

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 115 OF 2019

BETWEEN :-

LACU 0092 | 2019

**JEFFREY BUSH**

Plaintiff

-and-



**THE CAYMAN ISLANDS OMBUDSMAN**

Defendant

-and-

**THE ATTORNEY GENERAL**

Interested Party pursuant to Order 77A

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APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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To the Clerk of Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicants (s)	Jeffrey Bush, 19 King Road, West Bay
Judgment, order, decision or other proceeding in respect of which relief is sought	Decision of the Cayman Islands Ombudsman to refuse to uphold JB's complaint against the police
Relief Sought	
i) An order of <i>certiorari</i> to quash the Defendant's decision; ii) An order of <i>mandamus</i> to compel the Defendant to reconsider the decision; iii) A declaration that section 7(4) of the Police (Complaints by the Public Law) 2017 is incompatible with Section 7 of the Bill of Rights contained within the Cayman Islands Constitution.	
Name and address of applicant's attorneys	Samson Law Associates, 4 <sup>th</sup> Floor Harbour Center, 42 North Church Street, George Town, P.O. Box 2255, Grand Cayman KY1-1107, Cayman Islands

Signed



Dated 17<sup>th</sup> July 2019

## GROUND ON WHICH RELIEF IS SOUGHT

### INTRODUCTION

1. The Plaintiff, Mr Jeffrey Bush (“JB”), seeks leave to apply for judicial review of a decision of the Defendant, the Cayman Islands Ombudsman, who did not uphold his complaint against the police in a Final Investigation Report dated the 15<sup>th</sup> May 2019 (“the decision”).
2. This application is brought under Order 53 of the Grand Court Rules (1995 Revision) and section 12 of the Police (Complaints by the Public Law) 2017. The latter provides an independent statutory avenue of appeal, in addition to the normal route by way of judicial review. As this application seeks a declaration of incompatibility under section 23 of the Bill of Rights contained within Part 1 of The Cayman Islands Constitution Order 2009 (“the Bill of Rights”), the Attorney General has been served pursuant to Order 77A of the Grand Court Rules.
3. JB has sufficient interest in this matter as he is the subject of the decision.
4. In summary, JB submits that it is sufficiently arguable that:
  - i. The decision was irrational because it did not take into account relevant considerations: The Defendant did not take an independent statement from JB in the course of its investigation, despite him being the complainant;
  - ii. The Defendant’s failure to take an independent statement from JB was unfair and a breach of natural justice, as it deprived him of the right to make representations in the course of the investigation;

- iii. The findings of fact made in the decision were not sustainable on the evidence;
  - iv. Section 7(4) of the Police (Complaints by the Public Law) 2017 (“the 2017 Law”) is incompatible with Section 7 of the Bill of Rights within the Cayman Islands Constitution. Section 7(4) of the 2017 Law binds a complainant to the findings of fact made by the Defendant in any related administrative or civil proceedings. The statute therefore purports to bind a court to the original findings of fact, which would include (i) a court determining a civil claim brought by JB against the police and (ii) the Grand Court sitting on appeal of the Ombudsman. This violates the right to a fair trial under section 7.
5. JB seeks the following relief:
- i. An order of *certiorari* to quash the Defendant’s decision;
  - ii. An order of *mandamus* to compel the Defendant to reconsider the decision;
  - iii. A declaration of the incompatibility of section 7(4) of the 2017 Law with the Bill of Rights.
6. It is submitted that leave to apply for judicial review should be granted.

#### **LEGAL FRAMEWORK FOR THIS APPLICATION**

7. Leave for judicial review is available to JB pursuant to two routes. Under section 12 of the Police (Complaints by the Public) Law 2017 (“the 2017 Law”):

“(1) In the case of a final investigation report, the complainant or the police officer concerned may seek leave of the Grand Court for judicial review of the Ombudsman’s determination within twenty-eight days, and the time shall begin to run at the dispatch of the final investigation report to a

delivery agent who is directed to deliver it to the complainant and the police officer concerned.

[...]

(3) The judicial review shall be limited to jurisdiction, findings of fact and the decision as to whether the complaint was well founded but shall not include recommendations made.”

8. Under Order 53 – “Applications for Judicial Review” – an applicant may apply for leave for judicial review under rule 3(1). Such an application must be made promptly and in any event within three months from the date when grounds for the application first arose (rule 4(1)).
9. The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates (Order 53, rule 3(7)).
10. Leave should be granted where the case is sufficiently arguable to merit investigation at a substantive hearing (see, e.g. *R v. Ebanks, ex parte Henderson* [2009 CILR 48] at paragraphs 10 to 11).
11. Under Order 77A, rule 3(1):

“In any proceedings to which the Attorney General is not already a party, where a party seeks a declaration that primary legislation, or any part thereof, is incompatible with a section or sections of the Bill of Rights, the party seeking the declaration shall forthwith serve on the Attorney General copies of the originating process together with all pleadings and particulars already served on the parties to those proceedings.”

## **FACTUAL BACKGROUND**

### **The arrest**

12. On the 20<sup>th</sup> July 2018, JB was involved in a police chase following his alleged failure to stop when requested by officers. He was followed to the area near Lacovia Apartments on West Bay Road, where he left the car and ran onto Seven Mile Beach. He was pursued by police, who detained him on the beach.
13. In the course of being detained, a police officer struck JB to the side of his chest, causing injury. He was subsequently taken to the Cayman Islands Detention Centre on the same day, where he complained of pain to the police officers. He asked to be taken to hospital, but was released on bail before this took place.
14. JB later attended George Town Hospital on the 27<sup>th</sup> July 2018, where he was informed that his tenth and eleventh ribs had been fractured.

### **The Defendant's Investigation and Final Investigation Report**

15. On the 8<sup>th</sup> August 2018, JB made a complaint to the RCIPS Professional Standards Unit, which was later referred to the Defendant. The complaint alleged that police had assaulted JB in the course of the arrest, causing injury. The Defendant investigated the matter and produced a report dated the 15<sup>th</sup> May 2019.
16. The report considered two issues:
  - i. Was the arrest of Jeffrey Bush lawful?
  - ii. Was the force used to effect his arrest reasonable and proportionate?<sup>1</sup>
17. In the course of the investigation, the Defendant considered various material arising from the police enquiry. This included video-recorded interviews of JB taken by police on the 29<sup>th</sup> July 2018 and 3<sup>rd</sup> August 2018, a written statement from JB taken by the police on the

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<sup>1</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 1

8<sup>th</sup> August 2018, statements of various officers attending the scene and involved in the arrest, statements of officers involved in JB's subsequent detention, and medical records.<sup>2</sup> It should be noted that these documents have not been disclosed to JB.

18. Though the Defendant considered the interview and written police statement given by JB, at no time did it take an independent statement from JB in the course of its own investigation.

19. According to the Defendant's report, JB stated that he had two broken ribs in his police interview on the 29<sup>th</sup> July 2018. He stated that he had spoken with the custody officer about this on the night of his arrest but was not taken to hospital.<sup>3</sup>

20. According to the Defendant's report, a further interview was conducted with JB by police on the 3<sup>rd</sup> August 2019. The report found that, during that interview, "*[a]t no point did Mr Bush raise any issues about the injuries he says happened during contact with police officers that night*".<sup>4</sup>

21. According to the Defendant's report, JB stated in his 8<sup>th</sup> August 2018 police statement that "*[a]s he reached the beach, he felt someone jump on his back and tackle him to the ground. The officer put a knee in his back while he was lying on the ground and punched him to his left side and said "look how you got me sweating"*".<sup>5</sup>

22. The Defendant considered the police witness statements of the officers who had arrested JB: APS Peter Maragh and PC Sedroy Thomas. The summary given in the Defendant's report is that they said that "*Mr Bush attempted to flee again and was tackled by officers. Mr Bush continued to struggle, and the officers had to forcibly place his arms behind his back in order put [sic] handcuffs on him. [...] None of the officers reported that he complained of any injury or assault.*"<sup>6</sup>

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<sup>2</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 2

<sup>3</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 3

<sup>4</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 4

<sup>5</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 2

<sup>6</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 3

23. In respect of whether it could uphold JB's complaint that unreasonable force had been used, the Defendant stated:

"Section 153 of *The Police Law (2017 Revision)* provides police officers the authority to use reasonable force to effect an arrest. I accept the medical evidence that Mr Bush suffered broken ribs, however I find no evidence to support his claim that the injury occurred during his arrest or during his time in police custody. Mr Bush made no reference to any injuries or pain following the arrest, despite numerous opportunities to do so. He did not mention any pain during his time in custody. He waited a week before he reported the injury. In considering the evidence provided by Mr Bush and the police officers, I find that the force used to arrest Mr Bush was reasonable and proportionate."<sup>7</sup>

#### **PROCEDURAL BACKGROUND**

24. The Final Investigation Report is dated the 15<sup>th</sup> May 2019. It came into JB's possession on the 27<sup>th</sup> May 2019.

25. On the 21<sup>st</sup> June 2019, JB gave formal notice to the Court and Defendant that he would seek to appeal the decision under section 12 of the Police (Complaints by the Public) Law 2017. On the 24<sup>th</sup> June 2019, JB filed a written notice of appeal pursuant to Order 55 of the Grand Court Rules, as per the direction of the Civil Registry given on that date.

26. On the 28<sup>th</sup> June 2019, the Civil Registry returned JB's notice on the basis that the appeal in fact had to be made by way of judicial review under Order 53.

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<sup>7</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 5

27. It is submitted that this claim is in time either under section 12 of the 2017 Law given the date of the original filing, or in any event in time under the three-month time limit prescribed by Order 53.

28. JB was granted legal aid on the 24<sup>th</sup> June 2019.

### **PRELIMINARY ISSUE**

#### **Section 7(4) of the 2017 Law is incompatible with section 7 of the Bill of Rights and a declaration should be made to that effect**

29. For the reasons set out below, it is submitted that this application for leave engages section 23(1) of the Bill of Rights and requires the Court to make a declaration of incompatibility in respect of section 7 of the Bill of Rights and section 7(4) of the 2017 Law.

30. It is submitted that this should be dealt with as a preliminary issue because it is relevant to whether the Court has the power to provide the relief sought.

#### **Law - Procedure**

31. Section 23(1) of the Bill of Rights states:

“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.”

32. Under section 25 of the Bill of Rights:

“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.”

33. In *Nairne* [2013 (1) CILR 345], Henderson J provided the following commentary on the interpretation of legislation when a declaration of incompatibility is sought (at [21]):

“The task of interpreting a constitutional provision differs in fundamental ways from the construction of a statute. Clayton & Tomlinson, 1 *The Law of Human Rights*, 2nd ed., para. 381, at 152 (2009) remarks that constitutional provisions “*must be approached in a flexible manner so that they can be adapted to changing conditions.*” The Privy Council has said (in *Edwards v. Att.-Gen. (Canada)* (5) ([1930] A.C. at 136)), that a constitution should be given a “*large and liberal interpretation*” and not one which is truncated by a “*narrow and technical construction.*” Again, in *Home Affairs Min. v. Fisher* (7) (44 W.I.R. at 112), the Privy Council called for a “*generous interpretation*” for the purpose of according to individuals a “*full measure of the fundamental rights and freedoms*” enshrined in the instrument. The court (*ibid.*, at 113) preferred the view that a constitutional instrument should be treated as *sui generis*, with its own principles of interpretation and without any “*necessary acceptance of all the presumptions that are relevant to legislation of private law.*” In *Reyes v. R.* (11) ([2002] 2 A.C. 235, at para. 26), Lord Bingham characterized the correct approach to constitutional interpretation as “*generous and purposive,*” echoing language used earlier by, among others, Lord Diplock in *Att.-Gen. (The Gambia) v. Jobe* (2) ([1984] A.C. at 700). Lord Bingham continued ([2002] 2 A.C. 235, at para. 26) with the observation (quoting, with approval, from *State v. Makwanyane* (12) (1995 (3) S.A. 391, at para. 88)) that, although public opinion may have some relevance to the court’s task, it is “*no*

*substitute*” for the court’s obligation to protect the rights of minorities and marginalized people through enforcement of guaranteed rights.

22 The Bill of Rights includes a requirement in s.25 that legislation must be “*read and given effect in a way which is compatible with the rights*” guaranteed by it:

“In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part.”

This section 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, although the obligation imposed by s.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.

23 The utility of reading down is not without limit. In *de Freitas v. Agric. Ministry Perm. Secy.* (4) ([1990] 1 A.C. at 79), the Privy Council observed that “*an enactment construed by severing, reading down or making implications into what the legislature has actually said should take a form which it could reasonably be supposed that Parliament intended to enact.*” The Privy Council in *de Freitas* quoted with approval (*ibid.*, at 79–80) from *Osborne v. Canada (Treasury Board)* (10) (82 DLR (4th) at 347) to the effect that, after a “*wholesale reading down,*” a law may “*bear little resemblance to the law that Parliament passed,*” which gives rise to a “*strong inference*” that it is simply incompatible. In such cases, the task of bringing the legislation into conformity with constitutional guarantees

is best left to the legislative branch of government as it will have access to relevant information and expertise not available to the court.

24 The obligation to attempt to read a challenged provision in a manner compatible with the UK Human Rights Act has been described there as a “*strong interpretative obligation*” (see *The Law of Human Rights, op. cit.*, para. 4.05, at 176). I accept that the courts of the Cayman Islands must approach the interpretative obligation with equal vigour, but the occasion is unlikely to occur as often because the Human Rights Act provision is expressed in broader language than s.25; the former (in s.3(1)) sets down an obligation (“as far as it is possible to do so”) which is not limited to “unclear or ambiguous” cases.”

#### **Law – The Right in Question**

34. The Bill of Rights under the Cayman Islands Constitution, section 7(1) states that:

“[e]veryone has the 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”.

#### **Law – The Impugned Legislation**

35. Section 7(4) of the Police (Complaints by the Public) Law 2017 (“the 2017 Law”) states:

“The findings of fact in the final investigation report are binding on the complainant and the police officer against whom the complaint was made, in any related administrative or civil proceedings, including police disciplinary matters”

## Submissions

36. Section 23 requires the Court to make a declaration of incompatibility where *in any legal proceedings* primary legislation is incompatible with a right under the Bill of Rights. This application for leave for judicial review constitutes legal proceedings. Therefore, if the Court finds that primary legislation engaged by these proceedings is incompatible with the Bill of Rights, then the declaration must be made.
37. Two matters arising from the section 7 of the Bill of Rights are relevant to this preliminary issue, namely that, in determination legal rights and obligations, everyone has the right to:
- i. A fair and public hearing;
  - ii. By an independent and impartial court.
38. Section 7(4) of the 2017 Law is incompatible with section 7 of the Bill of Rights for the following reasons:
39. **First**, in the course of his complaint about police misconduct, it would usually be open to JB to ask for his legal rights to be determined by a civil court in the form of a claim against the police. This claim could, for example, allege that the individual police officer committed the tort of battery against him, or that the police force had been negligent in failing to protect him from individual officers acting beyond the scope of their duty.
40. However, section 7(4) of the 2017 Law purports to remove this option from him. Where a complainant seeks to bring civil proceedings that are based on the same complaint as made to the Ombudsman, section 7(4) *binds* that complainant to the findings of fact made in the Ombudsman's report.
41. In binding a complainant (or indeed a police officer) to those findings of fact, the legislation prohibits a court from making new findings of fact in any civil proceedings.

42. The consequence of that is:

- i. The complainant or police officer is deprived of their right to have their legal rights determined at a fair and public hearing. The Ombudsman does not provide for a public hearing but makes its investigations and determinations in private;
- ii. The complainant or police officer is deprived of their right to have their legal rights determined at a hearing by an independent and impartial court. The Ombudsman is not a court.

43. Section 7(4) therefore deprives JB of his right to bring any form of meaningful civil claim against the police, given the findings of fact in the Ombudsman's report.

44. **Second**, section 7(4) of the 2017 Law is further incompatible with section 7 of the Bill of Rights, and inconsistent with section 12 of the 2017 Law, because it appears to bind the Grand Court to those findings of fact when the Court sits on appeal of the Ombudsman.

45. A claim for judicial review of the Ombudsman's decision must be "*a related administrative or civil proceeding[...]*". The section therefore binds the complainant to the Ombudsman's findings of fact, despite section 12(3) stating that "*[t]he judicial review shall be limited to jurisdiction, findings of fact and the decision as to whether the complaint was well founded [...]*".

46. In apparently denying a complainant an effective right to appeal, section 7 of the Bill of Rights is violated. That being so, JB's right has been violated on this occasion.

### **Conclusion on the Preliminary Issue**

47. Section 7(4) of the 2017 Law is incompatible with section 7 of the Bill of Rights. The Court must make a declaration of incompatibility in this respect, pursuant to section 23 of the Bill of Rights.

## GROUNDS FOR JUDICIAL REVIEW

### **GROUND 1 – The decision was irrational because it failed to take into account a material consideration, namely any independent evidence from JB**

48. In failing to take a statement from JB in the course of its investigation, the Defendant failed to take into account a material consideration. This approach rendered the decision irrational and therefore unlawful.

### **Law**

49. It is incumbent on decision makers to take into account all considerations relevant to the decision and to reject all considerations irrelevant. Failure to do so may render the decision irrational.

50. In *Mohanty v Health Practitioners Board* [2001 CILR 459], Smellie C.J. stated at paragraph 57:

“A decision which appears to be tainted with arbitrariness—in the sense of disregarding important matters for consideration—can properly be set aside on judicial review. In *R. v. Deputy Industrial Injuries Commr., ex p. Moore* (4), Diplock, L.J. (as he then was) stated the principle in the following terms ([1965] 1 Q.B. at 488):

“The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an

astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.”

51. In the English House of Lords decision of *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, Lord Keith of Kinkel stated at page 764:

“Sir Thomas Bingham M.R. in the course of his judgment in this case said that “material” in subsection (2) meant “relevant,” and in my opinion he was correct in this. **It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again.** But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense.” (emphasis added)

52. In *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014, Lord Diplock said at page 1065, when considering a decision of the Secretary of State,

“[t]he question for the court is, did the Secretary of State **ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?**”

### **Submissions**

53. During the course of its investigation, the Defendant did not take a statement from JB. It relied solely on the statements that JB had given to the police. From the report, these appear

to be video recorded interviews on the 29<sup>th</sup> July 2018 and the 3<sup>rd</sup> August 2018, and a written statement given to police on the 8<sup>th</sup> August 2018.

54. Failure to take an independent statement from the complainant himself was an irrational approach to the investigation which rendered the decision unlawful. Independent evidence from the complainant should have been a central part of the investigation. The Defendant did not “ask [...] *the right question and take reasonable steps to acquaint [itself] with the relevant information*”.

55. Though the Defendant may have considered statements taken from JB by the police, those statements cannot be a suitable substitute for an independent statement given directly to the Defendant:

i. The taking of the police interviews on the 29<sup>th</sup> July 2018 and the 3<sup>rd</sup> August 2018 was in the context of a criminal investigation against JB. Those interviews cannot be relied upon as having probed all issues that may have been salient in the Defendant’s separate, non-criminal investigation. The police clearly had a different aim in their investigation, and at best any complaint by JB about his treatment would have been an issue subordinate to the question of whether he had committed a criminal offence;

ii. JB’s complaint is of an assault by a police officer. He therefore may not have been as open as he might have been when making his complaint to *police*, rather than an independent body such as the Defendant. This is due to likely fear that accusing his accuser would (i) be less effective than reporting it to an independent body and (ii) may negatively influence the criminal investigation against him and so the likelihood of him being charged or released on bail.

56. In addition to failing to take a statement from JB at the beginning of the investigation, the Defendant also failed to seek JB’s comments on the suggestion made by police officers that he did not mention that he was in pain during his original detention, or that he did not ask to be taken to hospital. He should have been given an opportunity to respond to these allegations.

57. In the circumstances, it is submitted that the Defendant failed to take into account a relevant consideration, namely independent evidence given by JB himself. This failure represents an irrational approach that renders the decision unlawful.

**GROUND 2 – The failure to take a statement from JB was a breach of natural justice and procedurally unfair**

**Law**

58. A breach of natural justice (and consequent unfairness) may arise where the affected party is not given sufficient opportunity to make representations.

59. In *Cortina International Limited (t/a Cortina Villas) v Chairman of Planning Appeals Tribunal & Ors* [1998 CILR 249], Harre C.J, quoted the judgement of *R (Doody) v Secretary of State for the Home Department* [1994] 1 A.C. 531, with approval (at paragraph 40). In *Doody*, Lord Mustill stated at page 560:

“(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

**Submissions**

60. On the basis of the reasons submitted in Ground 1, the failure to take a statement from JB was a breach of natural justice. It is clear that the decision could (and has) affected him

adversely. The fact that he was deprived the opportunity of making any statement or response in the course of the investigation amounts to procedural unfairness and renders the decision unlawful.

**GROUND 3 – The decision was unsustainable on the evidence and was therefore unlawful**

**Law**

61. Section 12(3) of the 2017 Law states that in a claim for judicial review, the Court has jurisdiction to review findings of fact:

“The judicial review shall be limited to jurisdiction, findings of fact and the decision as to whether the complaint was well founded but shall not include recommendations made.”

62. At common law, a decision may be unlawful if the decision maker reaches an unsustainable or unsupported finding (see, e.g. *Edwards (Inspector of Taxes) v Bairstow* [1956] A.C. 14).

**Submissions**

63. The Defendant’s findings of fact are unsustainable on the evidence it considered.

64. In the Final Investigation Report, the Defendant accepted that JB had sustained two broken ribs but concluded that “*I find no evidence to support his claim that the injury occurred during his arrest or during his time in police custody.*”<sup>8</sup>

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<sup>8</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 5

65. This is not a sustainable conclusion as the Defendant did have the (albeit limited) evidence in the form of the statements that JB had given to police on the 29<sup>th</sup> July 2018 and the 8<sup>th</sup> August 2018, where he stated that he was assaulted by police. It is therefore patently incorrect to find that there was “*no evidence to support his claim*”.
66. Furthermore, in apparently rejecting JB’s evidence out of hand, the Defendant failed to apply common sense to the context of his complaint. The Defendant accepted that JB sustained two broken ribs; this was noted by the doctor who saw him on the 27<sup>th</sup> July 2018. JB reported that he had sustained the injury during an assault by the police on the 20<sup>th</sup> July 2018. Furthermore, he had stated that he had told the police officers about this injury when he was detained in custody.<sup>9</sup>
67. It is submitted that JB’s account is the most likely explanation as to how the injury was caused. In rejecting JB’s complaint, the Defendant must have concluded that JB had suffered the injury in the days between his arrest on the 20<sup>th</sup> July 2018 and his attendance at hospital on the 27<sup>th</sup> July 2018, and then concocted a plan to falsely blame the police for the injury. This conclusion is contrary to common sense. It also appears that this conclusion was reached without investigating or finding any alternative cause for the injury.
68. Moreover, the Defendant appears to have taken the evidence of the police officers at face value and rejected JB’s account, without assessing thoroughly the reliability of each. In rejecting JB’s account, the Defendant appears to rely on two points:
69. **First**, much weight is placed on the fact that the police did not record JB as having any injury when he attended the Detention Centre on the day of his arrest,<sup>10</sup> despite JB’s claims that he did indeed complain of an injury.
70. However, the fact that this was omitted from the custody record should not be sufficient to counter what is the commonsense explanation for how he sustained the injury. It is notable

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<sup>9</sup> See, e.g. Final Investigation Report, 15<sup>th</sup> May 2019, page 3, paragraph 1

<sup>10</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 3, final paragraph

that it was not possible to take a statement from the custody officer to clarify this issue because they have retired.<sup>11</sup> Though it is stated that Auxiliary Constables Welsh and Lawes only recorded that JB was asthmatic, it is not clear what questions were asked by these officers, who were only responsible for taking fingerprints and producing documentation.<sup>12</sup> It is also not clear when those statements were taken: were they provided at the time when JB was in the Detention Centre, or were they taken as part of the Defendant's enquiry many months later? If the latter, then it may be questionable as to how well those witnesses could recall these events.

71. The conclusion that "*Mr Bush made no reference to any injuries or pain following the arrest, despite numerous opportunities to do so*" does not give sufficient weight to the possibility that he did mention these issues, but that the officers failed to record them or otherwise have not remembered correctly.
72. **Second**, weight is put on the fact that, during his interview on the 3<sup>rd</sup> August 2018, JB did not make any reference to his injuries and appears to be moving his arms freely without discomfort.<sup>13</sup> However, this can hardly undermine JB's account with any force, given that he stated to the police in his interview on the 29<sup>th</sup> July 2018 that he had suffered injury.
73. It is submitted that these two matters are relatively minor and insufficient to undermine the commonsense conclusion, namely that this injury was caused by unreasonable force on the 30<sup>th</sup> July 2019.
74. The factual findings that support the decision are unsustainable on the evidence. For that reason the decision is unlawful.

## CONCLUSION

75. For the reasons set out above, it is submitted that:

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<sup>11</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 4, paragraph 4

<sup>12</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 4, paragraph 3

<sup>13</sup> Final Investigation Report, 15<sup>th</sup> May 2019, page 4, paragraph 3

- i. Section 7(4) of the 2017 Law is incompatible with section 7 of the Bill of Rights. The Court must grant a declaration of incompatibility pursuant to section 23 of the Bill of Rights;
- ii. The decision was unlawful as it failed to take into account a material consideration, namely an independent statement from JB;
- iii. The decision was unlawful because it did not provide JB with a sufficient opportunity to make representations in his own interests (e.g. through an independent statement), which was unfair and a breach of natural justice;
- iv. The decision was unlawful because it is unsustainable on its own factual findings.

76. In the circumstances JB asks that the Court grant leave to apply for judicial review.

**17<sup>th</sup> July 2019**

Rupert Wheeler

Samson Law

**FINAL INVESTIGATION REPORT**  
**COMPLAINT OF JEFFREY ARMANDO BUSH**

15 May 2019

OMB File: 201800258  
RCIPS File: 2018-00076

This final investigation report was produced under section 7 of the *Police (Complaints by the Public) Law, 2017* (the Law).

**Involved Parties:**

Complainant: Mr Jeffrey Armando Bush  
19 King Road  
West Bay, Grand Cayman,  
Cayman Islands

Police Officer: APS Peter Maragh RCIPS  
PC Sedroy Thomas RCIPS

**Complaint:**

Mr. Jeffrey Bush complained that the police used excessive force when they arrested him on the 20<sup>th</sup> of July 2018 on the beach behind the Lacovia Apartments on West Bay Road, George Town. Mr. Bush said he was forced to the ground by police officers during the arrest and then a police officer struck him a blow to his side. Mr. Bush went to the George Town Hospital on the 27<sup>th</sup> of July 2018 and discovered his 10<sup>th</sup> and 11<sup>th</sup> ribs were fractured.

**Issues:**

- Was the arrest of Jeffrey Bush lawful?
- Was the force used to effect his arrest reasonable and proportionate?

**Investigation:**

We reviewed the following information as part of this investigation:

- Statement from Jeffrey Bush
- Statement from PC Ricardo Lewis
- Statement of PC Braithley Robinson
- Statement of PC Sedroy Thomas, arresting officer
- Statement of APS Peter Maragh, arresting officer
- Statement of PC Kayon Ward-O'Connor, dated 5 February 2019
- Statement of Auxiliary Constable Zeta Welsh, custody staff
- Statement of Auxiliary Silvester Lawes, custody staff
- Statement of Doctor Verley Campbell, attending Physician, George Town Hospital
- RCIPS Incident Investigation File -RMS 2018-020147
- PSU Report
- Custody Record of Jeffrey Bush
- PSU Investigation File
- *The Traffic Law, 2011*
- *The Police Law (2017 Revision)*
- Videotaped interview of Jeffrey Bush
- RCIPS *Custody of Prisoners Policy*

**Evidence of Mr. Bush**

According to a signed written statement made to the RCIPS the 8<sup>th</sup> of August 2018, Mr. Bush stated that he took his brother's girlfriend's car without permission. He said that he has never obtained a driver's licence but he decided to drive the car to George Town. He was driving along the Esterly Tibbetts Highway when he saw a police roadblock. He acknowledged that he drove through the roadblock, the police tried to stop him but he didn't stop the vehicle in spite of being followed by police cars with their lights and sirens in use. Mr. Bush said that he drove to the Lacovia Condominium on West Bay road, parked in the parking lot and ran to the beach. As he reached the beach, he felt someone jump on his back and tackle him to the ground. The officer put a knee in his back while he was lying on the ground and punched him on his left side and said, "look how you got me sweating". He was unable to provide the officer's name, but he described the officer as "thick, dark complexion, taller than 5'6". The officer handcuffed Mr. Bush.

Mr. Bush also said that the officers searched him and found a "draw of weed" he had in his waist. He did not recognize any of the officers. They took him back to the car and found a knife.

He said he failed to stop when asked because he knew he didn't have a driver's licence. He also indicated that he didn't fight the officers and the officer didn't have any right to punch him.

Mr. Bush said that he complained of pain to the officers who took his fingerprints. He asked to go to the hospital, but he was not taken there. On release he went home and took medication for the first couple of days but the pain got worse and he couldn't sleep so on the 27<sup>th</sup> of July 2018, he went to the George Town Hospital to see a doctor. The doctor told him that he had two broken ribs.

On the 29<sup>th</sup> of July 2018 Mr. Bush was interviewed again by the police and he told the officer in charge (who was not on the beach during the arrest), that he had two broken ribs. The officer asked him why he didn't say anything earlier and Mr. Bush told the officer that he had spoken with the custody officer on the night of the arrest but was not taken to the hospital.

Mr. Bush said that he was still taking medication and experiencing discomfort, especially when lying down, which was causing him to have trouble sleeping. He was unable to work because of the injury.

#### **RCIPS evidence/information**

On the 20<sup>th</sup> of July 2018, at approximately 11:00 P.M., Mr. Bush was driving a vehicle along the Esterly Tibbetts Highway in the vicinity of the Heritage Roundabout. The police had a roadblock in place and Mr. Bush was directed to pull over for a routine check. Instead of complying with this request he sped off in his vehicle.

PC Ward-O'Connor, PC Thomas and APS Maragh pursued Mr. Bush. Despite officers using emergency signals, Mr. Bush refused to stop and continued into the parking lot of the Lacovia Apartments on West Bay Road. He fled the vehicle on foot leaving the engine running and headed around the building and onto Seven Mile Beach. Police officers gave chase on foot and eventually apprehended the complainant by tackling him on the beach near the apartments.

APS Peter Maragh and PC Sedroy Thomas arrested Mr. Bush. They said that they chased him to the beach and found him hiding in some bushes. Mr. Bush attempted to flee again and was tackled by the officers. Mr. Bush continued to struggle, and the officers had to forcibly place his arms behind his back in order put handcuffs on him. They searched him for weapons and found what they suspected to be ganja in the waistband of his pants. Five police officers were involved in the arrest of Mr. Bush. None of the officers reported that he complained of any injury or assault.

Mr. Bush's version of events is very similar to the officers except he alleges, that once tackled, an officer had a knee on his back and he received a blow to the left side of his body.

Mr. Bush was arrested for driving offences and possession of ganja. He was transported to the Fairbanks Detention Center.

A review of the custody record does not mention any complaint from Mr. Bush that he had sustained an injury or was in any pain or discomfort during his time in custody.

We viewed the following video and audio police interview under criminal caution of Mr. Jeffrey Armando Bush:

Date – 03/08/2018  
Location – FDC  
Start Time – 12: 17 p.m.  
Finish Time – 12:36 p.m.  
Interviewing officers – PC Lewis and PC Hall

We reviewed the video to determine if Mr. Bush made any reference to the injuries he said occurred during his arrest. Mr. Bush freely answered the officers' questions and admitted to taking a motor vehicle, driving without a valid licence and failing to stop at the police check point. At no point did Mr. Bush raise any issues about the injuries he says happened during contact with police officers that night. Mr. Bush did not appear to be in any discomfort and moved his arms freely, at one point raising his left arm to touch the top of his head. At the conclusion of the interview Mr. Bush was asked if he would like to add anything further and he said no.

Statements from Auxiliary Constables Welsh and Lawes, who were on duty and were responsible for the administration of fingerprints and associated documentation of Mr. Bush support the fact that during his detention he made no mention of any injury or discomfort. Mr. Bush only stated that he was asthmatic, and this was recorded accordingly. Mr. Bush was released from police custody on bail the following day at approximately 9:00 p.m.

The RCIPS *Custody of Prisoners Policy* (implemented on the 30<sup>th</sup> of April 2018) requires the custody officer to ensure that a prisoner receives medical attention if it appears that the person is injured – even if the prisoner does not request medical attention. While the custody officer in this case retired, we inspected the custody log and there are no references to any concerns about the prisoner's health.

On the 27<sup>th</sup> of July 2018, seven days following his interaction with the police, Mr. Bush went to the George Town Hospital complaining of a sore chest and an X-ray was performed. He was told he had fractures of the 10<sup>th</sup> and 11<sup>th</sup> ribs, which were not serious, and he was not hospitalized.

On the 8<sup>th</sup> of August 2018, Mr. Bush went to the Professional Standards Unit (PSU) offices and lodged a complaint against the arresting officers in his case alleging excessive use of force.

#### **Analysis & Findings:**

The RCIPS has the authority to erect a road block in accordance with section 116 of *The Traffic Law, 2011*. Section 116(4) of the *Traffic Law* states that if a driver fails to stop it is an offence. Mr. Bush admitted that he failed to stop for the police at a roadblock on the 20<sup>th</sup> of July 2018. He also admitted that he did not possess a valid driver's licence and that he was in possession of ganja. On this basis, I find that his arrest was lawfully made in accordance with section 60 of *The Police Law (2017 Revision)*.

Section 153 of *The Police Law (2017 Revision)* provides police officers the authority to use reasonable force to effect an arrest. I accept the medical evidence that Mr. Bush suffered broken ribs, however I find no evidence to support his claim that the injury occurred during his arrest or during his time in police custody. Mr. Bush made no reference to any injuries or pain following the arrest, despite numerous opportunities to do so. He did not mention any pain during his time in custody. He waited a week before he reported the injury. In considering the evidence provided by Mr. Bush and the police officers, I find that the force used to arrest Mr. Bush was reasonable and proportionate.

**Decision:**

I do not support Mr. Bush's complaint.



**Sandy Hermiston | JP**  
Ombudsman