IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G423 OF 2013

BETWEEN:

CARMEN JACK-CHOWTEE

Applicant

AND

IMMIGRATION APPEALS TRIBUNAL

Respondent

Appearances: Mr. Steve McField of Steve McField & Associates for the Applicant

Ms. Reshma Sharma, Crown Counsel, for the Respondent

Before:	**Hon. Justice Richard Williams**
Hearing:	**12 January 2015**
Final written submissions received:	**20 February 2015**
Draft Judgment circulated:	**27 February 2015**
Final Judgment:	**6 March 2015**

JUDGMENT

1. The Applicant is a 46-year old Jamaican national who has resided in the Cayman Islands since 1997 gainfully employed, primarily as a domestic helper until 2013. She married in 2005 and has a 10-year-old son.

2. The application arises, as described by the affidavits of Mrs. Carmen Jack-Chowtee ("the Applicant") sworn on 26 November 2013 and 11 March 2014 and the affidavit of Buck Grizzel, Deputy Chairman of the Immigration Appeals Tribunal ("IAT") sworn on 25 February 2014.

First Application for Permanent Residence

3. In 2005 the Applicant first applied to the Caymanian Status and Permanent Residency Board ("the Board") for permanent residence, with both her husband and son being named as her dependents. The Board in its assessment considered the Points System which requires a minimum of 100 points before a grant of permanent residence can be made. In August 2007 she was notified by the Board that her application was refused as she had only scored 90 points. When applying she was seeking points under the heading Financial Assessment claiming that she was making an investment in property in the Islands. It was evident to the Board that she had not purchased the property and, as it transpires, she did go on to purchase the said property.

4. The Applicant unsuccessfully appealed that decision in August 2007 to the IAT. When the appeal was heard in September 2011 she was awarded only 5 additional points, making a total of 95 points. She was notified of the IAT's decision by letter dated 10 May 2012. She then applied for a one-year work permit in June 2012, which she continued working on until 15 May 2013.

Application for Permanent Residence which is the Subject of these Proceedings

5. On 7 May 2013 the Applicant made a new application for permanent residence to the Board pursuant to section 30(1) Immigration Law (2012 Revision) ("the Law"), again naming her husband and son as her dependents. As stated by Mr. Grizell, having regard to section 30(4) of the Law, "*the Board was required to consider her application by taking into account, amongst other things, the overall suitability of the applicant measured against the criteria set out in paragraph 2 of section 30(4) as well as the scores obtained by the Applicant when assessed according to the criteria set out in the points system in the Second Schedule of the Immigration Regulations (2010 Revision) ("the Regulations").* She was again required to obtain 100 out of a maximum of 205 points.

6. By letter dated 21 June 2013 the Applicant was informed that the second application was deferred for her to obtain information, namely an affidavit from a Mr. Pierre Foster or his agent to:

(i) confirm ownership of property Block 38C Parcel 200 Lower Valley by her and her spouse; and

(ii) show the stage of construction by producing a report of pictures and evaluation of the proposed home.

The same letter made clear that she had 10 days to submit the affidavit and warned that a failure to do so could result in her application being denied. It was appropriate for the Board to request her to provide this information. This was especially so as the Board noted that the property then being relied upon was not the same property that had been

referenced in her 2005 application, and which she had not gone ahead and purchased. In fact, it is to the credit of the Board that they deferred the application and made the request as they were affording an opportunity to the Applicant to provide the information and thereby to put her application in order before it was finally determined.

7. Unfortunately, the Applicant failed to provide the requested information by the due date. The assertion made in a letter dated 15 July 2013 sent to the IAT by the Integrated Immigration and Concierge Services on the Applicant's behalf was factually inaccurate. The Applicant conceded that she had been wrong at paragraph 10 of her affidavit sworn on 26 November 2013 when she claimed that the transfer of land form dated 30 August 2013 had been presented to the Board. However, she did provide the Board with a letter from Scotiabank & Trust (Cayman) Ltd. dated 10 April 2013 which confirmed that she had qualified for a pre-approved residential mortgage in the amount of CI$190,000. The letter stated that it was a conditional offer based on information provided to the bank in her application made on 27 March 2013, it was valid for 120 days and it contained 17 conditions. The letter also stated that *"due to the length of time in completing construction we cannot provide a formal personal credit agreement at this time. We have provided this pre-approval in lieu of a formal personal credit agreement."* It appears not to be disputed that the Board was also provided with the agreement of sale with Mr. Pierre Foster in relation to the property dated 12 April 2013 (which contained details of $2,000 deposit which had been paid) and a building contract showing an intention to build on the land. Regrettably, the above documents do not prove conclusively the ownership of the property or completion of the transaction, but more an intention to

purchase the property. The Board could not be expected to be fully satisfied the Applicant and her husband were the owners of property, even though it had inferred a willingness to be so if the information they had requested on 21 June 2013 had been forthcoming. The Applicant and her agents/representatives had an obligation to provide that information to the Board, especially having regard to the Board's request in the deferral letter of 21 June 2013. With hindsight, it would have been wise for the Applicant to notify the Board of her predicament and to have sought an adjournment of a few months until the conveyancing had been completed and when she would then have been able to file the requisite verifying documentation from the Land Registry in support of her application.

The Board's Decision

8. The application went before the Board on 4 July 2013. The Board awarded the Applicant only 84 points, 16 short of the required 100 points. The Board held that, "*in the absence of confirmation of ownership of the property by the Applicant as well as a previous purchase history, including a failure to follow through on an earlier purchase agreement) it was not minded to award points*" under Factor 4 of the Points System – for "Financial Assessment." In a letter dated 16 July 2013 the Board informed her that her application had been refused and, as required, of her right to appeal and the time limit for doing so.

9. The Applicant filed a Notice of Appeal dated 15 July 2013. The Board prepared an appeal statement dated 1 August 2013 setting out the reasons for its decision, which it provided to the Applicant on 11 September 2013.

The Appeal to the IAT

10. On 12 September 2013 the Applicant wrote to the IAT seeking an early hearing of her appeal, stressing the difficulties her family was encountering, including her having a mortgage which she had to honour. The IAT complied with her request and she was informed on 24 September 2013 that her appeal would be heard on 26 September 2013 and that she could attend to address the Tribunal. She was also afforded the opportunity to submit to the IAT an affidavit by 25 September 2013 setting out any changes in her circumstances as related to her application. On 25 September 2013 her agents submitted her grounds for appeal.

11. As part of the appeal the IAT was asked to consider a draft copy of the transfer of land certificate dated 30 August 2013 in her and husband's name. Regrettably, this was still a 'draft,' as it had not been filed with or endorsed by the Registrar of Lands. This was not conclusive evidence that ownership had actually transferred, but was evidence of the parties' agreement to transfer. The IAT was asked to consider the certificate of fitness for occupancy of the said property dated 6 August 2013. This document does not prove ownership but simply that construction work on the property had reached such a stage that the property was fit for occupancy. The IAT was asked to consider the residential full appraisal report/photographs of the property; again this is not proof of ownership of the

property. Finally the IAT was asked to consider an extract from the Land Register dated 5 August 2013, however, this was not helpful to the Applicant as it still showed Mr. Pierre Foster as being the proprietor. The IAT cannot be criticised, even based on its consideration of the fresh evidence before the IAT, for finding that the Board had not been unreasonable and had not come to the wrong conclusion that it could not be sufficiently satisfied that the Applicant owned property for which points could be awarded.

12. At the appeal an attorney at law, Mr. Brady, appeared on behalf of the Applicant and he was permitted to make submissions on her behalf. The Applicant noted at paragraph 11 of her affidavit sworn on 7 March 2014 that Mr. Brady at the hearing "*was given every opportunity to provide all relevant evidence to the Respondent*" and that "*he passionately appealed to the chairman to accept the new pieces of evidence that he had presented.*" It is therefore evident that the IAT considered the further materials put before it and gave Counsel ample opportunity to make representations before it. The IAT noted that the land transfer document had not been certified by the Registrar of Lands as having been received and that the submitted extract from the Land Register did not show the Applicant as being the proprietor. The IAT was not satisfied that the evidence, including the recently produced evidence, conclusively demonstrated the Applicant's ownership of the property. Importantly, the latest extract from the Land Register for the property shows that she and her husband were the proprietors as of 18 September 2013 and the Transfer of Land Form registered at the Land Registry on 18 September 2013 (certified on 2 October 2013), both of which have been exhibited before me, were not placed before the

IAT. Again, with hindsight the Applicant would have been wise to have sought to adjourn the hearing until she had these verifying documents to hand.

13. The IAT carried out part one of a potential two-step appeal hearing process. I was informed by Crown Counsel that this practice has been in place since 2010, and is based on a Guidance Note received from Lord Pannick Q.C. following the judgment of Smellie C.J. in ***Ford v Immigration Appeals Tribunal*** [2007 CILR 258]. Mr. Grizzel stated at paragraph 27 in his affidavit sworn on 25 February 2014 that:

> *"...the appeal process is a two-step test which requires the Respondent to first consider whether or not grounds of appeal had been made out before moving to the second stage of the test, namely to a hearing de novo wherein changes in circumstances may be taken into consideration by the Respondent. In the instant case the Respondent considered that insufficient grounds had been put forward on behalf of the Applicant to show that the Board's decision was erroneous in law, unreasonable, contrary to the principles of natural justice or at variance with the Regulations. As such it did not hold a hearing de novo at which time it would have considered the new information before it, namely the valuation of the house and property and the Certificate of Occupancy."*

14. Mr. Grizzel went on to say paragraph 29 of his affidavit:

> *"Pursuant to section 12(6) of the 2012 Law the Respondent may regulate its own procedure. It is the Respondent's policy to consider the Appeal Statement by the Board, which gives the Board's reasons for its decision, along with any defence submitted by the Board and all documentation provided by the appellant, including new information. As a matter of procedure, at the initial grounds stage the Board will look at, but not*

consider information that was not before the Board when it made its decision."

Despite this statement as to the approach of looking at but not considering information not before the Board, it is evident from paragraph 11 of the Applicant's affidavit sworn on 7 March 2014 and the affidavit of Mr. Grizzel that the IAT reviewed the documents referred to by Mr. Brady when he was making his oral representations to it.

The IAT's Decision

15. The IAT considered that the Applicant had not made out any basis for interfering with the Board's decision not to award her any points for property ownership under the heading Financial Assessment. The IAT did not find that, on the materials presented to the Board, the points allocated were unreasonable. Having reached that decision they concluded that the grounds of appeal had not been made out and therefore there was no requirement for a full hearing *de novo*. Accordingly, the IAT did not take the matter to the second stage, namely the appeal then proceeding by way of rehearing *de novo*. By letter dated 14 October 2013 the Applicant was notified by the IAT that insufficient grounds for appeal had been made out and that appeal had been dismissed.

The Present Application

16. I have before me a Notice of Originating Motion dated 26 November 2013 in which the Applicant seeks to appeal the above-mentioned 14 October 2013 decision of the IAT. The Applicant indicated at the mention hearing held on 10 February 2014 that she wished to only proceed on the first five grounds of appeal set out in the Notice. Those grounds are:

"(i) *The Immigration Appeals Tribunal in reviewing all the Applicant's documentation to support the allocation of additional Points to receive Permanent Residence and Employment Rights failed to take relevant considerations into account.*

(ii) *The Immigration Appeals Tribunal in reviewing the Appeal Statement dated 30 August 2013 which outlined the reasoning behind the decision to refuse the grant of Permanent Residence to the Applicant together with the Grounds of Appeal dated 26th September 2013 and the Applicant's submissions failed to exercise its statutory discretion reasonably toward the Applicant.*

(iii) *The Immigration Appeals Tribunal in hearing the Applicant's appeal failed in its statutory duty to exercise its discretion reasonably to take into account the fresh evidence and the change in circumstances of the Applicant that had arisen before/and or at the time of the Appeal hearing.*

(iv) *The Immigration Appeals Tribunal erred in law as it failed to treat the Applicant's appeal as a rehearing of the Applicant's application for Permanent Residence and Employment Rights.*

(v) *The decision of the Immigration Appeals Tribunal in all the circumstances of the case and the documents before it, failure to award the Applicants one hundred (100) points of the system is so unreasonable that no reasonable tribunal seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case would have refused the Applicant Permanent Residence and Employment Rights."*[1]

[1] These grounds of appeal are quoted straight from the Notice of Originating Motion and the original grammatical and spelling errors have not been corrected.

17. The prayer in Notice set out six orders which were then being sought. The Applicant concedes that only the first two can be properly sought at this hearing, namely:

(i) an order setting aside the decision of the IAT; and

(ii) an order that the IAT again review the Applicant's appeal from the decision of the Board.

Procedural Background to the Present Application

18. At a hearing of the Applicant's summons for interim relief dated 27 November 2013, by consent, the Court ordered that she and her husband be allowed to remain and work in the jurisdiction pending the final determination of the appeal. The matter was set down for a mention hearing on 10 February 2014 at which the Court was informed that a final hearing had been listed for 24 March 2014 and at which the Court gave a number of case management directions. The Court made it clear that the Applicant was to file her skeleton argument 6 clear working days prior to the hearing, and the Respondent was to file and serve the same 3 working days in advance of the hearing. The bundle was to be filed 3 working days before the hearing. The hearing was rescheduled to 23 April 2014 but, due to ill-health, Mr. McField was unable to attend the hearing or to then comply with the direction in relation to the filing of the skeleton argument. A new hearing date had to be obtained and the long delay in the hearing coming on was caused by Mr. McField indicating that he was unavailable for any hearing until early 2015.

19. In compliance with the Court's directions of February 2014, the Respondent filed its skeleton argument on 7 January 2014. It did so even though it had not received the skeleton argument from the Applicant. Regrettably, the Applicant failed to comply with the order as her skeleton argument and the bundle filed only one working day prior to this hearing. Ms. Sharma took no issue with the non-compliance and was content for the appeal to proceed.

20. At the close of the hearing held on 12 January 2015, I indicated to the parties that I would be late delivering a reserved judgment. On the same day I provided the parties with a copy of Henderson J's judgment in ***The Central Planning Authority v The Mirage Development Ltd (Operating as Snug Harbour Villas)*** Cause No. 611 of 2007. The parties were afforded the opportunity to submit written submissions by or on 26 January 2015.

21. On 23 January 2015 the Respondent filed its Supplemental Submissions. However, I then became aware of a significant development. Smellie C.J. delivered his judgment in ***Scott Murray Aitken v The Immigration Appeals Tribunal*** Cause No. 471 of 2015 ("Aitken"). In ***Aitken*** the Chief Justice was also considering a statutory appeal of the IAT's refusal of an appeal against the Board's refusal of an application for permanent residence. The identified point of law in that case was the same as the one I am dealing with, namely whether the IAT had unlawfully fettered its discretion by adopting the two-stage process. Having regard to the relevance of this decision and the case authorities referred to by the Chief Justice I provided a copy of the judgment to both parties, affording them the

opportunity to provide further written submissions. The Respondent's Further Supplemental Submissions were received on 12 February 2015, and the Applicant's Supplemental Submissions on 20 February 2015

The Statutory Framework for Appeals

22. Section 15(1) and (2) of the Law provides, in part:

> *"(1) Any person aggrieved by or dissatisfied with, a decision of a Board... may, withn –*
>
> *(a) twenty-eight days of the communication of the decision to him; or*
>
> *(b) such longer period as the Chairman of the Immigration Appeals Tribunal may, for good reason shown, allow,*
>
> *appeal therefrom by way of rehearing to the Immigration Appeals Tribunal, and matters referred to the Tribunal may not be remitted to that Board.*
>
> *(2) an appeal under subsection (1) May be lodged on the ground that –*
>
> *(a) it is erroneous in law;*
>
> *(b) it is unreasonable;*
>
> *(c) it is contrary to the principles of natural justice; or*
>
> *(d) it is at variance with the regulations."*

23. Section 16 of the Law deals with the conduct of appeals. Section 16(7) provides that: *"Appeals to the Immigration Appeals Tribunal shall be by way of rehearing."* Subsection 8 provides that when hearing an appeal the IAT "*may take into account fresh evidence in any change in circumstances that may have arisen in relation to the parties."* Subsection 9 provides that: *"At every hearing of the appeal where the appellant or his representative is present, the appellant or his representative shall be given an opportunity to address the appellate tribunal..."*

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

25. Section 17(2) provides that "*An appeal may be made to the Grand Court from a decision of the Immigration Appeals Tribunal on a point of law only."*[2]

Analysis

26. I am greatly assisted by the thorough and well-reasoned judgment of the Chief Justice in ***Aitken.*** Similarly, the ground alleged was that the decision of the Board was unreasonable. The Applicant in that case was also in the course of transacting for the purchase of a property with no conclusive evidence of completion having been presented. The Applicant had received only 95 points under Points System, having failed to achieve any points for investment in property in the Islands. However, I note that in ***Aitken*** it was the lack of points in other areas that particularly concerned the applicant. In ***Aitken***, as in the matter before me, it was the Board's discretionary factual assessment of the relevant factors which the IAT had been asked to review on appeal. The appeal that came before the Chief Justice greatly mirrors the substance of the overlapping grounds before me. The Applicants in both matters contended that the two-stage process adopted by the IAT, namely a requirement to first find that a ground of appeal is made out against the decision of the Board before then proceeding to a full rehearing *de novo*, was wrong as it fettered its discretion and because the Applicants had a statutory right to a full *de novo* rehearing.

[2] My emphasis by underlining.

27. In ***Aitken*** the Chief Justice carried out a scholarly review of the relevant case law when considering whether the IAT's adoption of the two-stage process meant that it was acting ultra vires by preventing itself from exercising discretion vested in it which the law required to exercise. The Chief Justice after carefully reviewing the cases of:

(i) ***R v Port of London Authority, ex-parte Kynoch*** [1919] 1 K.B. 176;

(ii) ***H. Lavender and Sons Ltd. V Minister of Housing and Local Government*** [1990] 1 W.L.R 1231;

(iii) ***British Oxygen Co. v Board of Trade*** [1971] AC 610;

(iv) ***R Secretary of State for the Home Department ex parte Simms*** [2000] 2 AC 115; and

(v) ***R (on the application of Daly) v Secretary of State for the Home Department*** [2001] AC 532 posed the two following questions at paragraph 55:

> *"...Has the application of the two-stage policy resulted in an unwarranted infringement upon the applicant's right to a fair hearing of his appeal keeping with the provisions and mandate of the law?"* and
> *"By the adoption of the policy, has the IAT fettered the exercise of the discretion vested in it to ensure that the applicant is afforded a fair hearing of his appeal according to the law?"*

28. When I consider the first question it is clear that the IAT afforded the Applicant at the first stage of the appeal hearing the opportunity to present additional materials and for representations to be made concerning the Board's decision. This is most vividly illustrated by the content of paragraph 11 of the Applicant's affidavit sworn on 7 March 2014[3] where she specifically comments upon the opportunities afforded by the IAT to her

[3] see paragraph 12 above

lawyer, Mr. Brady. It is clear that the IAT reviewed the Board's decision, appropriately analysing whether the Board, on the material which had been before the Board, and the additional material now before the IAT, had been wrong or acted unreasonably when awarding no points for investment in property in the Islands. It was only then that the IAT concluded that the ground was not made out and therefore the appeal should not move on to the second stage, namely to a full rehearing *de novo*.

29. As the Chief Justice similarly found in ***Aitken***, I am satisfied that the Applicant has been *"afforded a deliberate consideration"* of her ground of appeal. This being the case, the IAT by adopting a procedure whereby first it would require a ground of appeal to be established before moving on to rehearing care was not placing "*an unwarranted or impermissible fetter upon"* its discretionary powers.

30. I agree with the Chief Justice's finding that the IAT's two-stage policy was not ultra vires its authority given under the Law. At paragraph 66, the Chief Justice when considering section 16 (7) of the Law rightly highlighted that:

> "*...to mandate a strict obligation to embark upon a full rehearing de novo upon the filing of every appeal, would be to require the IAT to overlook the requirements of the law for the establishment of at least one of the four grounds of appeal stipulated by section 15(2).*"

The Chief Justice went on to say at paragraph 70 that:

> "*If a workable meaning is to be ascribed to this provision, as a first step a valid appeal must be brought within at least one of the four permissible grounds. Otherwise, the IAT could be invited to embark upon an appeal*

which is not prescribed upon any grounding permissible by the Law. For that reason, it seems plain to me that the IAT may note overlook the limitations in section 15(2)."

The Chief Justice added at paragraph 71 that:

"...the IAT has correctly regarded itself was required to direct his mind to whether or not the particular ground(s) of appeal relied upon by an appellant is made out. And, if it decides that no ground of appeal within section 15(2) has been made out, to dismiss the appeal.

31. At paragraph 84 the Chief Justice helpfully sets out his clear conclusions, which I view to be applicable to the matter before me and upon which I cannot improve, so I repeat them herein in full:

> *"(i) Section 15(2) of the Law requires an aggrieved person to identify his ground(s) of appeal upon which relies in bringing an appeal under that section to the IAT.*
>
> *(ii) Such ground(s) must come within those identified are permitted by section 15(2). A person aggrieved must be agreed upon at least one of those grounds.*
>
> *Any other construction would render the prescribed grounds meaningless as the IAT would be required to embark upon a rehearing de novo in every case of an appeal, or whatever ground – or absence of ground – is presented by an appellant.*
>
> *In this regard, I'm content for the sake of emphasis to adopt Lord Pannick Q.C's advice as appears from para. 25 of the Guidance Note:*
>
> > *"First, a valid appeal must be grounded within one of the four permissible grounds, as set out in section 15(2). The*

IAT cannot simply ignore the limitations in section 15(2) and consider appeals on some other basis. It must do justice to the words of section 15(2), and only consider grounds of appeal which are their set out."

(iii) As the right of appeal to the IAT is delimited by the permissible grounds, the IAT is correct regarding itself as needing to be satisfied that at least one of the permissible grounds can be made out before it embarks upon a rehearing de novo of the matter.

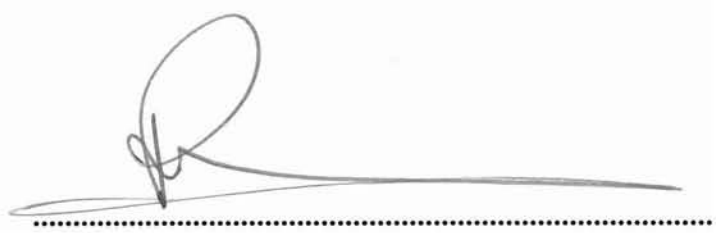
(iv) In doing so, the adoption of the two-stage policy by the IAT is sensible and reasonable exercise of its discretionary powers vested in it for the fair and timely dispensation of appeals. The two stage policy is not a fetter upon those powers but is a workable implementation of the discretion complied with the principles of the case law was authoritatively settled in British Oxygen, Simms and Daly..."

32. Mr. McField in his written supplemental submissions disagrees with the Chief Justice's findings. Mr. McField states that what he terms "Lord Pannick Q.C.'s policy" is no more than a guiding principle of the decision-making of the IAT in set of circumstances and is not law that is binding upon the Courts. However, the Chief Justice in his judgment did not approach this matter on the basis that he was in anyway fettered by Lord Pannick's advice. Mr. McField fails to recognise that the Chief Justice reached his conclusions about the intended procedure following a careful and full analysis of the relevant case law and by reading the Law as a whole. It was only after reaching the conclusion about the appropriate procedure that he found it was consistent with the guidance being given by Lord Pannick, which he then adopted *"for the sake of emphasis"* in the penultimate paragraph of his judgment. The Chief Justice rightly did not regard this as being a fetter

in the policy, but as being a practice that has developed based on a proper interpretation of the procedure that the statute intends. I do not accept Mr. McField's submission that this approach was *"fundamentally wrong in law."* I adopt the Chief Justice's conclusions and fully endorse them as being the correct procedure for such appeals before the IAT.

33. I have already indicated that I am satisfied that the IAT when considering the first stage, the grounds stage, afforded the Applicant the opportunity to appear and considered both the representations made by her attorney and the additional documents submitted to the extent required to determine whether a ground had been made out. I am satisfied that the IAT, having afforded the above opportunities, cannot be viewed as being unreasonable for concluding that, on the evidence placed before the Board by the Applicant, the Board's refusal to grant points for investment in property in the Islands was unreasonable and amounted to a ground of appeal. I am also satisfied that the two-stage process to an appeal adopted by the IAT is the correct procedure to be followed when reviewing the relevant provisions of the Law as a whole.

34. Accordingly, the Applicant's appeal and grounds 2, 3, 4 and 5 fail and it is dismissed. For completeness sake, I find that ground one is not on a point of law and is therefore inappropriately brought. There will be no order as to costs.



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The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT