*** describes certain decisions of the Tribunal as being administrative, and that Section 18 (2) of ***the Law*** states that brief reasons will be given, does not abrogate the Tribunal from the Common Law principles of Natural Justice and the requirements set out in Section 19 of ***the BOR***.

35. Due to the lack of particularization in the decision, it is averred that all the appeals should be remitted to freshly constituted Tribunals.

The Wrong Test

36. In all the decisions (apart from the decision in respect of MT) the Tribunal used the phrase "*on balance, the Tribunal is not satisfied that the Appellant satisfies the requirements of being a refugee for the purposes of the 1951 Convention*". It was submitted that, in the case of MT, the Tribunal failed wholly to set out the appropriate burden and standard of proof that they applied to the Appellant's appeal.

37. It is the Appellant's contention (bar MT) that the Tribunal has misdirected themselves in Law when it comes to the standard of proof that they applied when considering the Appellants' claims for asylum. It is the Appellants position that by using the phrase "*on balance*" the Tribunal has adopted a balance of probabilities test. Therefore for the Appellants to be awarded asylum they would have to demonstrate to the Tribunal that on the balance of probabilities that they would be persecuted for a convention reason if they were returned to Cuba. If this is the case, then the Tribunal has applied too high a burden and this would amount to an error of law.

38. In the case of MT, it is not clear what test the Tribunal has applied in regards to the standard of proof, and therefore in those circumstances, this amounts to an error of law.

39. It is noted by the Appellants that in the affidavits of Shaun McCann, Buck Grizzell and Morris Garcia they all provide an explanation similar to or the same as the below quote:

> "*I wrote the IAT decision and was aware not to apply the higher civil standard of proof in asylum cases. Had I intended to do so, I would have expressly referred to and written this in the decision as being the relevant test.*
>
> *I used the phrase "on balance" as analogous to "in the round": or "all things being considered". The phrase was not a reference to the standard of proof applied."*

40. However, it was submitted that neither Shaun McCann nor Buck Grizzell go on to set out the appropriate standard of proof and that they provide no explanation as to why they did not set it out in their judgment.

41. It is only Morris Garcia who in his affidavit quotes the correct test of the standard of proof. That being said, Mr. David submitted that it is not clear from his decisions that he applied this correct test to the evidence provided by the Appellants as the decisions do not set out which standard of proof was applied to the circumstances.

42. As none of the decisions, including that of MT, state the burden or standard of proof that the Tribunal had applied, it is averred that an error of law has occurred.

43. In all of the affidavits submitted on behalf of the Respondents, they state that if they had intended to use the higher "*balance of probabilities test*" then they would have made that clear. However, what is clear from not only the written decisions but also the minutes of the meetings is that the Tribunal never advised the Appellants on any of the appropriate legal tests, i.e. standard of proof, whether prosecution amounts to persecution, what persecution means etc. By failing to advise a Litigant in Person ("LIP") on the tests that the Tribunal is going to apply, the Tribunal has not only assumed that the LIP knows the appropriate tests, Counsel submitted, but also failed to ensure that the LIP could make the appropriate submissions. It is contended that this amounts to an error of law as the Tribunal has prevented the Appellants from fully contributing to their appeals.

44. It is further contended that the absence of directions in regards to:

i. The definition of persecution
ii. When prosecution can amount to persecution
iii. The special care that has to be given in respects to the credibility of asylum seekers
iv. Past persecution
v. Imputed political belief.

would amount to further errors of law as it is not clear that the Tribunal properly directed themselves in regards to the above factors.

Lack of Access to Legal Aid

45. In the case of ***Regina (Howard League for Penal Reform and another) v Lord Chancellor (Equality and Human Rights Commission intervening)*** [2017] EWCA Civ 224, it was held that in determining whether the removal of legal aid from any category caused inherent or systemic unfairness depended on:

    i. The importance of the issues at stake
    ii. The complexity of the procedural, legal evidential issues and
    iii. The ability of the individual to represent himself without legal assistance.

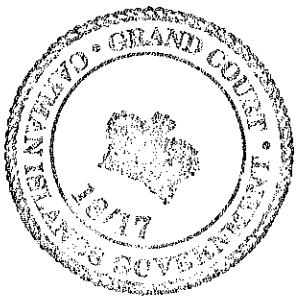
46. Mr. David argues that in these appeals, none of the Appellants had been (or could be) granted legal aid until their matters reached the Grand Court. Reference was made to sections 4 and 5 of the ***Legal Aid Law.***

47. It was submitted that, since matters before the IAT amount to "*Tribunal Proceedings*" and not "*proceedings before a Court*", the Law prevents the Appellants from obtaining legal aid.

48. In these matters it was contended that:

    i. Asylum claims are the most important matters that a Court can deal with. In many cases, the life of the applicant or whether he will be tortured on his return to the Country he is fleeing from will be the issue before the Court.

    ii. Asylum cases are complex legal matters. In these cases the following relevant issues have been addressed and considered:
        - The credibility of the Appellants
        - The balance and standard of proof
        - Imputed political belief



- Whether prosecution amounts to persecution in the circumstances
- Whether the Appellant had suffered treatment prior to leaving Cuba which amounted to persecution.
- Whether the Appellants would upon their return to Cuba suffer persecution due to a convention reason.
- Any objective evidence which supported their position
- Any relevant case law, be that Caymanian case law or international case law.

iii. All the Appellants were detained at the time of their applications with limited access to the internet and no access to immigration law books. None of the Appellants speak or read fluent English. All the Appellants required a translator before the Tribunal.

49. Because all of the Appellants did not have access to free legal advice from an independent attorney their ability to present their cases at its highest has been, it was argued, hamstrung and therefore this amounts to a breach of Section 7 of ***the BOR*** as the Appellants have not been able to fully participate in their appeals. The current system in regards to legal aid being restricted to the Grand Court, creates an inherent or systemic unfairness which amounts to a breach of section 7 of ***the BOR***.

50. While it is accepted that YD, YJ, and HS had the help of Martin Diaz, a McKenzie Friend, it was asserted that the fact that a McKenzie Friend helped them is not sufficient for the Appeal system to be regarded as a fair system and not amount to a breach of section 7 of ***the BOR***.

51. Furthermore, the Refugee Convention at Article 16 states that:

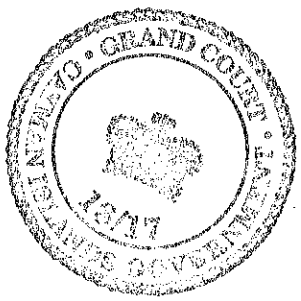
> "*1. A refugee shall have free access to the courts of law in the territory of all Contracting States.*"

52. It was submitted that, in this case, the Appellants cannot be seen as having free access to the Tribunal in that they did not have the ability to obtain legal advice for free.

53. It is therefore contended that the inability of the Appellants to obtain legal aid means that the Appellant's right to a fair trial has been breached and that the Appeals should be remitted to the Tribunal and a direction provided by the Court that legal aid should be granted.

Whether Section 84(6) Immigration Law (2015 Revision) is compatible with the *BOR*

54. **Section 84(6) of the Law states:**



> *"(6) Notwithstanding section 14, a person whose application for asylum has been refused may appeal to the Immigration Appeals Tribunal, within fourteen days of his being notified of the decision, against the refusal on the grounds that requiring him to leave the Islands would be contrary to the Refugee Convention."*

55. It is therefore contended that the Tribunal's remit is limited to those Grounds of Appeal which are based upon the Refugee Convention.

56. In the vast majority of the Appeals, if not all, the Appellants were told that at the beginning of their hearing that the Tribunal had two options,

    i. To grant them Political Asylum; or

    ii. Repatriate the Appellants to Cuba.

57. Mr. David asserts that it therefore appears that the Tribunal are prevented from considering Appeals based upon, the following grounds:

- Breaches of Section 2 of ***the BOR*** – right to life
- Breaches of Section 3 of ***the BOR*** – right to not be subject to torture or inhumane/degrading treatment.
- Breaches of Section 9 of ***the BOR*** – right to a family life.

58. For instance if the Tribunal accepted that the applicant had established that if he was to be returned to Cuba and would likely be killed, tortured or suffer inhumane and degrading treatment (but not because of a protected characteristic) or that it would not be reasonably justifiable to interfere with his right to a family life, the Tribunal would be prevented from granting the appeal due to the fact that Section 84 (6) of ***the Law*** prevents these from being grounds of appeal and therefore prevents the Tribunal from considering them. In effect the Tribunal is prevented from considering ***the BOR***, he submits.

59. In the current matters, all the Appellants fear being imprisoned if they return to Cuba and the conditions they will face. The objective evidence which accompanied the applications to extend the time limit shows that the conditions in Cuban jails are not good, which it is contended amount to a breach of Section 3 of ***the BOR***. Further, YJ, in his interview with the Tribunal made it clear that he is in a relationship with a Caymanian lady and they wish to marry and therefore, the argument continues, his removal from the Cayman Islands would amount to a breach of Section 9 of ***the BOR***. It was submitted that the Tribunal is prevented from considering these relevant factors due to the restrictive nature of Section 84(6) of ***the Law***.

60. Section 24 of ***the BOR*** states:

> *"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 authorized 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."*

61. It is argued that section 84(6) directly prohibits the Tribunal from considering Grounds of Appeal outside of the Refugee Convention, i.e. ***the BOR***, it is therefore submitted that the Tribunal cannot consider appeals based upon constitutional rights and therefore the Tribunal are forced to act in a way which is incompatible with ***the BOR***.

GRAND COURT CAYMAN ISLANDS GOVERNMENT 12/17

62. It is accepted by the Appellants that Section 25 of ***the BOR*** states:

> *"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."*

63. However, it was submitted that it is not possible to interpret section 84(6) of ***the Law*** in any other way in which the Tribunal can be seen as acting in accordance with both the Constitution and Section 84(6) of ***the Law***. If the Appellants were to grant an appeal on the basis that the Appellants' constitutional rights would be breached if they were returned to the Country they are seeking refugee from, then the decision of the IAT would not be on a permissible ground and therefore would be subject to Appeal. If, however, the Tribunal concluded that the Appellants' constitutional rights would be breached by returning the Appellant to the Country they were fleeing from, but concluded they were prevented from granting the appeal on this basis because of Section 84 (6) of ***the Law***, the Tribunal would be acting contrary to the Constitution.

64. It was submitted that, because of the close nature of the Refugee Convention and the Constitution, in particular Sections 2 and 3 of ***the BOR*** which are directly influenced by Articles 2 and 3 of the ***European Convention on Human Rights*** ("***ECHR***"), it is more than likely that the Tribunal will find themselves in a situation in which they cannot grant the appeal because of the restrictive nature of Section 84(6) of ***the Law***. Counsel emphasized that the Tribunal is the last opportunity for an Appellant to put before a Tribunal a factual matrix in which they could allege that their removal form the Cayman Islands would breach their constitutional rights. However, because the Tribunal has no discretion in this matter, they could still be removed. It is therefore averred that Section 84(6) is incompatible with the Constitution in that it directly limits the Tribunal's considerations and a declaration should be made to that effect.

The Respondent's Arguments:

Re: The Wrong Test

65. The Respondent does not seek to suggest that the present Cuban regime is anything "*other than a brutally repressive Marxist dictatorship*" (Respondent's Speaking Notes). However, Mr. Smith submits that not everyone who seeks to flee such a regime does so for reasons of political or other types of persecution. Often it is simply because they desire a better standard or quality of living, or other economic reasons.

66. Furthermore, reasoned Mr. Smith, "*simply not liking your country's government does not make you a refugee. Otherwise Cayman would be full of British asylum seekers fleeing Brexit, and US asylum seekers fleeing Trump*".

67. Counsel noted that he had not been able to find any previous case on asylum in the Cayman Island's judgments.

68. He argued that, although there may be a lack of experience, any flaws in the Tribunal's decision notices were not so substantive as to reach the high bar required to render them unlawful.

69. Further, it is not part of the Respondent's task to defend the decisions or documentation emanating from the Department of Immigration. Whilst the Appellants point to alleged mistakes by that Department, these appeals are against the decisions of the Tribunal, which was able to hear the applications (appeals), in effect, *de novo*, which included the Appellants being able to submit additional evidence, if they wished to do so at that stage.

70. As regards the allegations made about alleged inadequacies of the Decision Notices of the Tribunal, the Respondent wished to draw the following principles to the Court's attention:

A. Each decision notice should be read as a whole document: ***Secretary of State for the Home Department v AH (Sudan) and others*** (FC) [2007] UKHL 49, per Lord Bingham at [11].

B. It is probable that the Respondent, as an expert tribunal, will have got it right in understanding and applying the law in its own specialized field. Therefore its decisions should be respected unless it is quite clear that it has misdirected itself in Law: ***AH (Sudan)*** per Baroness Hale at [30].

C. In approaching this task it is no part of the court's duty to subject each decision notice to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. As the notices are addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry, it is not necessary to rehearse every argument relating to each matter in every paragraph, paraphrasing Forbes J in ***Seddon Properties Ltd and James Crosbie & Sons Ltd v Secretary of State for the Environment and another*** [1978] 2 EGLR 148 at [150].

71. In the premises, the Respondent admits that it failed in each case to set out the matters listed in paragraphs 6 and/or 10 of the Appellants' SKA, but say that this does not render the decisions inadequate or unlawful because there was no requirement for the Respondent to address each and every matter under consideration or to give the express and lengthy decision notice that this would entail. It was submitted that the Appellant's case amounts to a counsel of perfection. Further, that it is worth noting that, following the extract from ***Poyser & Mills*** that the Appellants pray in aid of their case, Megaw J goes on to say that:

> *"... no minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think there must be something substantially wrong or inadequate in the reasons..."*

CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 12/17

72. It was argued, that, treating each decision notice as a whole document, it can be seen that they all set out:

i. The process that the Respondent followed;

ii. The legal test applied (i.e. the quoted section of the Refugee Convention), including the standard of proof, i.e. "*a well-founded fear of persecution*";

iii. The Appellant's case;

iv. The procedure adopted at the hearing; and

v. The final decision, with reasons.

73. It was submitted that in each decision notice, the Respondent explained the reasons for its conclusions:

(i) RG - "*The Tribunal was not satisfied by the Appellant's evidence that there was a well-founded fear of persecution. The Appellant professed that he had lived a good life in Cuba however he did not agree with the government and this appeared to the Tribunal to be the reason for his application or political asylum*"- Ex NJ1 p.4

(ii) AR - "*Based on the Appellant's written and oral evidence, the Tribunal's view is that he has a fear of prosecution for being a boat builder used for illegal purposes and involvement in schemes in assisting other Cuban nationals to depart Cuba illegally, but not a well-founded fear of persecution if he returned to Cuba*" - *Ex SB1P.19*

(iii) AC - "*The Tribunal.... concludes that the basis of his claim for asylum is for economic reasons. His stated aim was to reach the United States via Honduras.*" - *Ex. SB1p.4.*

(iv) YD – "*The Tribunal was not satisfied that the Appellant is in any danger of persecution by the Cuban authorities as this has been his third attempt to leave Cuba*" - *Ex NJ1.*

(v) YJ - *"The video evidence provided...was not substantial for the Tribunal to grant political asylum to the Appellant. The Appellant also stated that he lived well with his earns* (sic) *from his private business and the help of his family from the United States."*

(vi) MT - *"The Tribunal was not satisfied by the Appellants evidence that he risked persecution... It appeared to the Tribunal the reason for his application for political asylum is to avoid prosecution."* - SB1p. 20

(vii) HS - *"The Tribunal considered all that was stated by the Appellant, his representative and the evidence submitted and did not agree that the Appellant qualifies for the grant of political asylum."- Ex. NJ1p. 4*

74. It was the Respondent's position that these reasons, although brief, are intelligible and, in the context of the relevant decision taken as a whole, adequately state how and why the Respondent reached the decision it did on the main issue (i.e. whether the Appellant qualified as a refugee). Mr. Smith posits that they meet the standard set out in ***South Bucks DC v. Porter (No. 2)***, and there was no requirement for them to address every material consideration in each case, or to give lengthy reasons.

75. As an alternative submission, the Respondent says that even if the decision notices did not meet the ***South Bucks DC*** type standard, it is in any event for the Appellant to show that he has been substantially and genuinely prejudiced by such shortcomings. It was submitted that a detailed decision notice, covering all the matters which are raised in the Appellants' SKA, would have contained the same ultimate conclusion in each case. It was therefore argued that no prejudice can be demonstrated.

76. It was also put forward that other avenues are in any event available, such as these appeals.

GRAND COURT CAYMAN ISLANDS GOVERNMENT 18/17

77. It was further submitted that the decision notices substantially comply with HO "*Implementing Substantive Asylum Decisions' Guidance*", although this Guidance applies to UK HO workers, not the Tribunal, and Mr. Smith indicates that the Tribunal was not aware of this Guidance when drafting its decisions. It was argued that any instances of non-compliance are in any event not sufficiently substantive to render the decisions unlawful.

78. Mr. Smith also made a general submission with regard to UK HO guidance generally. It was suggested that this guidance has been given on the basis of decades of experience in the UK on asylum law, whereas the law on asylum in the Cayman Islands is not anywhere as well developed or complex. It was argued that best practices evolve over time and that the Tribunal has not yet had time to develop and implement its own best practices. Further, it is not in any sense bound to follow UK guidance, although of course it can obviously be of assistance in informing its procedures. In the circumstances, to require the Tribunal to comply with UK best practice, would, it was submitted, be entirely unreasonable, and amount to a counsel of perfection.

79. The Respondent commenced this aspect of its submissions by once again referring to Baroness Hale's enjoinder in ***Secretary of State for the Home Department v AH (Sudan)*** that expert tribunals are to be assumed, in the absence of clear evidence to the contrary, to have properly directed themselves in respect of the law.

80. The Respondent asserts that the only evidence proffered by the Appellants in respect of misdirection as to the standard of proof, is the use of the words "*on balance*" in six of the seven decision notices. The Respondent submits that this, in itself, is insufficient to overturn the presumption in favour of the expert Tribunal.

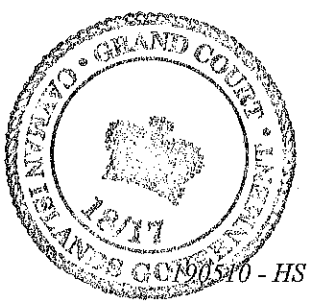
81. Reference was made to the fact that the Appellants acknowledge in their SKA that the affidavits filed on behalf of the Respondent all state that the use of the term "*on balance*" by the relevant deponent was in the sense of "*in the round*", or "*all things considered*". It was submitted by Mr. Smith, that this is the correct approach. Reference was made to ***SM***

(Section 8: Judge's process)Iran [2005] UKAIT 00116 at [10], where it is stated as follows:

> *" ...It is the task of the fact-finder,* ***whether official or judge****, to look at all the evidence* ***in the round****, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some other aspects of the evidence may be matters to which section 8 applies. Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and, despite section 8, and although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence,* ***and to reach his view as a whole on the evidence as a whole.****"*
>
> (Counsel's emphasis)

82. The Respondent also refers to the fact that each deponent states that they were aware not to apply the higher standard of proof in asylum cases. Reference was also made to the fact that section 11(2) of ***the Law*** requires that the Chairman and Deputy Chairs be legally qualified. It was posited that the Chair and the three Deputy Chairs would have been given a copy of the UK Home Office publication ***Asylum Policy Instruction: Assessing Credibility and Refugee Status*** (Version 9.0, 6th January 2015) prior to the hearings, and it was they who gave guidance on the law to the other members of the Panels when the appeals were considered after the conclusion of the hearings. Reference was made to paragraphs 4.1 and 5.2, where the burden of proof is dealt with in some detail, as follows:

> *"The level of proof needed to establish the material facts is a relatively low one - a reasonable degree of likelihood - and must be borne in mind throughout the process.*



....

'Reasonable degree of likelihood' is a long way below the criminal standard of 'beyond reasonable doubt', and it is less than the civil standard of 'the balance of probabilities' (i.e. more likely than not)

...

The question to be asked is whether, ***taken in the round****, the caseworker accepts what he or she has been told and the other evidence provided. In practice, if the claimant provides evidence that,* ***when considered in the round****, indicates that the fact is 'reasonably likely', it can be accepted.*

....

Each material fact must be assessed, ***in the round****, and then accepted or rejected.*

....

Material facts must always be assessed in the context of the evidence as a whole and not in isolation*. Caseworkers may, because of the weight of adverse evidence in other aspects of the claim, reject in the round a material fact which, when taken in isolation, could be credible; conversely, they can decide to accept an aspect of the claim which at first sight seemed unlikely to be true."* (Counsel's emphasis)

83. It was submitted that, whilst this document was not binding on the Tribunal, it is referred to, to show that the Chair and Deputy Chairs were aware of the correct standard of proof and that this was what the Tribunal members applied.

84. Mr. Smith described the Appellants' argument that the failure to state the standard of proof and other directions as to the law, in the body of the decision notices, as supporting a finding of an error of law on the part of the Respondent, as not being supported by any

legal principle. It was reiterated that the decision notices need only deal with the main points of contention.

85. It was also averred that no authority was cited in support of the Appellants' submission that a failure to advise LIPs on the tests to be applied amounted to an error of law.

86. Alternatively, the Respondent contends that any misdirection as to the standard of proof or other matters does not render the decisions unlawful. It was argued that support for that proposition can be found in the case of ***R (on the Application of Xhelollari v Immigration Appeal Tribunal*** [2002] EWHC 2451 (Admin). In that case, as Mr. Smith points out, even where the Special Adjudicator had expressly stated that the balance of probabilities had been the test erroneously used in coming to a decision, and the decision also contained a number of other errors, the application for judicial review of the Tribunal's decision was denied. The judgment discusses the issues as follows:

(i) *"The standard of proof, whilst dominating, of course, throughout any proceedings of an adversarial nature, has to be regarded as of minimal effect in the light of the way in which the evidence was laid before the fact finder."* [17]

(ii) *"In my judgment, the terms of the rule and the powers conferred on the Tribunal necessarily lead to the conclusion that one resorts to the totality of the adjudicator's determination and reasons..."* [23]

(iii) *"I take the force of the submission directed to the inconsistencies which Miss Wood has identified in para 33, and I take the force to be sufficient to give cause for doubt as to whether the correct standard of proof was applied, but I have concluded that the Tribunal were nonetheless entitled to refuse permission to appeal."* [24]; and

(iv) *"In my judgment, this is sufficient to dispose of this application because although it can be said that one is in doubt about the standard of proof which has been*

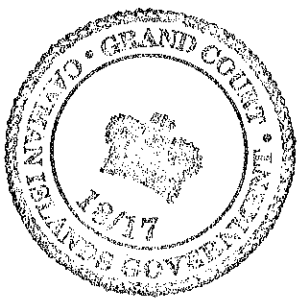
CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 10/17

applied to the claimant's evidence, no prejudice or affront to justice has occurred as a result."

87. The Respondent raises a further argument in the alternative. This is that, if a misdirection is found to have been made in respect of any decision, that the Court should exercise its discretion under Order 55 Rule 7(2) to deny the relevant appeal(s) because no substantial wrong or miscarriage of justice would have been thereby occasioned. This is because, on the facts before it, the argument runs, the Respondent would have reached the same decision in each case, if properly directed.

Re: Appellant's case alleging lack of access to legal aid

88. The Respondent asks the Court, when considering this issue, to bear in mind paragraph 6 of the judgment in ***R (Howard League for Panel Reform and the Prisoners Advice Service) v The Lord Chancellor***, where Beatson LJ stated:



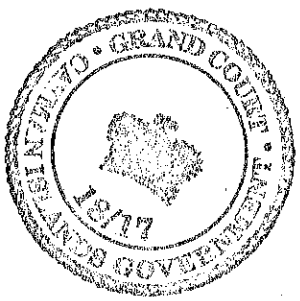
"6. In the light of the authorities which we consider in section IV of this judgment, there is broadly common ground as to the test required to show systemic unfairness. ***The threshold is a high one, and requires showing unfairness which is inherent in the system itself and not just the possibility of aberrant decisions and unfairness in individual cases..."*** (Counsel's emphasis)

89. Mr. Smith submitted that the Appellants have not reached the high threshold required, and have not shown that the lack of legal aid at their hearings renders the system itself, rather than the procedures followed in their individual cases, systematically unfair.

90. Reference was made to the case of ***NJDB v United Kingdom (App.No.76760/12)*** - [2015] All E.R. (D) 229 (Oct), where at paragraphs 71-74, the European Court on Human Rights set out the general principles in respect of the right to legal aid as follows:

"71. *The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his case effectively before the court and that he is able to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights (see* ***Steel and Morris****, cited above, §§59-60).*

72. *Since the right of access to a court is not absolute, it may be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his prospects of success in the particular proceedings. Moreover,* ***it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his adversary*** *(see* ***Steel and Morris,*** *cited above, at §62)*



73. *As has been pointed out in previous case-law, the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively (see* ***Steel and Morris,*** *cited above, §61).*

74. *Finally, regard must be had to the overall context, and in particular, the extent to which the applicant has already enjoyed access to court and equality of arms in the proceedings. Article 6 §1 and its* ***"right to a court"...cannot be interpreted and applied as investing litigants****, including those involved in proceedings where fundamental aspects of the Convention right under Article 8 to respect for family life may be at stake,* ***with an unqualified right to obtain legal aid in order to pursue their claim as far as they would personally want to. The Court must therefore examine the particular facts of the case, taking the proceedings as a whole, in order to determine whether the refusal of legal aid in relation to the applicant's appeal to the Supreme Court denied him his "right to a court"*** *as guaranteed by Article 6 §1."*

(Counsel's emphasis)

91. The Respondent submitted, that in light of these general principles, neither Article 16 of the Refugee Convention nor Section 7 of ***the BOR*** can be construed so as to mean that the government is obliged to grant legal aid to every asylum seeker at each and every stage of their application and subsequent appeal process.

92. Further, it was argued, that at none of the appeal hearings was the Chief Immigration Officer ("the CIO") represented and that therefore the Appellants were not at any, or any substantial disadvantage, *vis-a-vis* the CIO due to a lack of legal aid. The Appellants all had the assistance of a translator and were permitted to present their case and supporting evidence to the Tribunal. In addition, three of them were also represented by Dr. Diaz, acting as McKenzie friend.

93. Further or in the alternative, says the Respondent, the Court should assess the proceedings as a whole, including the present appeals where the Appellants do have the benefit of legal aid, and where the Court is able to substitute its own decision for that of the Respondent using its powers under Order 55 Rule (7)(1) if it sees fit. The Appellants

therefore, it was argued, cannot be said to have been denied their "*right to a court*", or section 7 ***BOR*** rights, due to the lack of legal aid.

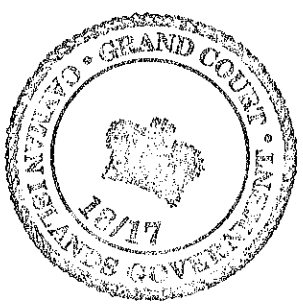
Re Whether Section 84(6) of *the Law* is incompatible with *the BOR*

94. The Respondent says that the Appellants' argument in this case appears to be based on a misapprehension that the Tribunal is the final opportunity for an asylum seeker to submit evidence against deportation, but that this is not so. Reference was made to section 89(1) of ***the Law*** which grants to the Governor the final decision on deportation of failed asylum seekers.

95. The Respondent also says that, even of section 84(6) of ***the Law*** does limit the powers of the Tribunal to the determination of refugee status, this does not render it incompatible with ***the BOR*** because breaches of ***the BOR*** which do not overlap with the Refugee Convention are able to be considered under other provisions of ***the Law***, either by representations against a final deportation order, under section 89 or on appeal to the Grand Court under section 17(2) of ***the Law*** or pursuant to section 26 of ***the BOR***.

96. It was submitted further or alternatively that s.84(6) should be construed in accordance with s. 25 of ***the BOR***. The Respondent refers to paragraphs [21] to [24] of ***Canute Nairne and in the Matter of the The Writ of Habeus Corpus Ad Subjiciendum*** [2013] CIGC J0214-2 as setting out the extent of the Court's interpretive duty. At paragraph [24], it is stated as follows:

> "[Paragraph 25] *ensures that the Court will strive to align an impugned legislative provision with what the Legislature may reasonably be taken to have intended and by this process of "reading down" will seek to avoid a formal declaration of incompatibility but the obligation imposed by section 25 arises only in "unclear or ambiguous" cases. Since the section appears in the Bill of Rights it has the effect of elevating both the rule of*



construction itself and the limitation upon it to constitutional status. Clear cases of incompatibility are to be left to the Legislature for correction."

97. Reference was also made to ***R v A*** [2001] UKHL 25, where the court's interpretive duty in respect of statutory provisions (as it relates to s.3(1) of the UK Human Rights Act), is discussed. Section 3(1) (which is in terms similar to section 25 of ***the BOR***) provides that: *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."*

98. The case concerned section 41 of the Youth Justice and Criminal Evidence Act 1999. The question certified by the Court of Appeal for consideration by the House of Lords was as follows:

> *"May a sexual relationship between a defendant and a complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?"*

99. At paragraphs [44] and [45], Steyn LJ discusses the issue as follows:

> *"44. On the other hand,* ***the interpretive obligation*** *under section 3 of the 1998 Act* ***is a strong one.*** *It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings.* ***It is an emphatic adjuration by the legislature. R v Director of Public Prosecutions, Ex p. Kebilene*** *[2000] 2 A.C. 326, per Lord Cooke of Thorndon, at p373F; and my judgment, at p366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see "Rights Brought Home: The Human Rights Bill" (1997) (Cm 3782), para. 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred*

stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31-33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). ***Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so.*** *In the progress of the Bill through Parliament the Lord Chancellor observed that "****in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility"*** *and the Home Secretary said "****We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention": Hansard*** *(HL Debates) , 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of section 3 against the executive:"* ***Pepper v Hart****: "A re-examination" (2001) 21 Oxford Journal of Legal Studies 59.* ***In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute <u>but also the implication of provisions.</u> A declaration of incompatibility is a***

measure of last resort. It must be avoided unless it is plainly impossible to do so. *If a clear limitation on Convention rights is stated in terms, such an impossibility will arise:* ***R v. Secretary of State for the Home Department, Ex p. Simms*** *[2000] 2 A.C. 115, 132 A-B per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.*

45. *In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in section 3 of the 1998 Act. That is the approach which I would adopt."* (Counsel's emphasis)

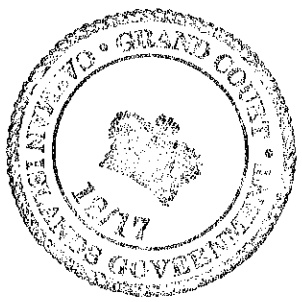
100. The Respondent rounded off this submission by suggesting that the wording of s. 84(6) is not sufficiently clearly incompatible with ***the BOR*** as to warrant a declaration of

incompatibility, and that the court's obligation is to construe that section in so far as is reasonably possible to avoid a declaration of incompatibility. This could be achieved by, for example, reading in the words "*or the Bill of Rights*" at the end of section 84(6).

Re The Legal Aid argument

101. The ***Howard League*** case is of great assistance to the Court. At paragraphs 6, 8-11 (inclusive), Beatson LJ discusses the matter in this way:

> *"6. In the light of the authorities which we consider in section IV of this judgment, there is broadly common ground as to the test required to show systemic unfairness. The threshold is a high one, and requires showing unfairness which is inherent in the system itself and not just the possibility of aberrant decisions and unfairness in individual cases. The dispute between the parties is the application of that test in the circumstances of these claims. Its determination depends on considering the full run of cases that go through the system and whether the existing alternative processes and procedures on which the Lord Chancellor is relying to fill the gap left by the removal of legal aid provides safeguards that are in practice available to ensure fairness in the light of that removal.*
>
> ....
>
> *8. Those within the prison population are there for the purposes of punishment, the protection of the public, and rehabilitation. The claimants' case proceeds on the basis that the prison population is overcrowded and contains very vulnerable individuals. It includes the mentally unwell, those with learning or other disabilities, the illiterate, those who do not or hardly speak English, and young people. The claimants submit that, in different ways, the decision-making process in the five areas from which legal aid has been*



removed is complex and can have such profound consequences for prisoners as to call for the highest procedural safeguards to ensure fairness. The complexity may, for instance, arise because of the need to assess the risk of future dangerousness and to consider assessments by the prison authorities, and the psychiatrists and psychologists who advise them, for which independent expert evidence may be required, or because of technical legal issues such as the disclosure of reports. There are some prisoners who, because of their vulnerabilities, are unable to participate in decision-making effectively, and most cannot pay for assistance.

9. *Ms. Kaufmann QC, on behalf of the claimants, submitted that there is no evidence that assistance by staff and other prisoners in practice provides safeguards that render the system capable of delivering fair decision-making for those vulnerable prisoners. She maintained that prison staffing levels at present mean that there is insufficient capacity to provide the support that is needed and in any event, support by prison officers who, for example, may be providing evidence which a prisoner wishes to contest is not appropriate. She also submitted that the Lord Chancellor's reliance on past-decision appellate or supervisory mechanisms is misplaced as these mechanisms are incapable of remedying a decision where the flaw lies in its inability to deliver fairness. In respect of categorization and placement in CSCs, she submitted that decisions in these areas may interfere with Article 8 of the ECHR, and that exceptional funding ought to be available under section 10 of LASPO, something which the Lord Chancellor does not accept.*

10. *The Lord Chancellor's case is that the flexibility in the system means that the high test for "inherent" or "systemic" unfairness is not met, particularly in the light of the margin of discretion*

allowed to the government in respect of the allocation of scarce legal aid resources. It was submitted that the areas of decision-making that are the subject of this challenge are essentially administrative, procedurally straightforward, and that decision-making is typically by an inquisitorial process.

11. Mr. Eady QC, on behalf of the Lord Chancellor, submitted that vulnerable prisoners are adequately supported within prisons by alternative processes and procedures not involving legal advice or representation, and by family and friends, and that it is not possible for them to engage in the types of decision-making under consideration. He argued that much of the evidence adduced on behalf of the claimants does no more than show that legal representations can play a role. That was not disputed but he submitted that is not the relevant question. The relevant question is whether, in the absence of legal representation, the procedure under consideration is inherently unfair. Mr. Eadie also maintained that mechanisms such as the internal complaints system, the Prison and Probation Ombudsman ("PPO"), Independent Monitoring Boards ("IMB") and civil legal aid for judicial review of decisions affecting prisoners provide substantial safeguards against unfairness."

102. In ***Howard league*** case, the challenge to the removal of legal aid, concentrated on five areas, namely (i) pre-tariff reviews by the Parole Board where the board did not have the power to direct release but advised the Secretary of State whether the prisoner was suitable for a move to open conditions; (ii) categorization reviews of Category A prisoners; (iii) access to offending behaviour courses and programmes; (iv) disciplinary proceedings where no additional days of imprisonment or detention could be awarded; and (placement in close supervision centres.

103. It was held that the high threshold for a finding of inherent or systemic unfairness had been satisfied in the case of pre-tariff reviews by the Parole Board, Category A reviews and decisions as to placement in close supervision centres, particularly where vulnerable prisoners were involved, such as those with learning disabilities and mental illness; but that the threshold had not been satisfied in relation to decisions about offending behaviour programmes or disciplinary proceedings (para 51-56,92, 109,126,137,143,144-147).

104. At paragraph 92, Beatson LJ expands as follows:

> *"92. The Lord Chancellor is responsible for policy on legal aid and for the allocation of resources to it. But, for the reasons given in the authorities as to the role of the court where the issue is the fairness of a system (see para 55 above), whether a system is unfair is a question of law for the court and only a modest margin of appreciation is left to the Lord Chancellor. Bearing this is mind, for the reasons we have given in this section of our judgment, we have concluded that, despite the height of the threshold, the removal of legal aid from pre-tariff Parole Board reviews has resulted in an inherently unfair system. In summary form, our reasons are:*
>
> *(1) Although decisions in pre-tariff reviews are not dispositive in the way that those in post-tariff reviews are, important issues are at stake in them. In practical terms, they affect the liberty of the prisoner in the sense that they materially affect his or her prospects of release, even if they are not directly determinative of release.*
>
> *(2) Pre-tariff reviews and hearings follow the same procedure as post-tariff reviews and hearings for which legal aid remains available. Like post-tariff reviews, they*

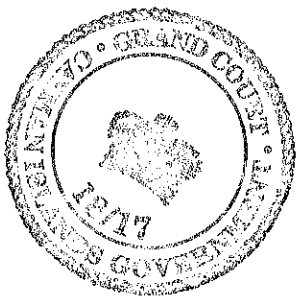
also involve the assessment of risk which can be complicated. The documents often include psychological and sometimes psychiatric reports which a prisoner, particularly one with learning disabilities or mental illness, is likely to find it difficult to grapple. It is likely to be difficult for a prisoner to identify a problem in the prison's assessments. For example, in relation to which assessment tools are the most appropriate for him or her, a matter on which there have been disputes. The case may require independent expert evidence and prisoners may require assistance in dealing with undisclosed sensitive information, both of which have hitherto generally been provided by the prisoner's legal adviser.

(3) The alternatives that exist in the prison system and outside of it are identified and relied on by the Lord Chancellor to fill the gap, do not provide sufficient protection in practice. The only new arrangements in the evidence appear to be the Parole Board's Member Case Management system, which was introduced to address questions identified by the Supreme Court in Osborn's case rather than the removal of legal aid from pre-tariff reviews. The 'Easy Read" guides for prisoners, and the internal guidance for Board members. Mr. Turner's statement (at paras 19-20) refers to Shannons Trust's "Turning Page" programme, which targets illiteracy, but while helping with literacy may assist a prisoner to complete applications, the programme is not designed to assist an illiterate or mentally ill prisoner to participate effectively in the review, and does not provide any guarantee that it will in fact be able to do so in the run of cases."

105. Paragraphs 139 and 143 read as follows:

"(f) Disciplinary proceedings

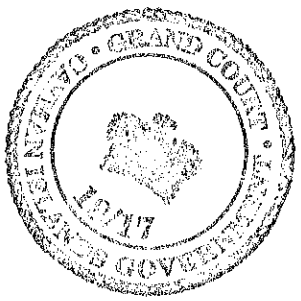
...



139. PSI 47/2011 on prisoner discipline procedures reflects the decision in R v Secretary of State for the Home Department, Ex. P. Tarrant [1985] QB 251 to which we referred at para 43 above. In cases heard by the governor, rule 54 of the Prison Rules provides that a prisoner shall be given a full opportunity of hearing what is alleged against him and of presenting his own case. The governor may impose one of the punishments under Rule 55 and can decide whether the prisoner should be permitted legal representation at a hearing by the "Tarrant criteria" which are set out in PSI 47/2011 at paras 2.10 - 2.15. They are: (i) the seriousness of the charge and of the potential penalty; (ii) whether any points of law are likely to arise; (iii) the capacity of a particular prisoner to present his own case; (iv) procedural difficulties; (v) the need for reasonable speed in making their adjudication, which is clearly an important consideration; (vi) the need for fairness as between prisoners and as between prisoners and prison officers. Where the prison governor exercises his discretion and legal representation is permitted, criminal legal aid will be available for a disciplinary hearing.

.....

143. While we accept the claimants' evidence that Mr. Creighton, for example, has acted in cases where an adjudicator has refused legal representation under the Tarrant criteria but then granted this following the receipt of his representations, it does not follow that legal aid is required for the system to be capable of operating fairly. In our view, in this context the other safeguards in the system are capable of ensuring that the system is not inherently unfair. This is because a complaint or a



claim for judicial review is capable of quashing the decision of the governor not to apply the Tarrant criteria in a prisoner's favour. The likely outcome of such a process would be to recommend that the governor reconsider his decision that the Tarrant criteria do not require legal representation. If judicial review exposed an error in the original decision, then in remaking the decision the governor, unlike the Parole Board, would have the power to apply the Tarrant criteria correctly, and ensure that legal aid was provided." (My emphasis)

UKHO Policy Guidance

106. At the hearing, by consent, two policy guidance documents prepared by the English Home Office were admitted in evidence. I accept as Mr. Smith submitted, in the UK best practices have evolved and it may not be correct to assess the Cayman Tribunal's activities by the same detailed standards. However, both counsel conceded that it would be of some assistance to the Court in arriving at a decision. These documents are as follows:

(a) Asylum Policy Instruction Assessing Credibility and Refugee Status Version 9.0 Publication Date 6 January 2015

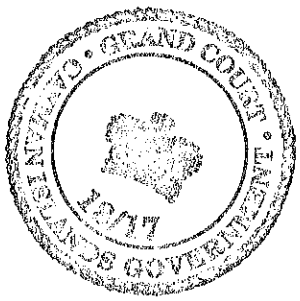
(b) Asylum Policy Instruction, Drafting, implementing and serving asylum decisions. Publication date: 1 May 2015.

107. I will first refer to the Assessing Credibility Instruction: Section 4: *Obtaining Evidence:-*

"4.1 The burden of proof

The burden of substantiating a claim lies with the claimant, who must establish the relatively low standard of proof required (see section 5.2) that they qualify for international protection.

Paragraph 339I of the Immigration Rules emphasis the burden on the claimant to provide evidence and the duty of the caseworker to assess the information put forward "in co-operation with the person". Caseworkers must examine, investigate and research the available evidence and, if appropriate, invite submission of further evidence, although the caseworker may well be in a better position that the claimant to substantiate aspects of the account.



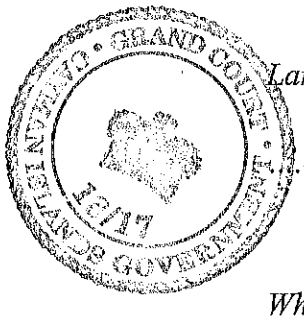
4.2 Evidence to be considered

Evidence includes-but is not limited to:

- *Screening interview (SIR)*
- *Statements made to an Immigration Officer prior to the claim being made, or information supplied when he/she applied for a visa*
- *Preliminary Information Form (PIF)*
- *Asylum Interview (SEF-Statement of Evidence Form)*
- *Other evidence submitted by the Claimant, eg. written statements, newspaper or internet articles, witness statements from family or associates, police or medical reports, political party membership cards*
- *Country of Origin Information (COI)*
- *Files relating to previous applications by the claimant or his/her relatives*
- *Passports: where available, checked for entry/exit stamps, visas, to confirm the claimant's immigration status and history*

'Section 8' type conduct prior to asylum claim being lodged ..

- *Medical reports (including Rule 35 reports completed by detention centre doctors)*
- *Other medical evidence*



Language analysis

4.4.4. Documentary evidence

When considering the weight to attach to any overseas documents, for example, official certificates or arrest warrants, it is for claimants to show that those documents can be relied on ***(Tanveer Ahmed) [2002] UKIAT 000439.*** *Caseworkers must assess whether a document is one on which reliance can be placed after looking at all the evidence in the round. In practice, this means that a document must be considered together with all other evidence, oral and written, that goes towards establishing the particular material fact. It is not appropriate to attach little or no weight to a document without giving reasons based on the available evidence regarding its reliability.*

.....

4.5 Country of Origin Information (COI)

Decisions must be supported by reliable, relevant and referenced country of origin information (COI). Case workers must be familiar with the current CIG reports (or COIS reports) before an interview to ensure that the claimant is given an opportunity to explain any inconsistencies between their account and the COI. If existing products do not provide the COI required caseworkers should send an information request to CPIT.

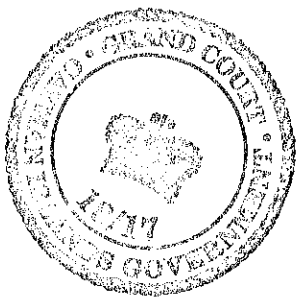
....

Section 5: Determining material facts and assessing credibility

A key element of the decision making process is to assess the validity of any evidence and the credibility of the claimant's statements..

5.1 Identifying the material facts of a claim

A material fact goes to the core of a claim and is fundamental as to why an individual fears persecution. For example, someone who claims to have been detained and ill-treated because of their political or religious beliefs must show that they genuinely hold such beliefs and that they suffered detention and harm.

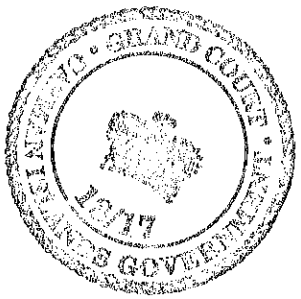


Examples of material facts can include a claimant's personal circumstances, e.g. Gender, nationality, ethnicity, membership of a political party, religious beliefs, sexual orientation, and past experiences of ill-treatment e.g. arrests, period of detention and torture, locations and episodes of threats or violence at the hands of state or non-state agents.

This list is not exhaustive and the material facts will depend on the nature of the asylum claim. It is for the caseworker to distinguish the facts material to the claim and those which are not. For example, someone may have a record of political dissent and ill-treatment, under a previous regime. While not irrelevant to the credibility of the claimant's beliefs, it is the experiences at the hands of the current regime which are most relevant.

Assessing the credibility of past and present events is an important aspect of assessing a claim, because if a claimant has already been subjected to persecution or serious harm, or direct threats of persecution or serious harm, paragraph 339 K of the Immigration Rules makes it clear that this will be a serious indication of a well-founded fear of persecution or real risk of suffering serious harm, unless there is good reason to believe that such ill-treatment will not be repeated. But the assessment of future risk is not one which should have been made at this stage.

Once the material facts of the case have been identified, it is then necessary to assess their credibility against the correct standard of proof. Material facts must not be considered in isolation; the evidence must be considered in the round, and the key issues assessed in context.



5.2 Assessing credibility: the low standard of proof.

The level of proof needed to establish the material facts is a relatively low one - a reasonable degree of likelihood - and must be borne in mind throughout the process. It is low because of what is potentially at stake - the individual's life or liberty - and because asylum seekers are unlikely to be able to compile and carry dossiers of evidence out of the country of persecution.

'Reasonable degree of likelihood' is a long way below the criminal standard of 'beyond reasonable doubt', and it less than the civil standard of 'the balance of probabilities (i.e.'more likely than not'). Other terms may be used: 'a reasonable likelihood' or 'a real possibility' or 'real risk'; they all mean the same.

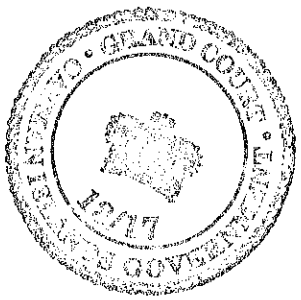
The question to be asked is whether, taken in the round, the caseworker accepts what he or she had been told and the other evidence provided. In practice, if the claimant provides evidence that, when considered in the round, indicates that the fact is 'reasonably likely', it can be accepted. A caseworker does not need to be 'certain' 'convinced', or even 'satisfied' of the truth of the account-that sets too high a standard of proof. It is enough that it can be 'accepted'.

....

5.4 A STRUCTURED APPROACH TO CREDIBILITY ASSESSMENT

The case worker should focus first on the credibility of the claim rather than the personal credibility of the claimant.

As is further elaborated on below.., if after looking at all the evidence and keeping the relatively low standard of proof in mind, the claimant's statements and other evidence about the facts being established can be accepted if they are:



- *Of sufficient detail and specificity*
- *Internally consistent and coherent (to a reasonable degree) consistent with specific and general COI*
- *Consistent with other evidence*
- *Plausible*

All indicators must be applied, and the credibility of the account examined in the round (i.e. looking at the case as a whole and mot just considering a fact in isolation) to determine whether the low standard of proof has been met and the facts accepted, rejected, or left as uncertain pending a decision on whether the benefit of the doubt should be given. It will be then that the claimant's personal credibility will be particularly relevant.

...

5.6.5 Benefit of the Doubt

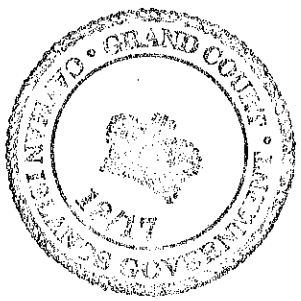
Having reviewed all the evidence in the round, and if there are material facts that remain in doubt, caseworkers should consider whether to apply the benefit of the doubt to those claimed facts.

The notion of the benefit of the doubt allows a finding to be made on whether to accept or reject a material fact or the facts as a whole and where the evidence in one or more areas is not sufficient to enable acceptance of those facts. Paragraph 339 L of the Rules states that:

'Where aspects of the person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

i. *The person has made a genuine effort to substantiate his asylum claim or establish that he is a person eligible for humanitarian protection or substantiate his human rights claim;*

ii. *All material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;*



iii. *The person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;*

iv. *The person has made an asylum claim or sought to establish that he is a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, unless the person can demonstrate good reason for not having done so; and*

v. *the general credibility of the person has been established.'*

If a claimant satisfies all five criteria, the caseworker should always give the benefit of the doubt, bearing in mind the relatively low threshold applicable to asylum cases, Much may depend on the 'general' or personal credibility of the claimant.

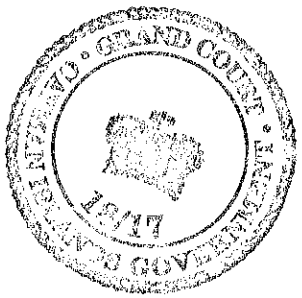
.....

Section 7: Assessing Convention reasons

Only those with a well-founded fear of persecution on account of one or more Convention reasons (i.e. race, religion, nationality, and membership of a particular social group or political opinion) should be recognized as refugees. It affords protection in well-defined circumstances where a person faces a real risk of serious ill treatment on a discriminatory basis. These circumstances often overlap.

Nevertheless, the Refugee Convention is a living humanitarian instrument and the interpretation of what constitutes persecution or the identification

of a particular social group (for example) is not fixed for all time. Where protection needs have been established, caseworkers should be wary of rejecting claims as non-Convention based, without careful examination of whether there is in fact a connection to a Convention ground and thus a valid claim to refugee status. This is most likely the case where membership of a particular social group could be established.



If a claimant is not a refugee and does not qualify for asylum, but there is a well-founded fear of persecution (or real risk of serious harm) for a non-Convention reason, caseworkers must consider granting Humanitarian Protection. For guidance, see AI on Humanitarian Protection."

(My emphasis)

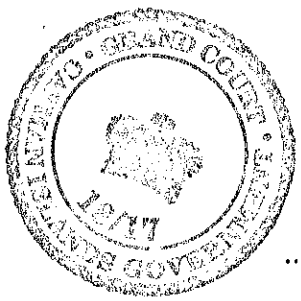
108. I now turn to the Asylum Policy Instruction on drafting the decision. Sections 3.1, 3.3, 7.1 and 7.2 are particularly helpful, and state as follows:

*"**Section 3: General Drafting Principles***

3.1 Key points

- *caseworkers must record the consideration of the claim and the reasons for the decision in every case*
- *if asylum is refused, a 'Reasons for Refusal Letter' (RFRL) must be produced*
- *if any form of leave is granted, a Consideration Minute must be drafted (in addition to the RFRL if applicable)*
- *caseworkers must complete all documents in the Document Generator (DOC GEN)*
- *caseworkers must follow the relevant Implementation Minute Sheets for the case type they are implementing*
- *a caseworker trained for the purpose of considering asylum claims must prepare the entire RFRL from beginning to end .....*

- *each paragraph in the RFRL must be numbered to assist the claimant and the Court - all sources must be correctly referenced (e.g. country information and guidance report: security, Afghanistan (August 2014) but can be abbreviated in subsequent uses*
- *caseworkers must generally draft correspondence to the claimant, which must be professionally drafted and customer focused*



.....

3.3 Standard paragraphs and templates

Standard templates only contain the relevant standard wording, they are not complete paragraphs and any optional or free text must be tailored accordingly. All current approved standard wordings and templates are on DOC GEN or within relevant guidance documents. The RFL standard paragraphs are available in DOC GEN. Caseworkers must only use these standard words in decisions.

.....

Section 7: Preparing Decision paperwork

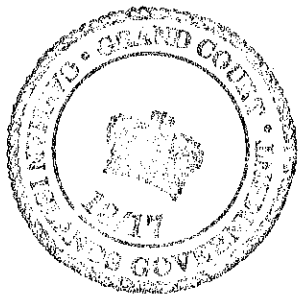
This section applies to the caseworker making the asylum decision who must refer to the implementation minute sheets for the correct documents and paperwork to serve with each decision.

7.1 ***The basis of claim***

All Refusal Letters (RFRLs) and consideration minutes must include a basis of claim. This should be a brief summary of the key facts and events material to the claim that succinctly sets out the reasons why the individual has claimed asylum. It must not include extensive detail that is subsequently referred to in the decision, details of family members in the UK (other than dependents in NSA cases), any analysis of the merits of the

claim or lengthy details such as objective evidence (e.g. country reports) or case law.

Caseworkers must state briefly who the claimant fears, what they say will happen to them on return to their country of origin and why they believe this to be the case. The key events-what happened- can be cited together- for example, 'you claim to have been detained on several occasions between [date] *and* [date].' *There is no need to follow the sequence that appears in the interview; assimilate relevant information and write it down in a correct and logical order.*



When alternative accounts have been provided, only the key differences need to be recorded on the basis of claim section. Explanations of discrepancies provided by the claimant should be addressed as part of the substantive consideration. A brief note of the claimant's immigration history should be included; this must state clearly the date asylum was claimed. Paraphrasing must be avoided where possible (writing what you think the claimant meant), the claimants own words should be used to avoid variations in meaning and which may introduce a degree of inaccuracy.

Human rights claims

Any human rights claims raised either by the claimant (explicit) or identified by the caseworker (implied) should be stated briefly but there is no need to address ECHR claims (including Article 8 issues) in the consideration minute where asylum is granted.

.....

The content of the Reasons for Refusal Letter (RFRL)

Caseworkers must follow the instructional letter in the Templates. The RFRL must:

- *state the basis of claim.*
- *be written clearly and concisely, addressing all issues material to the claim*
- *be in accordance with the law and relevant policy guidance, any case law quoted must be in context, the relevance explained and must apply to the individual circumstances of the claimant*
- *subject to the need to express legal requirements accurately, avoid using over-complicated words or sentence structure given that English is unlikely to be the claimant's first language*
- *address key aspects of the asylum claim, setting out the consideration of the claim*
- *be accurate and clear, the RFRL is the document which informs the claimant of the reasons for the decision taken on behalf of the Secretary of State*
- *ensure any important names of organisations, political parties or religious groups etc. are initially written in full followed by the abbreviation in brackets*
- *ensure that where there is a right of appeal, and this is being exercised, the Home Office presenting officer is provided with information on which they can base their submission to the immigration judge*

....."

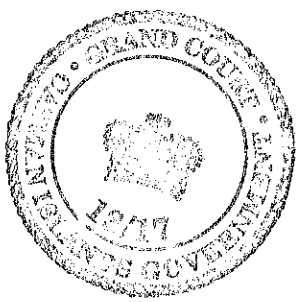
The Further Submissions on The Immigration Law (2015 Revision) and the Legal Aid Law 2015 – Compatibility with the Constitution

109. Following the decision of the Honourable Chief Justice in the landmark decision in ***Chantelle Day & Vickie Bodden Bush v Governor of the Cayman Islands & Ors*** (Causes G111 and G184 of 2018), delivered 29 March 2019, the Court invited the parties to make further submissions. In particular, I invited the parties to make submissions on whether: (i) section 84(6) of the ***Immigration Law (2015 Revision)*** and (ii) sections 4

and 5 of the ***Legal Aid Law 2015*** should be consider Laws brought in after the ***Cayman Islands Constitution Order 2009*** came into effect, or whether they should be considered existing laws. I am grateful to both parties for their prompt and helpful submissions in this regard.

110. In the **Day** case, the learned Chief Justice held, amongst other matters, that section 2 of the ***2008 (Marriage Amendment) Law*** was a law which was an existing law for the purposes of section 5 of the ***Constitution Order.*** He found that the definition of marriage as "*the union between a man and a woman*" was unconstitutional and stood to be modified or altered pursuant to the court's duty under section 5.(1) of ***the Constitution Order.*** So that section 2 of the ***Marriage Law*** now reads ""*marriage" means the union between two people as one another's spouse."* The Chief Justice's decision modifying ***the Law*** has been stayed by the Court of Appeal pending determination of an appeal by the Government.

111. Mr. Smith of the Attorney General's Department submitted that section 84(6) is worded identically to section 79(6) of the ***Immigration Law 2003***, i.e. Law 34 of 2003, and an identical enactment is included in every Immigration Law Revision between 2006 and 2012. As Counsel points out, the introductory wording to the 2015 Revision states in relevant part, as follows:



"Law 34 of 2003 consolidated with Laws 13 of 2005, 3 of 2006, 35 of 2006, 3 0f 2007, 17 of 2008, 15 of 2010, 31 of 2010, 12 of 2011, 24 of 2011, 27 of 2011, 2 of 2012, 12 of 2013, 23 of 2013 and 6 of 2015.

Revised under the authority of the Law revision Law (1999) revision)

Originally enacted-

Law 34 of 2003 - 16th December, 2003

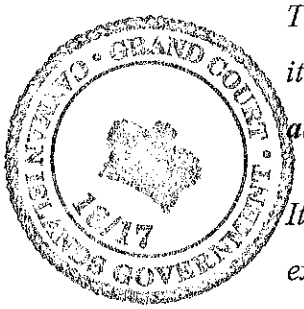
...Consolidated and revised this 2nd day of July, 2015."

112. Reference was also made to the Law revision Law (1999 Revision) which states as follows:

> *"3. The Governor may authorize the* ***re-publication of any existing Law*** *in amended or revised form as hereinafter provided and such law shall in its revised form be, for all purposes, the only proper version of such law in the Islands.*
>
> ***Provided that nothing in this section shall be taken to imply any power to make any alteration or amendment in any manner of substance of any law or part thereof.***
>
> *In authorizing the republication of any law in revised from the Governor may permit-*
>
> .....
>
> *(c) alteration of the order of sections in any law and, in all cases where it may be necessary to do so, the renumbering of the sections..."*

113. Reference was made to the decision of Lord Diplock in ***Inland revenue Commissioners v Joiner*** [1975] 3 All E.R. 1059 where he stated:

> *"**The purpose of a consolidating Act is to remove this difficulty** (the need to refer to and fro and back and forth between ever-increasing numbers of different statutes in order to discover what a particular provision of any of those statutes means...)* ***by bringing together in a single statute all the existing statute law dealing with the same subject matter*** *which forms the general context in which the a particular provision of the Act falls to be construed, so that it will no longer be necessary to seek that context in a whole series of amended and re-amended provisions appearing piecemeal in earlier statutes.*



This is the only purpose of a consolidation Act; this is the only 'mischief' it is designed to cure. ***It is true that a consolidation Act is not intended to alter the law as it existed immediately before the Act was passed."***

It was submitted that in the premises, section 84(6) should be treated as an existing law under section 5(3) of the Constitution Order.

114. Mr. Smith points out that section 84(6) has since been repealed by section 134(2) of the ***Customs and Border Control Law 2018***, section 111(6) of which Law has the same purpose and effect as section 84(6). The Respondent reiterates its argument that no qualifications modifications, adaptations or exceptions are necessary to bring section 84(6) into conformity with the Constitution. These arguments also apply to section 111(6). Briefly, it is argued that the sole remit of the Respondent under the 2015 Revision or the refugee Protection Appeal Tribunal (under ***the 2018 Law***) is to determine whether the appellant qualifies for asylum under the refugee Convention, and there are other avenues available for the pursuit of other rights under Part 1 of the Constitution.

115. As regards the ***Legal Aid Law 2015***, section 43 clearly and unambiguously repeals the prior 1999 Law and consequently the Respondent does not consider this to be an existing law for the purposes of section 5 of the Constitution. The Respondent repeats that sections 4 and 5 of ***the Law*** are not incompatible with section 7 of the Constitution or the Refugee Convention.

116. Mr. David articulates the Appellants' position as follows:

i. The ***Legal Aid Law*** is not an existing law as defined by section 5 of the Constitution. Therefore if the Court consider the restriction placed on the Appellants from obtaining legal aid by section 4 of the ***Legal Aid Law*** amounts to a breach (for example) of section 7 of ***the BOR*** then the only remedy that the Court has is make a declaration of incompatibility and grant the Appeal.

ii. Section 84(6) of the ***Immigration Law*** is an existing law and therefore if the Court finds that this section is unconstitutional then it must remedy the section. (Counsel's emphasis)

iii. Section 111(6) of the ***Customs Law*** should be regarded as "*an existing law*" and therefore any changes that apply to section 84(6) of the ***Immigration Law*** should also apply to section 111(6). If however the Court believes that section 111(6) of the ***Customs Law*** is not an existing law, but that the section is still unconstitutional, then the Court must make a declaration to that effect.

DISCUSSION AND ANALYSIS

The Immigration Law, section 84(6)

117. In my judgment, the section is somewhat unclear, as the Refugee Convention is a rights-based instrument and the Bill of Rights is paramount. In my view, applying the interpretation obligations set out in section 25 of the Constitution, s.84(6) should be read as suggested by Mr Smith, which is to construe the sub-section as ending with the words "*against the refusal on the grounds that requiring him to leave the Islands would be contrary to the Refugee Convention"* followed by the words "*or Bill of Rights*". This gives the section a possible meaning that is compatible with ***the BOR***.

118. Alternatively, even if section 84(6) does limit the powers of the Tribunal to the determination of Refugee status, this does not render it incompatible with ***the BOR*** because such breaches that do not overlap with the Refugee Convention can be considered under other provisions of ***the Law*** and be the subject of humanitarian treatment.

119. Whilst the Tribunals here have a certain amount of expertise, that is not the same as saying that there is a vast experience amongst the members of the Tribunal, particularly because there has not been a relatively heavy volume of work. This is a prolifically growing area of the law. Indeed, the UK Home Office Guidance that has been referred to

shows that an evolution of best practices has taken place and developed over time, and is based on experience, no doubt after some trial and error, and learnt the hard way.

The Legal Aid Law

120. It is the case that the Refugee Convention provides that a refugee should have free access to the courts of law. However, in my judgment this does not amount to an obligation on the Cayman Islands to provide legal aid to asylum seekers at the Tribunal stage. As stated in the ***Howard League*** case, "*The threshold is a high one, and requires showing unfairness which is inherent in the system itself and not just the possibility of aberrant decisions and unfairness in individual cases. The dispute between the parties is the application of that test in the circumstances of these claims*".

121. Further, as the European Court on Human Rights reminds in ***NJDB v United Kingdom***, the right of access to a court is intended to guarantee practical and effective rights in view of the fundamental importance of a fair trial. However, that right of access is not absolute. Additionally, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party. The important thing is that there be a reasonable opportunity given for each side to present their case under conditions that do not place him or her at a significant disadvantage. The Court has to look at the proceedings as a whole, in order to determine whether the inability to obtain legal aid denied the Appellants free access to a court.

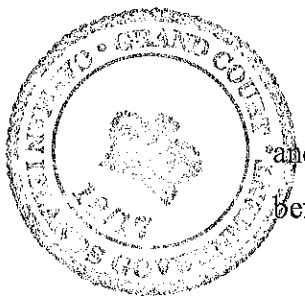
122. As the Respondent points out, at none of the appeal hearings was the Chief Immigration Officer (**"the CIO"**) represented and that therefore the Appellants were not at any, or any substantial disadvantage, *vis-a-vis* the CIO due to a lack of legal aid. The Appellants all had the assistance of a translator and were permitted to present their case and supporting evidence to the Tribunal. In addition, three of them were also represented by Dr. Diaz, acting as McKenzie friend.

123. In making his argument that the Court should assess the proceedings as a whole, by including the present appeals where the Appellants do have the benefit of legal aid, Counsel sought to make the point that the Court is able to substitute its own decision for that of the Respondent using its powers under Order 55 Rule (7)(5) if it sees fit. The Appellants therefore, it was argued, cannot be said to have been denied their "*right to a court*", or section 7 ***BOR*** rights, due to the lack of legal aid.

124. Order 55 Rules 7(5) and 7(7) read as follows:

> *"**Powers of Court hearing appeal (O.55, r.7)***
>
> *7. ...*
>
> *(5) **The Court may give any judgment or decision or make any order which ought to have been given or made by the Governor-in-Council, the Registrar of Lands, tribunal or other person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.***
>
> .....
>
> *(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned."* (My emphasis)

125. However in this case, and it appears to have been agreed by Counsel on both sides early in the proceedings, that the Court would not be deciding for itself whether the Appellants would be granted asylum. If the decisions of the Tribunal are found to be flawed the Court will remit them for hearing by the Refugee Protection Appeals Tribunal, with directions as to matters that must be expressly considered, and form part of the decisions,



and so that they could reconsider the matter on the basis of all relevant material placed before them.

126. The separation of powers recognizes that the choice of an acceptable system for dealing with asylum seekers is the choice of the executive, and in making its choice it is entitled to weigh political and other imperatives, and competing needs for public funds. However, as stated and discussed in some of the cases on this topic, there has to be an irreducible minimum of due process. Further, the question of whether what has been provided is a fair system is a question of law for the courts – see the decision of the English Court of Appeal in **R on the application of the Refugee Legal Centre and Secretary of State for the Home Department** [2004] EWCA Civ 1481, paragraphs 7, 8 and 15.

127. It is true that under the present system, if there has been unfairness in the interview process, and the approach by the Tribunal, the Appellants and others like them only have access to public funding when seeking an appeal to the Grand Court (in some countries, or stages, the process is by way of judicial review), thereafter. However, there is in my judgment, nothing about the system itself up to this point that has been demonstrated to be unfair. In my judgment, any potential unfairness is susceptible to control which the law provides by way of access retrospectively, to the appeal to the Grand Court if the wrong approach or due process has not been observed. It is to be remembered that the process in the Cayman Islands involves an appeal to the Grand Court, and whilst it is in essence a judicial review type appeal, it is not simply limited to the aspects of the process whereby this Court examines the lawfulness of the decision of the Tribunal only in the sense of whether it is illegal, irrational or whether there has been procedural impropriety and a lack of proportionality in approach. This Court has the power, and duty, to remit if it so sees fit the matter, with directions as to the proper approach to be taken and retains some control over issues of fact.

128. The other aspect of control is to ensure that at earlier stages, the persons participating in the asylum process are properly trained, and subject to ongoing training, as this is a massive and growing area of the law, all over the world. That is because an appellant has

rights to a fair appeal, but his full set of rights includes an initial right to a fair hearing and to an initial decision fairly arrived at.

129. There is nothing, in my judgment, sufficient to satisfy the high threshold as set out in the ***Howard League*** decision.

130. The Respondent submitted, that in light of these general principles, neither Article 16 of the Refugee Convention nor Section 7 of ***the BOR*** can be construed so as to mean that the government is obliged to grant legal aid to every asylum seeker at each and every stage of their application and subsequent appeal process. There is no ideal in this world, and public funds are scarce. There must be the balance between fulfilling the Cayman Islands' Refugee Convention obligations and the many needs competing for the allocation of scarce public funds.

Breach of section 19, Natural Justice and *BOR*

131. In my judgment, the Tribunal has committed important errors in failing to state the burden and standard of proof clearly. These are basic matters that must be clearly expressed and communicated. The use of the term "*on balance*" has to be viewed in context, thus whilst in some circumstances it could mean things were considered in the round, its use is confusing because nowhere did the Tribunal go on in the decisions to state the appropriate standard of proof. Using the term "*on balance*" without stating the proper test does suggest that they have adopted a balance of probabilities test which would mean that they have placed a higher standard or burden on these Appellants and this amounts to an error of law. The test they should be applying for well-founded persecution, i.e. *"a reasonable degree of likelihood"* or *"a real and substantial risk"* of occurrence/re-occurrence – ***R v Secretary of State for the Home Department Ex P Sivakumaran*** [1988] A.C. 958 is a lower one.

132. The problem was compounded because there was a lack of directions as to the definition of persecution, when prosecution can amount to persecution, the special care that has to

be given to aspects of the credibility of asylum seekers, past persecution and imputed political belief.

133. In my judgment, although the ***Legal Aid Law*** is not incompatible with the Appellants' rights to a fair trial, the combination of the lack of clarity and directions being shared with the Appellants, and the fact that they do not have access to legal aid at the stage before court, make it all the more important for the Tribunal Members to be knowledgeable, and to keep undergoing training and evaluation in this complex area. Indeed, the Judges who will be asked to deal with these complex matters will also need to have specialist ongoing training.

134. I am unable to conclude that the errors made by the Tribunal have caused no miscarriage of justice and thus the matters must go back for proper consideration.

Disposition

135. In sum, the Appeals are all allowed and are remitted for hearing before the Refugee Protection Appeals Tribunal, with the directions and guidance that I have given.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT