

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 41

(TUESDAY 28 SEPTEMBER 2021)

International Arbitration Centre
3rd floor Ritter House
Wickhams Cay II
Road Town, Tortola

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Solicitor General Mrs Jo-Ann Williams-Roberts (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Mr Richard Rowe of Silk Legal appeared for those members of the House of Assembly who are not members of the Government.

Counsel to the Commission Mr Bilal Rawat also appeared.

Mr Joseph Smith-Abbott gave evidence.

Mr Ian Penn gave evidence

Hon Vincent O Wheatley gave evidence.

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Those present:

Session 1

Mrs Jo-Ann Williams-Roberts, Solicitor General (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Mr Joseph Smith-Abbott

Mr Ian Penn

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

Session 2

Mrs Jo-Ann Williams-Roberts, Solicitor General (attending remotely)

Mr Bilal Rawat

Hon Vincent O Wheatley

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

P R O C E E D I N G S

Session 1

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3 COMMISSIONER HICKINBOTTOM: Mr Rawat, I think we're
4 ready to begin.

5 MR RAWAT: Good morning, Commissioner.

6 Before we start with our Witnesses this morning, can I
7 introduce the legal representation. Attending on behalf of the
8 Attorney General and the elected Ministers remotely is Solicitor
9 General Jo-Ann Williams-Roberts, and attending on behalf of a
10 number of Members of the House of Assembly, Mr Richard Rowe.

11 Our scheduled witness this morning is Mr Joseph
12 Smith-Abbott, but we have an additional witness, and that's
13 Mr Ian Penn, they're effectively going to give evidence
14 together.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 BY MR RAWAT:

17 Q. Gentlemen, can I thank you for coming back to give
18 evidence, and a special thanks to Mr Penn because you were
19 volunteered by Mr Smith-Abbott rather than being requested by
20 the Commission.

21 But you both made affirmations when you first came to
22 give evidence, and there is no need to take the affirmation
23 again. You're still bound by that. But the way that I propose
24 to deal with matters this morning is that I'll put my questions
25 towards Mr Smith-Abbott, but if you feel, Mr Smith-Abbott, that

1 it's a question that's better directed towards Mr Penn, if you
2 defer to him. And similarly, Mr Penn, you can defer to
3 Mr Smith-Abbott or if there are matters where you can add
4 additional detail, please feel free to do so.

5 There is a bundle on the desk in front of you, and we
6 might need to go and look at some of the documents as we go
7 through.

8 My last request is can you both just remember to keep
9 your voices upon. The microphones that you have in front of you
10 won't amplify. They will just record. So, if anything, I'd
11 suggest that you pull them as close to yourselves as you can.

12 The topic on which we are asking questions today is in
13 relation to the grant of Belongership. Now, on the 29th of July
14 of this year, the Commission sent a letter to The Honourable
15 Vincent Wheatley asking for an affidavit on the issue, and that
16 response was provided by you, Mr Smith-Abbott. Now, given that
17 you were appointed as Honourable Wheatley's Permanent Secretary
18 in May 2021, why was it thought that you were better qualified
19 than the Minister to make the Affidavit on such an important
20 topic?

21 A. (Mr Smith-Abbott) Good morning, or good day, everyone,
22 and Commissioner, I would also like to thank you very much for
23 allowing the Chief Immigration Officer to be a part of the
24 evidence given this morning.

25 It was important, perhaps, for myself to coordinate

1 the response, since there are a number of technical matters
2 related to Belongership and the grant of Belongership over time,
3 which coordinating with the Immigration Department, it was
4 deemed to be important and suitable for that response to be put
5 together for at least technical matters that were addressed in
6 the various requests to be considered at that time. And
7 bundled, so to speak, and responded to.

8 Q. Now, you made on this topic on behalf of the Minister,
9 two Affidavits. Can I ask you just to take up the first bundle,
10 please. Just turn to page 364. That's the first page--in fact,
11 your fourth Affidavit, Mr Smith-Abbott, to the Commission. If
12 we turn through to page 366, you confirm that it is dated the
13 26th of August 2021 and carries your signature?

14 A. (Mr Smith-Abbott) Yes.

15 Q. The Second Affidavit that you made on the topic of
16 Belongership we find in bundle 2, page 1338.

17 COMMISSIONER HICKINBOTTOM: 1328? (drop in audio).

18 MR RAWAT: You're right, 1328.

19 THE WITNESS: (Mr Smith-Abbott) I'm sorry, 13?

20 BY MR RAWAT:

21 Q. 1328.

22 COMMISSIONER HICKINBOTTOM: It's in bundle 2.

23 BY MR RAWAT:

24 Q. This is now, in fact, the Seventh Affidavit that you
25 provided, Mr Smith-Abbott, to the Commission, but it's the

1 second one on the topic of Belongership. And if you turn
2 through to page 1350, again, can you confirm that's dated the
3 10th of September 2021 and carries your signature?

4 A. (Mr Smith-Abbott) Yes, it does.

5 Q. And are you content that these two Affidavits should
6 stand as part of your evidence before the Commissioner?

7 A. (Mr Smith-Abbott) Yes, I am.

8 Q. Now, from your early answer and indeed from the
9 presence of Mr Penn here today, the Affidavit itself is the work
10 of a team of Public Officers; would that be a fair way of
11 putting it?

12 A. (Mr Smith-Abbott) That is very correct.

13 Q. And was--your role was to coordinate that process; is
14 that right?

15 A. (Mr Smith-Abbott) Yes, it was.

16 Q. Can I start off by thanking you and your colleagues
17 for your efforts in putting together the Affidavits on
18 Belongership. As the Commissioner has recognised, Public
19 Officers have often had to shoulder the burdens of requests from
20 the Commission, even when they are directed to Ministers and
21 have had to do that with sometimes limited support, and we are
22 grateful for the efforts that you and your team have put it.

23 A. (Mr Smith-Abbott) Thank you, sir.

24 Q. I just need to clarify one detail with you in
25 relation--we can take it with the Second Affidavit first.

1 You've put in at paragraph 5, which is at page 1329.
2 What you say is: "At the onset, I should further say that in
3 this Affidavit where I mentioned document, I do not waive any
4 privilege asserted in respect of it unless I do so expressly".

5 Are you able to clarify any further at this point in
6 time whether there is any document that you do assert privilege
7 over?

8 A. (Mr Smith-Abbott) Given the fact that Belongership
9 discloses--the persons of Belongership discloses quite a
10 considerable amount of biographical personal information about
11 individuals, it was deemed necessary in this particular case to
12 exercise some degree of right over personal data, which may also
13 include potentially convictions and other--other types of events
14 that, in other words, may not be in the best interest, public
15 interest, to disclose at this time.

16 COMMISSIONER HICKINBOTTOM: That's to do with personal
17 data, and certainly I understand that, and it's important as we
18 go through any evidence today that none of us refer to personal
19 data, including names. I understand that. But what about
20 privilege, which is a different matter?

21 THE WITNESS: (Mr Smith-Abbott) Privilege, otherwise,
22 would be--the bundle itself has no information that otherwise we
23 will exercise any privilege over because it's process-driven.

24 COMMISSIONER HICKINBOTTOM: It's purely personal data?

25 THE WITNESS: (Mr Smith-Abbott) Correct.

1 COMMISSIONER HICKINBOTTOM: Which becomes--

2 THE WITNESS: (Mr Smith-Abbott) Which becomes the
3 subject of privilege in this case, I understand it to be.

4 COMMISSIONER HICKINBOTTOM: It's confidential.

5 THE WITNESS: (Mr Smith-Abbott) Exactly, correct.

6 BY MR RAWAT:

7 Q. But what may set your mind at ease, Mr Smith-Abbott,
8 is that firstly, the Commissioner has throughout made clear that
9 all disclosure is to him in the first place alone and is
10 confidential.

11 And secondly, the position that was taken by the
12 Attorney General in respect of documents with which you're
13 concerned today, and it's a matter on which the Commissioner has
14 not ruled, is that the Attorney General was not going to
15 disclose all material. And, therefore, I suspect that much of
16 the material with which you are concerned, which is individual
17 biographical data, has, in fact, not been provided to the
18 Commission. That may assist us.

19 In relation to--is the position the same, then, in
20 relation to the exhibits that you appended to your first
21 Affidavit, the fourth one that we've just looked at?

22 A. (Mr Smith-Abbott) Correct.

23 Q. Can I begin, then, just by asking you both to confirm
24 that the key aspects of the legislative framework, the first
25 part is, and we don't need to turn up the pages, but I will give

1 the Commissioner the references. But the starting point is the
2 Constitution; isn't it?

3 A. (Mr Smith-Abbott) That is correct.

4 Q. And specifically that section 22 sets out what the
5 definition of a Belonger is?

6 A. (Mr Smith-Abbott) That is correct.

7 Q. But then in terms of the piece of legislation that is
8 the overarching piece of legislation we have to look to the
9 Immigration and Passport Act of 2013?

10 A. (Mr Smith-Abbott) That is correct.

11 MR RAWAT: And, Commissioner, in this bundle you will
12 find the Constitution at page 1366 in the second bundle, with
13 section 22 appearing at 1370.

14 COMMISSIONER HICKINBOTTOM: Yes, thank you.

15 BY MR RAWAT

16 Q. In terms of the Act itself, the 2013 Act, we will find
17 that at 1425, that's where it starts, but the key provision is
18 at 1438, and that's section 16; is that right?

19 A. (Mr Smith-Abbott) That is correct.

20 Q. And if we look at section 16, and I will ask you to
21 give the Commissioner some more detail about how it operates in
22 due course, but that's headed "certificates that a person
23 belongs to the Territory", and that will set out essentially the
24 basis on which someone can apply for a certificate?

25 A. (Mr Smith-Abbott) That is correct.

1 Q. For Belongership.

2 A. (Mr Smith-Abbott) Yes, indeed.

3 Q. Section 17 is headed "validity of certificate" issued
4 under section 16, and then section 18 deals with a different
5 status, and that is Residence Status; is that right?

6 A. (Mr Smith-Abbott) That is correct.

7 Q. And Residence Status can be revoked by the Cabinet
8 under section 19; is that right?

9 A. (Mr Smith-Abbott) That is correct.

10 Q. Which can include if we look at page 1441, if the
11 person has in any country been sentenced to imprisonment for a
12 criminal offense for a term of one year or more?

13 A. (Mr Smith-Abbott) Under subsection (b)?

14 Q. Subsection (b), yes.

15 So, can you help me with this. If you turn back to
16 section 3, which is at page 1432, please. That's headed
17 "persons who are deemed to belong to the Territory", and at
18 section 3--and you've set this out in the Affidavit,
19 Mr Smith-Abbott, it says: "For the purposes of this Act, a
20 person shall be deemed to belong to the Territory if that person
21 so qualifies under section 22 of the Virgin Islands Constitution
22 Order".

23 And then it gives under subsection 3(2), that subject
24 to subsection (3), "the Governor may at any time by order
25 declare any person deemed to belong to the Territory by virtue

1 only of a Certificate of Naturalisation to be no longer deemed
2 to belong to the Territory on the grounds that", and then there
3 are various grounds set out, which include at (c), "as within
4 five years of the grant of such certificate been sentenced to
5 imprisonment in any country for a criminal offense for the term
6 of one year or more, or (d) has obtained such a certificate by
7 means of fraud, false representation, or concealment of any
8 material fact".

9 Just to break that down a little, firstly, is it right
10 that when the Act refers to a Certificate of Naturalisation,
11 it's referring to a certificate that you can obtain under
12 section 16?

13 A. (Mr Smith-Abbott) Yes, sir. At this time, I would
14 like to invite Mr Penn, if possible, to provide the answers to
15 these questions.

16 Q. Certainly.

17 A. (Mr Smith-Abbott) Thank you.

18 Q. Mr Penn, I think we should introduce for the
19 Transcript because you're Chief Immigration Officer, so you have
20 a certain level of expertise.

21 A. (Mr Penn) Yes.

22 Q. Do you want me to put the question again?

23 A. (Mr Penn) Please.

24 Q. Where subsection 3(2) refers to a Certificate of
25 Naturalisation, is that a certificate that you would be granted

1 under section 16?

2 A. (Mr Penn) Naturalisation, no. Certificate of
3 Naturalisation is granted through the Passport and Visa Office.
4 And a Certificate of Naturalisation can come where someone has
5 attained residence and one year after residence then they can
6 apply for a Certificate of Naturalisation.

7 Q. So, is there any provision by which once an individual
8 had been granted Belongership, that grant can be revoked?

9 A. (Mr Penn) Well, the law states that under section
10 17(2)(c), it says--has written five years of the grant of such
11 certificate has been sentenced to imprisonment in any country
12 for a criminal offense for a term of one year or more, or (d),
13 has obtained such certificate by means of fraud, false
14 representation, or concealment of any material fact.

15 Q. And thank you for drawing our attention to that, so
16 once you have a certificate under section 16, the Cabinet can
17 revoke it if, having been granted that, you engage in any of the
18 activities set out there, which can include being sentenced to a
19 criminal offense?

20 A. (Mr Penn) Yes.

21 Q. I see. Thank you.

22 I may need to come back to that as we get deeper into
23 section 16, but I just want to just flag up the other two
24 significant pieces of legislation that we will need to look at
25 today, and that is the two Immigration and Passport (Amendment)

1 Act passed in 2019. So that is, we will find the first one at
2 1493 in the bundle, which was Immigration and Passport
3 (Amendment) Act 2019 No. 5 of 2019, and that made amendments to
4 section 16, and then was followed--I think was assented on
5 the--or Gazetted on the 18th of June 2019, and then Immigration
6 and Passport (Amendment) Act No. 2 of 2019 Gazetted on the 2nd
7 of September, also came into force.

8 Now, those two acts make amendments to section 16, and
9 in effect keeping it simple because it is something I would like
10 some detail on, but it introduced what has been called a
11 "fast-track scheme" to get Belongership Status; is that right?

12 A. (Mr Penn) Yes, correct.

13 Just a point of note as well--well, yes, section 16,
14 yeah, these would be Belongership Status, yes.

15 Q. I will ask you to just pause as we go through,
16 probably give the Commissioner a lot more detail about how it
17 works as we go through but if we start off with Belongership
18 Status, our starting point, as we said, is that someone is
19 deemed to belong if they fall within section 22 of the
20 Constitution Order of 2007. And it's right, isn't it, that
21 Belonger Status will bring certain privileges which include
22 voting rights and the right to remain free from Immigration
23 control?

24 A. (Mr Penn) Yes.

25 Q. Now, if we turn to--and I know that the bundle is with

1 you at the moment, Mr Penn, and it might be sensible to keep it
2 there--but if you turn to page 1329 in that bundle?

3 A. (Mr Penn) This in bundle 2?

4 Q. Yes. At 1329, we find paragraph 8, and the Affidavit
5 sets out section 22, and if you go over to the next page, 8.5,
6 it deals with the different ways in which a person can obtain
7 Belonger Status under the Constitution. Could you just set out
8 for the Commissioner the different sort of elements of Belonger
9 Status that are available under the Constitution.

10 A. (Mr Penn) Right.

11 So, under the Constitution, 2(a) states a person
12 belongs to the Virgin Islands if that person is born in the
13 Virgin Islands, and at the time of his birth, his or her father
14 or mother is or was a British overseas Territory citizen. By
15 virtue of birth, registration or naturalisation in the British
16 Virgin Islands or by virtue of descent from a father or mother
17 who was born in the Virgin Islands.

18 And then under two, it says, settled in the Virgin
19 Islands for the purpose, "settled" means ordinary residence in
20 the Virgin Islands without being subject under the law in force
21 in the Virgin Islands to any restriction on the period for which
22 he or she may remain does not include persons or contract with
23 the Government of the Virgin Islands or any statutory body or
24 corporation.

25 (b) is born in the Virgin Islands of a father or

1 mother who belongs to the Virgin Islands by birth or descent.

2 So (b) goes back to (a) where a person is born of a father or
3 mother who belongs to the Virgin Islands by birth or by descent.

4 (c) is a child adopted in the Virgin Islands by a
5 person who belongs to the Virgin Islands by birth or descent.

6 So, that is pretty straightforward.

7 (d) is born outside of the Virgin Islands of a father
8 or mother who is a British overseas Territory citizen by virtue
9 of birth in the Virgin Islands. This means that someone is born
10 outside of the Territory, outside of the BVI, whether in the US
11 or another country. But, however, their parents, their mother
12 or father, is from the Territory, okay?

13 (e) is a British overseas Territory citizen by virtue
14 of registration in the Virgin Islands. That means a British
15 overseas Territory citizen. We have Caymans, Anguilla, you
16 know, those places, Bermuda, which are overseas Territory
17 citizens, and they can Register here in the Territory, here in
18 this Territory.

19 Q. Could I just ask you to keep your voice up a little
20 bit, please, Mr Penn.

21 A. (Mr Penn) Oh, sorry.

22 (f) is a person to whom a certificate has been granted
23 under section 16 of the Immigration and Passport Act 1977, and
24 that goes--and that--of the Virgin Islands, and that goes to
25 section 16 of the Immigration and Passport Act that we are

1 discussing here today.

2 (g) is a spouse of a person who belongs to the Virgin
3 Islands and has been granted a certificate under section 16 of
4 the Act, again section 16 of the Immigration Act comes into play
5 where a spouse would marry someone who belongs to the Virgin
6 Islands.

7 And (h) was immediately before the comments of this
8 Constitution deemed to belong to the Virgin Islands by virtue of
9 the Virgin Islands Constitutional Order 1976(a).

10 Q. So, to distill that answer down, and to summarise it,
11 the position is that, under the Constitution, you could--a
12 person could acquire Belonger Status either by birth or
13 adoption?

14 A. (Mr Penn) Yes.

15 Q. Or by virtue of having acquired British Overseas
16 Territories citizenship?

17 A. (Mr Penn) Exactly.

18 Q. The third way is by grant under section 16 of the Act
19 that we have been looking at. And there is also then, as you've
20 said, section 22(h) being deemed to belong under the 1976
21 Constitution Order?

22 A. (Mr Penn) Yes, sir.

23 Q. So, turning to section 16, and if we look at
24 paragraph 9.2 in the Affidavit, which you will find at
25 page 1331. What has been helpfully set out in the Affidavit is

1 section 16 as it is in force today, and that sets out the
2 different ways in which someone can obtain a grant of
3 Belongership under section 16. We can cross refer that to
4 paragraph 11.1 of the Affidavit.

5 And can you confirm this, Mr Penn: That, in summary,
6 the different ways in which someone can get a grant of
7 Belongership under section 16 are as follows:

8 Firstly, Belongership--they can be a Belonger by
9 tenure, and that's based on the length of time residing in the
10 Territory, and that is under section 16(1) and (3) that they
11 have been ordinarily a resident for a period not less than 10
12 years.

13 The second way in which you can become a Belonger by
14 tenure is on what's set out in the Affidavit or described in the
15 Affidavit as an exceptional basis under subsection 16(1) and
16 (4), and that is where you have been ordinarily a resident for a
17 period of not less than seven years.

18 The third way, which we find at 16(5), is that in the
19 exceptional circumstances of any case where Cabinet considers it
20 fit to do so, it may, in its own discretion and without the need
21 for an application, grant a certificate of Belongership to
22 someone who in Cabinet's opinion has made a significant and
23 consistent contribution to the Economic and Social Development
24 of the Territory over a period of at least 50 years.

25 And then the fourth one is Belongership by marriage,

1 and then the Belonger and the spouse must have been living
2 together as husband and wife for at least five years.

3 And then the last, which is a relatively new
4 provision, is Belongership by fourth generation descent.

5 Is that an accurate summary of the different bases on
6 which under section 16 someone could get a grant of
7 Belongership?

8 A. (Mr Penn) Yes, that is correct.

9 Q. Now, leaving policy aside but taking the grant of
10 tenure first, and you might want to just look at paragraph 10 on
11 page 1332. Again. Perhaps without going into the detail of the
12 Act, someone who seeks to be a Belonger by tenure, and that's
13 under the "not less than 10 years" requirement, what are the
14 criteria or the requirements under the Act for someone to obtain
15 that status?

16 A. (Mr Penn) Going back do section 16 clearly states the
17 criteria there--

18 Q. Sorry, your voice has dropped again.

19 A. (Mr Penn) Sorry.

20 Going back to section 16, clearly states the criteria
21 under section 3, where such person is of good character, is not
22 less than 18 years of age, has been ordinary resident in the
23 Territory for a period of not less than 10 years immediately
24 prior to his or her application. Has held a Certificate of
25 Residence granted under section 8 for the period of not less

1 than 12 months immediately preceding the date of the
2 application.

3 And (e) has in his or her application restated his or
4 her intention of making the Territory his or her permanent home
5 and has satisfied the Board that it is his or her intention to
6 do so.

7 Q. So, good character, ordinarily a resident for not less
8 than 10 years, has to have held a Certificate of Residence for a
9 period of not less than 12 months, and then must show an intent
10 to make the BVI a permanent home?

11 A. (Mr Penn) Yes.

12 Q. Now, you can get, as we've explained, Belongership by
13 tenure on an exceptional basis, and that's at 16(4). But
14 firstly, that's for Cabinet to decide after consultation with
15 the Immigration Board; is that right?

16 A. (Mr Penn) Exactly.

17 Q. And that can be--and again, the requirements are that
18 the person who makes that application must be of good character,
19 must be ordinarily a resident in the Territory, and has to have
20 been so ordinary a residence for a period of not less than seven
21 years immediately prior to the application?

22 A. (Mr Penn) Yes.

23 Q. Does it follow, then, Mr Penn, that that person does
24 not have to be not less than 18 years old?

25 A. (Mr Penn) Well, as the--as the--as the section says,

1 "in exceptional circumstances"; right? So, "exceptional
2 circumstances" could mean a lot of different things. Okay? It
3 could mean less than 18 years. It could mean--it could mean
4 that the--that the period--that the period of seven years, could
5 be, you know, could be immediate. So it doesn't mean that it
6 has to be a drawn-out process and, therefore--and, therefore,
7 the age factor, the age factor in this piece of legislation
8 under section 4 could mean that the age difference, that the age
9 difference, it could be under 18 years.

10 COMMISSIONER HICKINBOTTOM: Can I just set out what I
11 think it means, and you can then perhaps confirm, Mr Penn.
12 There are five conditions under subsection (3) for, as it were,
13 10 years ordinary residence tenure. Subsection (4) provides
14 that there are different conditions. One is good character.
15 One is ordinary residence for seven years. And a third
16 condition is there has to be exceptional circumstances.

17 So, it seems to me that there is no requirement, no
18 condition under subsection (4) that you have to be over 18, but
19 there would have to be exceptional circumstances.

20 THE WITNESS: (Mr Penn) Yes, exactly.

21 COMMISSIONER HICKINBOTTOM: Yes. Because I think you
22 have to look at it that way because, being under 18 is not in
23 itself an exceptional circumstance, but it's not a condition of
24 falling within subsection (4).

25 THE WITNESS: (Mr Penn) Right.

1 COMMISSIONER HICKINBOTTOM: Yes, thank you, Mr Rawat.

2 BY MR RAWAT:

3 Q. We looked briefly at the two provisions in 2019 that
4 amended section 16. It's right, isn't it, that those were
5 time-limited in terms of the changes they made?

6 A. (Mr Penn) Yes.

7 Q. And I understand that the change was to--or the period
8 in which the provisions were in effect was from the 3rd of June
9 2019 initially to the 1st of October 2019, but then it was
10 extended, I think, to the 1st of February 2020; is that right?

11 A. (Mr Penn) Yes.

12 Q. Whether it's Mr Smith-Abbott or yourself.

13 But why were these changes introduced?

14 A. (Mr Penn) Those changes were introduced at that point
15 in time because there was the Government of the day decided that
16 they wanted--that it wanted to do a fast-track, and to
17 facilitate that fast-track then those amendments, you know, were
18 made at that point in time.

19 COMMISSIONER HICKINBOTTOM: The temporary change, as I
20 understand it, Mr Penn, were twofold--again, correct me if I'm
21 wrong because--and this is not a criticism, but they're fairly
22 labyrinthine, but firstly introduced a fast-track; and secondly
23 introduced, I think great grandchildren provisions.

24 THE WITNESS: (Mr Penn) Yes.

25 COMMISSIONER HICKINBOTTOM: That the relationships are

1 not straightforward. I think they're sort of
2 great-grandchildren provisions. Both of those provisions--

3 THE WITNESS: (Mr Penn) Fourth generation.

4 COMMISSIONER HICKINBOTTOM: Four generations, exactly.

5 Both of those provisions, fast-track and the
6 fourth generation provisions, both were temporary?

7 BY MR RAWAT:

8 Q. So the fourth generation--

9 A. (Mr Penn) No, the fast-track was temporary.

10 COMMISSIONER HICKINBOTTOM: The fast-track was
11 temporary. The fourth generation, which I think is paragraph
12 5(a), is permanent?

13 THE WITNESS: (Mr Penn) Yes.

14 THE WITNESS: (Mr Smith-Abbott) Commissioner, if I may
15 just for sake of clarity--right?--because we are referring to
16 fast-track without defining what in law it actually means.

17 COMMISSIONER HICKINBOTTOM: We will come on to that.

18 THE WITNESS: (Mr Smith-Abbott) I understand.

19 COMMISSIONER HICKINBOTTOM: I'm using fast-track only
20 as a shorthand for--

21 THE WITNESS: (Mr Smith-Abbott) Right.

22 COMMISSIONER HICKINBOTTOM: --for whatever the
23 provisions say.

24 THE WITNESS: (Mr Smith-Abbott) Correct. But the
25 fast-track element of this was the fact that you'd have the

1 period of ordinary residence being what is stated in the Act,
2 and then that would be to residents, and then from residents you
3 have a 12-month period that would qualify that individual to
4 become a Belonger, at least to be considered a Belonger. So
5 that 12-month period was in essence shortened so that you would
6 have a simultaneous--and Mr Penn can correct me if I'm wrong--a
7 simultaneous consideration of both residents and Belongership,
8 so that becomes the functional, practical need to address a
9 significant backlog of individuals.

10 So, I think we are employing the term "fast-track",
11 and it's important to at least understand the context and
12 understand what it actually means in the provisions that we're
13 going through, so that individual would be clear and the
14 Commissioner would be clear as to exactly what the material
15 impact of that amendment, which was time-bound, and the reason
16 why it had to be time-bound was because you would not want to
17 permanently waive that 12-month period between the grant of
18 residence to the grant of Belongership or at least the
19 consideration I should say, not the grant but the consideration
20 to a Residence and Belongership.

21 COMMISSIONER HICKINBOTTOM: I suspect Mr Rawat will
22 have some questions about this.

23 THE WITNESS: (Mr Smith-Abbott) Correct. But at least
24 at this particular time as we are starting to--

25 COMMISSIONER HICKINBOTTOM: Look at it?

1 THE WITNESS: (Mr Smith-Abbott) Look at it.

2 COMMISSIONER HICKINBOTTOM: Perfectly fair,
3 Mr Smith-Abbott. As you said, and as I'm sure we'll have some
4 questions that go deeper into this, but ordinarily it's a
5 two-stage process.

6 THE WITNESS: (Mr Smith-Abbott) That is correct.

7 COMMISSIONER HICKINBOTTOM: Residency and
8 Belongership. But to become a resident and then to become a
9 Belonger, there is usually a process.

10 THE WITNESS: (Mr Smith-Abbott) Right.

11 COMMISSIONER HICKINBOTTOM: It's not a right. There
12 is a process which has to be gone through, and under what's
13 called a fast-track system, those are effectively merged--

14 THE WITNESS: (Mr Smith-Abbott) That's correct.

15 COMMISSIONER HICKINBOTTOM: So there is only one
16 consideration.

17 THE WITNESS: (Mr Smith-Abbott) That's correct.

18 COMMISSIONER HICKINBOTTOM: Of both Residents and
19 Belongership at the same time?

20 THE WITNESS: (Mr Smith-Abbott) That is correct.

21 COMMISSIONER HICKINBOTTOM: But you mentioned--and I
22 think this probably responds to Mr Rawat's question--as to the
23 reason for the fast-track, and you said that there was a
24 significant backlog.

25 THE WITNESS: (Mr Smith-Abbott) That's correct.

1 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

2 BY MR RAWAT:

3 Q. I will come back to the fast-track and ask some more
4 details about how the criteria that were applied, but just
5 whilst we're on the topic, what you seem to be suggesting or
6 summarizing, Mr Smith-Abbott, is that you had a, essentially, a
7 dual process where someone could make a combined Residence and
8 Belonger application.

9 A. (Mr Smith-Abbott) That is correct.

10 Q. Was it possible for someone who already had the
11 benefit of residence to use the fast-track process to make a
12 Belonger application?

13 A. (Mr Smith-Abbott) Subject to correction by the Chief,
14 yes, individuals did take advantage of the ability, if they had
15 residency, to then apply for Belongership at that time as well.

16 Q. And if--and you've explained that the reason why it
17 was time-bound. If someone had made an application under the
18 fast-track programme before the expiry of the end date, which
19 ultimately I think was the 1st of February 2020, but that
20 application had not been determined by that date, does it still
21 fall to be considered under the amended law or does it revert to
22 being considered under the original section 16?

23 A. (Mr Smith-Abbott) To that answer I would yield again
24 to Mr Penn.

25 A. (Mr Penn) Can you repeat, please?

1 Q. I will put it this way. I think--and I have been
2 saying this, but I think when the Act was--yes, when the second
3 Immigration and Passport (Amendment) Act of 2019 came in, one of
4 its effects was to extend the time for what we're calling the
5 "fast-track programme"--

6 A. (Mr Penn) Right.

7 Q. --so that it would end on the 1st of February 2020.

8 If someone put in an application under the fast-track
9 programme before the 1st of February but it was not determined
10 until after that date, was it determined under the amended
11 legislation or under the law as it stood at the time that the
12 application was actually decided?

13 A. (Mr Penn) No. Once the application was in before,
14 before the--before the--before the temporary time limit was
15 ended, then those applications would have had to be determined
16 on that basis and not go back to the original law.

17 Q. If we do go back to the original law, which is now
18 essentially what is currently in force with the addition of
19 16(5) (a), which is the fourth generation Belonger basis, the
20 common component when you're looking at Belongership on the
21 basis of tenure whether it's not less than seven years or not
22 less than 10, is good character, isn't it?

23 A. (Mr Penn) Yes.

24 Q. And also someone must be ordinarily residence.

25 Now, if we turn up 10.8 of the Affidavit, it refers

1 there to subsection 16(10) which provides as follows--I will
2 take you to 10.7. So under subsection 16(9) of the Act, there
3 are different periods of ordinary residence depending on which
4 section you're applying under. So, if you're applying for
5 Belonger by tenure on the basis that you've been ordinary
6 resident for less than 10 years, you have to make sure that the
7 number of days from which you are absent from the Territory does
8 not exceed 900 days; that's right, isn't it?

9 A. (Mr Penn) Yes.

10 Q. Whereas if you're doing it on the basis of
11 Belongership or the exceptional basis of tenure where it's not
12 less than seven years, then you are, as long as you are absent
13 for the Territory for a period not exceeding 630 days, your
14 application can still proceed; is that right?

15 A. (Mr Penn) According to the law, yes.

16 Q. And there is, again, when we're looking at seeking
17 Belongership by marriage, the time period in which the applicant
18 is allowed to be out of the Territory must not exceed 450 days,
19 so that's the position.

20 And what's said at 16(10), and this is at 10.8 of the
21 Affidavit, is that notwithstanding the definition of "ordinarily
22 resident", an applicant shall be deemed to be ordinary resident
23 in the Territory where he or she proves to the satisfaction of
24 the Cabinet that he or she has been absent from the Territory on
25 grounds of illness, study, Government service or service in the

1 armed force of Her Majesty's Government.

2 And so, those are, if you like, specific reasons which
3 can mitigate absence from the Territory. So, if someone is
4 studying abroad for an extended period, that would not count
5 against them when you're calculating ordinary residence; is that
6 right?

7 A. (Mr Penn) Yes.

8 Q. And similarly, if, for example, a Public Officer has
9 to go abroad on behalf of the Government, and again, is there
10 for an extended period, that doesn't count?

11 A. (Mr Penn) That is correct.

12 Q. But is it right to read section 6(10) as essentially
13 saying that it's only those four grounds that allow you to not
14 have time counted against you?

15 A. (Mr Penn) Yes, according to the law, yes.

16 Q. I'm struggling for an example. But if someone decides
17 that they're going to go on a round-the-world trip for three
18 years, the effect of that is that for those three years they
19 would not be deemed as being ordinarily resident in the BVI?

20 A. (Mr Penn) No.

21 Q. Is that a no of agreement or a no of dissent, Mr Penn?
22 Would you agree with what I put to you?

23 COMMISSIONER HICKINBOTTOM: I think it was a no to
24 agreement. You agreed with Mr Rawat?

25 THE WITNESS: (Mr Penn) Right.

1 COMMISSIONER HICKINBOTTOM: So, in counting up these
2 days for the purposes of defining "ordinarily resident" that you
3 can be out of the Territory; otherwise, you've got to be
4 physically here. You don't count any days when you're out of
5 the Territory for these particular--for these particular
6 reasons. For example, if you're studying abroad?

7 THE WITNESS: (Mr Penn) Right, correct, yes.

8 COMMISSIONER HICKINBOTTOM: But that's it. There are
9 no other reasons that the days cannot count?

10 THE WITNESS: (Mr Penn) Well, let me put it this way:
11 This law was written a long time ago, and it's kind of arcane
12 right now, but, you know, from time to time, you know, we amend
13 the law based on situations that happen and stuff like that.

14 So, in a situation like what we're in now, COVID-19,
15 persons could be out of the Territory and could not return
16 because of restrictions, you know, airports being closed, you
17 know, countries are in quarantine and stuff like that, so the
18 law does not mention this, however, but in today's legalised
19 law, it--it can be seen--it can be seen as one of the exceptions
20 as well. However, it's not there.

21 If you understand what I'm trying to say.

22 BY MR RAWAT:

23 Q. Yes.

24 But if you take COVID as the example, though, did the
25 Department issue any kind of policy to say where someone can

1 show that they are outside the BVI wanting to come back to the
2 BVI but cannot for reasons outside their control, then we will
3 not count that time against them.

4 A. (Mr Penn) Well, someone can make that application. It
5 would be up to--it would be up to Cabinet to make that
6 determination, perhaps Cabinet may have the discretion to do so.

7 Q. I see. All right. Thank you.

8 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
9 but does that mean that even in the circumstances in which
10 you've outlined, which are understandable, for example, if
11 you're, as it were, physically locked out of the country because
12 of COVID.

13 THE WITNESS: (Mr Penn) Right.

14 COMMISSIONER HICKINBOTTOM: I understand the merits of
15 that, but you'd say that that's not something that you would
16 take into account. It's something that the Cabinet may possibly
17 be able to take into account in their discretion?

18 THE WITNESS: (Mr Penn) Yes.

19 What I would--what I would say to that applicant is to
20 put it in writing, as Mr Rawat just stated, put his reason why
21 he was out of the Territory, although it is not under one of the
22 three exceptions that we've read, and therefore it will be
23 presented to Cabinet. And I'm sure Cabinet will be advised by
24 the Attorney General on whether they have the discretion to deal
25 with it in that sense or not.

1 COMMISSIONER HICKINBOTTOM: From that response, do I
2 take it that you don't have any opinion as to whether Cabinet
3 has got that discretion? That's something that the AG would
4 advise Cabinet about?

5 THE WITNESS: (Mr Penn) Yes.

6 COMMISSIONER HICKINBOTTOM: Fair enough. Thank you.

7 BY MR RAWAT:

8 Q. If I could just ask you to turn up page 1346, please,
9 Mr Penn.

10 It's right at the bottom, the question was posed to Mr
11 Smith-Abbott about the current test for ordinarily resident and
12 whether it was mandatory, and if you go to page 1347,
13 Mr Smith-Abbott explained that--and referred back to the
14 Legislation that we've looked at, particularly subsection 16(9)
15 and pointed out that it has not been amended, and then in
16 relation to the period of ordinary residence required under
17 different subsections, which is 10(7) or five years, what's
18 recorded is that the Department is, therefore, bound to apply
19 that definition as a minimum requirement, and by that that's the
20 Immigration Department, isn't it?

21 And then you say--and it's something we'll come back
22 to, in addition, in respect of tenure applications, it applies
23 the Benchmark of 20 years. Put that to one side because I will
24 ask you about that in a moment.

25 But in effect, what that means, is that if someone

1 were to apply for a tenure on the basis of having ordinarily
2 resident for six years, that would disqualify them straightaway;
3 is that right?

4 A. (Mr Penn) Yes, it was. Yes, it would be because it
5 would be under the seven year--

6 Q. The seven- or the ten-year?

7 A. (Mr Penn) Or the ten-year, yes.

8 Q. Okay. Now, there are also--and we can jump back to
9 10.8 in the Affidavit--sorry, 10.9. What has been set out in
10 the Affidavit is reference to subsection 16(8), which gives
11 guidance as to the factors that Cabinet has to consider when
12 addressing applications made under section 16(1) to (4), and
13 they are the economic situation in the Territory and whether it
14 will effect--in effect whether the application will prejudice a
15 trade or profession that other persons are already engaged in.
16 Secondly, whether the applicant has established a close personal
17 connection with the Territory. Thirdly, the applicant's
18 character and previous conduct are unexceptional. And fourthly,
19 the applicant's--whether the applicant's continued residence in
20 and association with the Territory may afford some advantage to
21 the Territory.

22 So, I suppose, breaking that down, does it come
23 to--those factors are essentially whether the applicant could
24 have a negative economic impact on others? So, for example, if
25 you--are you going to take work or a trade from somebody who's

1 already here? Secondly, it's whether you have a close personal
2 connection with the Territory. Thirdly, it's essentially
3 whether you are of good character, isn't it?

4 A. (Mr Penn) Yes.

5 Q. And then fourth is, whether continued residence in
6 association with the Territory will afford--will add something
7 to the Territory.

8 Now, those are the factors that Cabinet, under the
9 Act, have to consider. Are they--and we will get into the
10 process, but are they factors that the Immigration Department,
11 when it's processing applications for Belongership, will also
12 have in mind?

13 A. (Mr Penn) Just to make it clear, the Immigration
14 Department as it relates to this application is purely not
15 decision-making or--and making sure--and making sure that the
16 application--that the application has all the criterias that is
17 there and processing those application to go before--to go
18 before the Board and eventually to Cabinet.

19 So, the Immigration Department is work for the
20 Belonger's application. It's just purely administrative.

21 COMMISSIONER HICKINBOTTOM: It is, Mr Penn, but we
22 shouldn't underestimate its role. So can I just finish because
23 I think this reflects what you say, I think, but I think the Act
24 or what you reflect what the Act says. What the Act says is,
25 under section 16(2) that a person may be granted a certificate

1 referred to in subsection (1) if he or she qualifies under
2 subsection (2) or subsection (3) or (4) or, indeed, (6). So
3 what an applicant has to do, he or she has to satisfy the
4 conditions. If we're talking about the ten-year tenure, the
5 conditions that are set out in subsection (3), they have to
6 satisfy those conditions. As I understand it, your role is to
7 see whether they satisfy those conditions, but once they satisfy
8 those conditions, they still aren't entirely through the process
9 because, under 16(2) there is a discretion, a person may be
10 granted a certificate if they satisfy all of the conditions, and
11 it's that discretion that's exercised by the Cabinet, and in
12 exercising that discretion, they have to take into account the
13 factors set out in subsection (8).

14 THE WITNESS: (Mr Penn) Yes, exactly. And I agree
15 with what you said, but even though--even though the application
16 comes and it is scrutinised by myself or the Department, I still
17 see that's purely administrative.

18 Yes, I follow the law, and make sure that all the
19 criterias are satisfied, and then after that, those applications
20 are processed and go before the Board.

21 So, that's why I said it's purely administrative, even
22 though it has to be scrutinised by myself and the Department.

23 COMMISSIONER HICKINBOTTOM: Because the final
24 assessment, the final judgment is made by Cabinet.

25 THE WITNESS: (Mr Penn) Exactly, yes.

1 COMMISSIONER HICKINBOTTOM: No, I understand that.
2 Thank you, Mr Penn.

3 BY MR RAWAT:

4 Q. I think probably I set this hare running, Mr Penn, by
5 not being clear about the distinction between the Immigration
6 Board and the Immigration Department. I mean, it comes out of
7 this, doesn't it, that there are three elements to the process.
8 The first part will be the Immigration Department scrutinizing
9 the application?

10 A. (Mr Penn) Yes.

11 Q. And putting it together?

12 A. (Mr Penn) Yes.

13 Q. And the second part is the work of the Board?

14 A. (Mr Penn) Yes.

15 Q. Which will involve, as we will come to, an interview
16 process and an assessment?

17 A. (Mr Penn) Yes, yes.

18 Q. And making a recommendation?

19 A. (Mr Penn) Yes.

20 Q. And then--it then goes to Cabinet who can either
21 accept or reject that recommendation?

22 A. (Mr Penn) Exactly.

23 Q. So, I think you're right, that in that sense the work
24 of the Department is that administrative in that you essentially
25 operate the scheme, but recommendations and decisions are made

1 by others?

2 A. (Mr Penn) Yes.

3 COMMISSIONER HICKINBOTTOM: That's very helpful.

4 Thank you.

5 BY MR RAWAT:

6 Q. But I think the reason I asked the question in the
7 first place was the extent to which these factors inform the
8 process because, under the Act, they determine how Cabinets will
9 approach the application. But in terms of when you and your
10 team are assessing an application or, indeed, when the Board is
11 looking at an application and deciding whether to make a
12 recommendation or not, would it be fair to say that these are
13 factors that inform the process?

14 A. (Mr Penn) Could you confirm again?

15 Q. There are four factors under the Act.

16 A. (Mr Penn) Oh, yes, right.

17 Q. So, leave Cabinet to one side.

18 A. (Mr Penn) Right.

19 Q. But in terms of the approach adopted by the
20 Immigration Department and the approach adopted by the
21 Immigration Board--

22 A. (Mr Penn) Right.

23 Q. --do these factors inform that approach?

24 A. (Mr Penn) Yes, because, in providing--in providing--in
25 processing the applications and getting it ready to put before

1 the Board, and the Board meets to make recommendation, the Board
2 will take into consideration a number of factors as well, and
3 some of those factors--you know, some of those factors would
4 include--would include but not limited to some of the things
5 that Cabinet has to take into consideration.

6 So, the Board will also look at a person's character,
7 and they would look more keenly into, you know, a number of--a
8 number of things procedurally, procedurally, that, you know,
9 that will cause them to make a recommendation to Cabinet.

10 And yes, and, therefore--yes, and, therefore, you
11 know, it would influence--it would influence their mind whether
12 to make a recommendation or not to recommend.

13 Q. I see.

14 I think we will get into the detail of the process
15 shortly.

16 A. (Mr Penn) Yes.

17 Q. But if I take you, Mr Penn, just to 10.4, so it's
18 page 1333, and paragraph 10.4 of the Affidavit, so we've dealt
19 with the two subsections which can give you Belongership by
20 tenure, and there is also, just to deal with the other ways in
21 which you can get Belongership, there is the further exceptional
22 basis which is subsection 65, and that's where someone has made
23 a significant and consistent contribution over a period of at
24 least 50 years.

25 A. (Mr Penn) Yes.

1 Q. I think at one point during, was it during the
2 fast-track period, that was shortened to 20 years; is that
3 right?

4 A. (Mr Smith-Abbott) Well, Commissioner, if I may
5 actually address this particular exceptional case, this was in
6 the context of Mr Lawrence Rockefeller, who was a significant
7 contributor to the development of economic activity in Virgin
8 Gorda, and Protected Areas, establishment of Protected Areas
9 system in the Virgin Islands along with the late-Joseph O'Neal.
10 So, in this particular case, which based on my background as
11 disclosed before, Cabinet felt very strongly that the bar would
12 be set very high for an individual of such stature and who would
13 have made a sterling contribution, to grant and make it very,
14 very clear that the strength of that contribution of 50 years
15 would be significant enough to grant Belongership on that basis,
16 where the other factors that we had been considering, being
17 ordinarily resident in the Territory, et cetera, would not
18 necessarily factor into that decision.

19 And as far as I'm aware, that exceptional case is the
20 single most--singular example of that such a grant of
21 Mr Rockefeller.

22 COMMISSIONER HICKINBOTTOM: But do either you or
23 Mr Penn know, as Mr Rawat suggests, that in the temporary
24 provisions in 2019, was that reduced from 50 to 20 years, or was
25 it not?

1 THE WITNESS: (Mr Smith-Abbott) (no audible answer).

2 BY MR RAWAT:

3 Q. If I take you to page 1493.

4 COMMISSIONER HICKINBOTTOM: Yes, thank you.

5 THE WITNESS: (Mr Smith-Abbott) Right. So, under
6 those circumstances, yes.

7 BY MR RAWAT:

8 Q. So, as I understand it, it's reverted back to 50
9 years.

10 A. That's correct, yeah.

11 Q. But also what I think is more important to say about
12 that provision is that it isn't one--it isn't one which requires
13 an application. It's essentially at the gift of Cabinet, and it
14 falls outside the processes that we're discussing today?

15 A. (Mr Smith-Abbott) That's correct.

16 COMMISSIONER HICKINBOTTOM: Yes, and it didn't--it
17 didn't simply reduce the 50 years to 20 years, I don't think,
18 because you also had to be ordinarily resident for 20 years,
19 whereas under the continuing subsection (5), it was simply 50
20 years.

21 THE WITNESS: (Mr Smith-Abbott) Correct.

22 And my understanding--

23 COMMISSIONER HICKINBOTTOM: 50 years' contribution?

24 THE WITNESS: (Mr Smith-Abbott) And my understanding
25 of that particular process is that, even with the reduction from

1 50 to, say, 20 years, all of those individuals would have still
2 applied under the--even under the fast-track. So the waiving,
3 so to speak, and again subject to correction, but the waiving of
4 such would have still required some application during this
5 particular period for the exceptional basis.

6 COMMISSIONER HICKINBOTTOM: Sorry, you're right,
7 because--

8 MR RAWAT: Yep.

9 COMMISSIONER HICKINBOTTOM: Because the temporary
10 section, the temporary subsection (5) refers to a person who
11 applied.

12 THE WITNESS: (Mr Smith-Abbott) That's correct. So,
13 you would be still subject to an application.

14 COMMISSIONER HICKINBOTTOM: So, it's a different
15 thing?

16 THE WITNESS: (Mr Smith-Abbott) Yes, exactly. It's
17 just that the provision actually would have been reduced from
18 the very high bar, as explained, from 50 to 20.

19 COMMISSIONER HICKINBOTTOM: But there are two other
20 bars.

21 THE WITNESS: (Ms Martin) That's correct.

22 COMMISSIONER HICKINBOTTOM: Two other criteria.

23 THE WITNESS: (Mr Smith-Abbott) Criteria, yes.

24 COMMISSIONER HICKINBOTTOM: Ordinary residence for 20
25 years and an application.

1 THE WITNESS: (Mr Smith-Abbott) That's correct.

2 COMMISSIONER HICKINBOTTOM: Thank you very much.

3 BY MR RAWAT:

4 Q. If we move on and I'll take you back to page 1331.

5 And it's this new 16(5) (a) which is the fourth generation grant,
6 just again does that require an application or does that require
7 just--yes, it does require an application. I'm not reading it
8 properly. That requires an application but all it requires in
9 terms of being successful subject to Cabinet's discretion is
10 that the person can show that they're a great grandchild of a
11 person who belongs to the Virgin Islands; is that right?

12 A. (Mr Penn) Yes.

13 Q. No other categories at all, for example, good
14 character or ordinary residence or age at all?

15 A. (Mr Penn) No.

16 Q. And then I think marriage we've dealt with, and one of
17 the factors, as we've seen, is that what will--good character
18 does come into play there because if the spouse of the Belonger
19 has been sentenced to imprisonment in any country for a criminal
20 offense for a term of 1 year or more, that could count against
21 them?

22 A. (Mr Penn) Yes.

23 Q. Could I take you, please, to paragraph 9.3. We've
24 dealt with the legislation, and it's just turning to policy.
25 Paragraph 9.3 refers to events in 2004 which culminated in the

1 Executive Council, as it then was, issuing administrative
2 guidelines. Can you help at all, either Mr Smith-Abbott or
3 Mr Penn, as to the circumstances in which those guidelines were
4 issued, other than what's in the Affidavit?

5 A. (Mr Smith-Abbott) As it is understood at that time,
6 there was a backlog of applications. And in establishing an
7 orderly process for the consideration of those applications at
8 that time, Cabinet would have been minded to establish at least
9 the order of precedence in terms of the consideration of those
10 applications by at least disclosing the fact that there would be
11 applications that would be considered in chronological order in
12 descending manner. So that the 20-year benchmark and above
13 became at least a means by which the Department would have been
14 constrained in terms of resources to process those applications
15 as the Chief Immigration Officer would have stated in his
16 submission just now or as the Department would be
17 administratively be responsible for vetting those, and with a
18 large number of applicants, there would need to be a way in
19 which you can rationalise how those applications would be
20 systematically addressed.

21 So in doing so, it means there was some criteria
22 established to that, as I understand it, to be considered the
23 backlog of individuals who would need to be considered for
24 Belongership at the time.

25 COMMISSIONER HICKINBOTTOM: Looking at the original

1 documents, there was a backlog, and that's what triggered the
2 Guidelines, it seems, but there were a number of--there are a
3 number of steps that were taken to get rid of the backlog. I
4 forget precisely what they were, but, I mean, 50 applications a
5 month or something would go to the--

6 THE WITNESS: (Mr Smith-Abbott) To the Board.

7 COMMISSIONER HICKINBOTTOM: To the Board and so on.

8 And also the application would be taken in
9 chronological order, oldest first?

10 THE WITNESS: (Mr Smith-Abbott) Yes.

11 COMMISSIONER HICKINBOTTOM: So, if you take the
12 applications oldest first, the 20 years' benchmark wasn't a
13 criteria for prioritisation because the priority was the oldest
14 applications. You don't have to put an artificial line at 20
15 years. The 20 years came in, didn't it, because it was said,
16 after the backlog has been dealt with, because they were
17 confident the steps would get rid of the backlog, then--unless
18 the applicant had been ordinarily a resident for 20 years, then
19 the application wouldn't be considered. It would be shelved.

20 THE WITNESS: (Mr Smith-Abbott) Yes. The functional
21 and practical implication of that policy would create that
22 condition, yes.

23 COMMISSIONER HICKINBOTTOM: But it wasn't
24 prioritisation. It was--it was a shelving of all of those
25 applications until 20 years had elapsed?

1 THE WITNESS: (Mr Smith-Abbott) Yes.

2 Q. We can see the guidance--or the Administrative
3 Guidelines Act at 1576 in that bundle, which I think is--yes,
4 dated 24th of August 2005.

5 Now, and the Guidelines we're really interested in
6 start on the other page at 1577, but there seems to be some
7 variability as to what date these guidelines began to be
8 applied, so we see it's dated the 24th of August 2005, and the
9 Affidavit mentions 2004, there are other documents that sort of
10 refer to 2004. Were you able to establish any definitive date
11 from which the Immigration Department started applying, and the
12 Immigration Board, started applying the Guidelines?

13 A. (Mr Smith-Abbott) So, what we were able to establish
14 based on, at least, the records available to us, that in a
15 practical sense, these guidelines became effective sometime in
16 2005, so I know that there are some dates that placed the
17 effective start later than this, but at least from what we have
18 been able to glean from the records, it appears that most of the
19 implementation of the Guidelines would have started in 2005,
20 late 2004-2005, which would be consistent with the extract, of
21 course, which would have been issued sometime in August of that
22 same year, so end of 2005 thereabouts you would have had some
23 activity.

24 COMMISSIONER HICKINBOTTOM: But the 24th of August--

25 THE WITNESS: (Mr Smith-Abbott) Sorry, 2004 into 2005.

1 COMMISSIONER HICKINBOTTOM: Exactly.

2 THE WITNESS: (Mr Smith-Abbott) I'm looking at the
3 date.

4 COMMISSIONER HICKINBOTTOM: Yes, because the 24th of
5 August 2004 date is slightly misleading. Because this is an
6 extract from the Minutes of the Executive Council Meeting of the
7 27th of October 2004, and also the memo that's been considered
8 is 367 of 2004.

9 THE WITNESS: (Mr Smith-Abbott) Yes.

10 COMMISSIONER HICKINBOTTOM: So, that fits in,
11 Mr Smith-Abbott, with what you've said, end of 2004.

12 THE WITNESS: (Mr Smith-Abbott) Yes. Right, it
13 becomes difficult to establish the Effective Date because some
14 records may have been lost, there's disclosure of the fact that
15 the Immigration Department had incidences where records were
16 lost in unfortunate circumstances.

17 So, whilst the effective date, whilst the memo refers
18 to 2004, the implementation as we have at least been able to
19 understand, may have started sometime in 2005.

20 COMMISSIONER HICKINBOTTOM: On the same document but a
21 different point, in paragraph 1345(a), it says the Board--that's
22 the--that's the Board of Immigration--has noted in its first
23 recommendation the need to formulate Immigration Policy as part
24 of the Territories national goals and objectives and not in
25 isolation.

1 One would imagine that policies concerning both
2 Residence and Belongership might fit in to a broader policy, a
3 broader national policy, based on things like expected
4 population growth by birth and Immigration by the growth of the
5 economy, all sorts of things, that might result in an
6 immigration policy as to how, and how many, Belongers, how they
7 should be processed, the criteria and how many Belongers there
8 should be allowed in by way of certificate. To be part of sort
9 of a broader policy as to where all of this is going over the
10 next 10, 20, 50 years or whatever it is.

11 Do you know of any such broader policy, a broader
12 policy than the Policies that go purely to Belongers?

13 This seems to touch upon it a bit by saying no more
14 than 25 persons per year. It doesn't really say how that's
15 calculated but that looks like it might be part of a bigger
16 picture.

17 Mr Penn, do you--

18 THE WITNESS: (Mr Smith-Abbott) If I may,
19 Commissioner, actually--

20 COMMISSIONER HICKINBOTTOM: Go ahead.

21 THE WITNESS: (Mr Smith-Abbott) To this point, earlier
22 testimony would have alluded to the significant point in terms
23 of criteria that you want to ensure that there is nothing that
24 adversely impacts existing sectors. So, if we just simply
25 revert back to that testimony--part of Mr Penn's testimony and

1 the line of questioning, I can speak directly to the fact that
2 around this time we had a broad National Development Planning
3 process taking place, which would have been the National
4 Integrated Development Strategy. That was a project actually
5 that was spearheaded by the Economic Development and Planning
6 Unit that would have fallen, I believe at the time, under the
7 Chief Minister's Office, and that was a broad consultative
8 process where varying sectors would have actually held
9 significant meetings looking at the overall strategy and the
10 direction of the Territory. So, it's against that backdrop and
11 that was a multi-year project that culminated with the
12 publication, actually, of the National Integrated Development
13 Strategy. So that I think would have been formed some of the
14 allusions that are being made in this particular paperwork with
15 respect to how the national goals and objectives would have
16 informed the Immigration Policy at that particular time.

17 COMMISSIONER HICKINBOTTOM: But is there any such
18 policy now? Any such broad policy now?

19 THE WITNESS: (Mr Smith-Abbott) Yes, actually there is
20 a National Development process that is taking place currently
21 under the Project, under the Premier's Office, that is an organ
22 of much broader National Development Plan strategy that is being
23 formulated currently.

24 So, even in today's environment, you have a parallel
25 similar process as would have been the case at that time.

1 COMMISSIONER HICKINBOTTOM: But that's looking at the
2 future, and what might happen in the future in terms of policy.
3 This sort of policy now into which the Immigration Policy fits
4 is sort of a policy which sets out the broad aims of the
5 Territory over the next period of time which informs the
6 Immigration Policy, that we want lots of people to come here or
7 we don't want lots of people to come here or whatever it is.

8 THE WITNESS: (Mr Smith-Abbott) There is such,
9 however, I have to say that it's not been directly linked to an
10 Immigration Policy because, effectively, as I understand it,
11 these guidelines constitute, to a large measure, the Immigration
12 Policy.

13 COMMISSIONER HICKINBOTTOM: These?

14 THE WITNESS: (Mr Smith-Abbott) Correct.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 THE WITNESS: (Mr Smith-Abbott) However, there is also
17 a national physical development planning process that looked at
18 the time, and this is a relatively recent adopted plan that
19 looks at projections based on capacity, both from a natural
20 resource perspective, in terms of looking at human settlements,
21 in terms of looking at what the broad national objectives may
22 be, and that is actually an input into this other process that
23 I'm alluded to, which is still ongoing, the national development
24 planning process.

25 So, there is a much broader policy framework being

1 developed that presented an Immigration Policy will fit into.

2 COMMISSIONER HICKINBOTTOM: So, as I understand you,
3 Mr Smith-Abbott, there is something which is ongoing which is
4 going to result in hopefully in some policies in the future.
5 But at the moment, we simply have this--

6 THE WITNESS: (Mr Smith-Abbott) Right. So in terms of
7 this strict view of an Immigration Policy, this is it.

8 COMMISSIONER HICKINBOTTOM: This is it. And there's
9 nothing which--because having a backlog of--having a backlog of
10 Belonger applications or residence applications doesn't address
11 the question of how many people it would be good or sensible or
12 wise or even politically wanted, it doesn't address any of those
13 questions?

14 THE WITNESS: (Mr Smith-Abbott) I would have to say
15 that the link, the direct link, of what is a desired population
16 number. The complement of point say to those that you
17 assimilate and integrate into the community, so to speak, those
18 very discrete questions are yet to be answered. However, what I
19 can also say is that there are instruments of policy that have
20 been developed and are being developed that form up the two
21 Strategy and Policy Statements that are referred to, namely the
22 National Physical Development Planning process, which there is
23 an adopted and approved plan that was the subject of a project
24 that culminated in 2019, 1819, I believe, and then of course,
25 the ongoing National Development Plan that will also speak to

1 how systematic development goals will be incorporated. It is
2 intended to be an instrument that will straddle administrations
3 because really and truly the horizon for implementation of such
4 a plan in such a strategy is long-term.

5 COMMISSIONER HICKINBOTTOM: Yes.

6 THE WITNESS: (Mr Smith-Abbott) And under that
7 process, I would say that you can reasonably then anchor an
8 Immigration Policy that at least takes the aspirations as stated
9 in those documents and places that into an administrative
10 framework, which may then also result in some amendments to the
11 Act.

12 COMMISSIONER HICKINBOTTOM: Very helpful. Thank you
13 very much, Mr Smith-Abbott.

14 Mr Rawat.

15 BY MR RAWAT:

16 Q. But--I mean, the point is made, it probably comes into
17 play towards the very end of 2004, but it does seem to be that
18 those administrative guidelines that we see set out at page 1577
19 have continued to be internal policy since that point.

20 A. (Mr Smith-Abbott) That's correct.

21 MR RAWAT: And Commissioner, for your note, we don't
22 need to turn it up but there is a document at page 1618 which is
23 headed--it's an appendix to a, I think, a Cabinet Memo, yes, but
24 it's headed "Immigration Policy Guidelines", and it then repeats
25 the administrative guidelines that we've been going through.

1 THE WITNESS: (Mr Smith-Abbott) May I just have the
2 Cabinet Paper number--

3 BY MR RAWAT

4 Q. It's page 1618. I don't have the--

5 A. (Mr Smith-Abbott) The Cabinet Paper. Yes.

6 Q. Because I think it's--

7 A. (Mr Smith-Abbott) Yes.

8 Q. At least that's recorded as Immigration Policy
9 Guidelines meeting of 15th of June and 20th of July of 2017. So
10 certainly that's an example of it.

11 A. (Mr Smith-Abbott) Reiterating the older policy.

12 Q. The guidelines through the years. But I think the
13 point that's made, Mr Smith-Abbott, in your Affidavit--and this
14 is at page 1332, and I wanted to clarify this with you at
15 little, if I may. But you make a point that these
16 administrative guidelines, as we have been calling them, are not
17 all followed in practice, and so, if we look at them, you make
18 the point that (a) and (b), that (a) dealt with persons who'd
19 applied for Belongership before the 1st of January 2003, and (d)
20 was a direction in effect about dealing with an outstanding
21 backlog of applications, in chronological order and with batches
22 of 50. You make the valid point that those two guidelines would
23 have been overtaken by time.

24 A. (Mr Smith-Abbott) Right.

25 So, under 9.3(a), you have that the quota of 25

1 persons--

2 Q. I'm sorry, I may be confusing you?

3 A. (Mr Smith-Abbott) Okay.

4 Q. If you keep your thumb or your finger at page 1332 and
5 just turn up 1577, please, Mr Smith-Abbott.

6 A. (Mr Smith-Abbott) 1577.

7 Q. That gives us the 2004 Administrative Guidelines. In
8 your Affidavit by reference to Guidelines (a) and (b), you make
9 the point that those would not--you make the observation that
10 they may no longer be relevant because all the applications and
11 questions would by now have been dealt with?

12 A. (Mr Smith-Abbott) Yes.

13 Q. But taking the others, there is what you've called
14 1347(d), which is in the cases of those who applied for
15 Residence Status after the 31st December--sorry, I will start
16 that again. In the case of those who had applied after 31st
17 December 2002 recommendations for Residence Status should be
18 made for no more than 25 persons each year.

19 Now, that is not something that we're not looking in
20 too great of detail at Residence Status, but is that policy
21 still applied?

22 A. (Mr Smith-Abbott) So, the Policy in relation to
23 consideration of no more than 25 persons per year, is that--

24 Q. Yes.

25 A. (Mr Smith-Abbott) So that's not adhered to, that's the

1 case. That's not adhered to.

2 COMMISSIONER HICKINBOTTOM: And looking at (d) and
3 (e), there was a policy both for Residence Status and then for
4 Belonger Status.

5 THE WITNESS: (Mr Smith-Abbott) Correct.

6 COMMISSIONER HICKINBOTTOM: Residence Status being a
7 pre-condition.

8 THE WITNESS: (Mr Smith-Abbott) Belonger, yes.

9 COMMISSIONER HICKINBOTTOM: Of 25 person per annum,
10 and both of those disappeared as conditions over time?

11 THE WITNESS: (Mr Smith-Abbott) That is correct.

12 COMMISSIONER HICKINBOTTOM: Thank you.

13 REALTIME STENOGRAPHER: Can we take a short break
14 soon?

15 COMMISSIONER HICKINBOTTOM: Yes, certainly,
16 Mr. Kasdan, I've got that in mind, and we are overdue. The
17 Stenographer needs a break after about an hour, and we've been
18 going for a lot longer than that. So we'll have a five-minute
19 break now and then return. Thank you both very much.

20 (Recess.)

21 COMMISSIONER HICKINBOTTOM: Yes, we're ready to
22 resume. Thank you, Mr Rawat.

23 MR RAWAT: Thank you.

24 BY MR RAWAT:

25 Q. Mr Smith-Abbott, just sticking with the administrative

1 guidelines briefly, you have explained that, in relation to the
2 cap of 25 persons for either Residence Status or Belonger
3 Status, that isn't applied anymore. Were you able to establish
4 when that part of the Guidelines stopped being applied?

5 A. (Mr Smith-Abbott) Well, again, I yield to the Chief
6 Immigration Officer, and perhaps he may have an answer.

7 A. (Mr Penn) I wouldn't be able to pinpoint that
8 accurately myself, as I've been Chief from 2014 onwards, those
9 years before I really can't attribute to when that had stopped.

10 COMMISSIONER HICKINBOTTOM: Did it stop before 2014?
11 Did it stop before you took over in 2014?

12 THE WITNESS: (Mr Penn) Yes.

13 BY MR RAWAT:

14 Q. The last guideline is that, in all cases, periods of
15 continuous residence in the Territory means a maximum of 90 days
16 absence in any calendar year, excluding absence to pursue
17 further education. And the point was made in the Affidavit,
18 Mr Smith-Abbott, is that that simply echoes the provisions of
19 the Legislation in respect of continuous residence.

20 A. (Mr Smith-Abbott) That's my understanding.

21 Q. And if it's not less than ten years, you have got to
22 be an ordinary residence for a maximum of 900 days, but in terms
23 of when an application is being considered, is it checked
24 whether someone is away for more than 90-days in a year or is it
25 just, for example, in relation to Belongership by tenure, does

1 the period of time away exceed 900 days? How is it assessed?

2 A. (Mr Penn) For which one? The 90 days?

3 Q. Yes. When you're looking at scrutinising an
4 application, is the question has someone been away for a period
5 of time not exceeding 900 days or is the question in each year
6 have they been away for no more than 90 days?

7 A. (Mr Penn) Right. So, upon application, when someone
8 submits an application, the part of the Immigration Department
9 is to pull that person's file because most likely they would
10 have a file with Immigration. Every year they have to renew
11 their entry permit with us. So therefore, we would go through
12 that file to make sure that they have been continuously residing
13 in the Territory for that period and look for any absences from
14 the Territory that would fit in those categories that, you know,
15 could in some event disqualify them from submitting the
16 application because they have been out of the Territory for, you
17 know, for such long periods.

18 So, part of our administrative work is to scrutinise
19 the application and the person's file and to look for those
20 information.

21 Q. And it's point (c) on the administrative guidelines,
22 which reads, once the backlog of those identified at (b) had
23 been cleared, the Board should make recommendations as
24 applicants reach the 20th anniversary of their arrival in the
25 Territory after the normal screening process, and that is the

1 basis of the Benchmark that has been applied since 2005, which
2 is that you consider applications when somebody has 20 years?

3 A. (Mr Smith-Abbott) That is correct.

4 COMMISSIONER HICKINBOTTOM: And looking at this
5 document which, Mr Smith-Abbott, you said is the policy, there's
6 nothing else, (a) and (b) have run out because of time. (d) and
7 (e), 25 persons no longer applied. (f) merely reflects the Act,
8 so the Policy is (c), isn't it? That's the remaining policy?

9 THE WITNESS: (Mr Smith-Abbott) That is correct.

10 BY MR RAWAT:

11 Q. And has that policy been published at any point?

12 A. (Mr Smith-Abbott) No, it has not.

13 Q. Were you in the work that was undertaken for the
14 Affidavit able to establish why it wasn't published?

15 A. (Mr Smith-Abbott) As I understand it, the
16 administrative guidelines were to then be followed by amendments
17 to the Act. Those are disclosed, of course, in further in the
18 paper under point 1348, along with other elements that are
19 described in that--captured in that section of the Cabinet
20 Paper. So, at least in establishing why this policy only
21 remained an internal document, the working--the working
22 guidelines, so to speak, in terms of the lack of a publication
23 really stems from the fact that it was never really acted on as
24 intended by Cabinet to result in that amendment. I'm not
25 certain why it would have not happened, but at least.

1 COMMISSIONER HICKINBOTTOM: I think you're just
2 looking at the documents. That's where you're getting your
3 information, your views from, but it makes sense. You think
4 that the Policy was introduced. There was a proposal to amend
5 the Act, to bring the Act in line with the Policy, the 20 years.
6 That, for some reason which is not known, was never followed
7 through, and then the Policy was never published again probably
8 you don't know the reason why it wasn't published.

9 THE WITNESS: (Mr Smith-Abbott) Yes, I wouldn't--I
10 wouldn't be able to elaborate much further than what I have.

11 COMMISSIONER HICKINBOTTOM: Exactly, yes. Okay.
12 Thank you.

13 THE WITNESS: (Mr Smith-Abbott) Yes.

14 BY MR RAWAT:

15 Q. And this takes us, Mr Smith-Abbott, back to 1332 of
16 the Affidavit because having addressed the administrative
17 guidelines, you comment or observe at your point (g) that it's
18 regrettable that the Internal Auditor's first two
19 recommendations, and this is a reference to an Internal Audit
20 Report in 2012, that her recommendations that the law be updated
21 which might include amendments to reflect practice of the
22 Department in respect of periods of residence applied as a
23 benchmark have yet to be implemented.

24 You conclude that the Immigration law of the Virgin
25 Islands is currently under review. Funding exists for a

1 Consultant to assist in this process. We await guidance for the
2 Attorney General's Chambers as to a possible candidate to act as
3 that Consultant.

4 And is that still the point you're at, are you still
5 waiting for guidance from the Attorney General?

6 A. (Mr Smith-Abbott) That is correct.

7 Q. And what is the--have you been able to decide or
8 determine what the Consultant will be asked to do?

9 A. (Mr Smith-Abbott) Well, let's take a step back, and I
10 think that the--just for awareness and understanding of the
11 incremental steps, so you have these policy guidelines which
12 have not been published, which have been acted on, obviously,
13 over the period with respect to at least when applications would
14 be considered, so the effective measure here is that they've
15 created a benchmark of 20 years for consideration. There was
16 the identification of the need to implement the Policy
17 statements that are contained in that Cabinet Paper, and these
18 would have been identified by the Auditor General--sorry, the
19 Internal Auditor in the 2012 and subsequent follow-up in 2014.

20 So, therefore, on the strength of all of these
21 recommendations, there has been at least some ongoing dialogue
22 about the need to ensure that all of this volume of work is
23 reflected accurately initially in policy, and then subsequently
24 by the required amendments in the Act that will give effect and
25 better legal standing to act in the manner in which

1 administratively by the Board, by the Department and then
2 subsequently by Cabinet.

3 So, this is now a matter of what this particular
4 disclosure under (g) will refer, that the immigration law of the
5 Virgin Islands is currently under review because, of course, we
6 would have been engaged in this process, and that the
7 consultancy, then, will result in at least--and this will
8 obviously be--will have to be the subject of Terms of Reference,
9 which was going to have to be developed in tandem with the
10 Attorney General's Chambers. But if I was to then lend from
11 other processes, obviously, we would have to look at the
12 context.

13 And there is a lot of work, actually, that would have
14 already been done with respect to the issues that need to be
15 addressed. If you look at the consultation process that
16 actually was undertaken at the time when the fast-track was
17 being considered, you had massive amounts of public engagement
18 and dialogue at that time, and I think that that would be a
19 significant input into any review of policy because the notion
20 that we started from scratch would be a totally false one.
21 There was quite a lot of public engagement and a lot of input
22 and feedback received even at that time.

23 So, I think that it's reasonable to suggest that any
24 review of the Immigration law which obviously would have to be
25 proceeded by a policy, would take that volume of work, that

1 would take the input and feedback received throughout that
2 process to inform what an Immigration--the Amendment of the Act
3 may entail.

4 And that consultancy, the consultancy would
5 effectively have to look at some of these other inputs that
6 we've already alluded to earlier, so we have to look, for
7 instance, at the National Physical Development Plan, for
8 instance, they would have to look at the National Development
9 Plan, once complete, to gain a sense of the overall direction,
10 so it's reasonable to suggest that the Terms of Reference of a
11 consultancy would have to look at all of this volume of work
12 already done to inform what are reasonable policy objectives to
13 be met that will inform an eventual amendment of the Act.

14 Of course, because you have this functional benchmark
15 of 20 years, that would also be a significant input into any
16 policy guidelines--guidance, I should say, as well.

17 COMMISSIONER HICKINBOTTOM: That's looking to the
18 future but at the moment, and really for the last 20 years,
19 since 2004-2005, the guidance has been the criteria set out in
20 the Act. The factors set out in the Act, which I think it's
21 section 16(8). And in terms of policy outside the Act, one
22 policy; that is, that until the 20th anniversary of arrival in
23 the Territory, residents in the Territory, that application
24 won't actually be considered. That's the only policy outside
25 the Act. That policy--and we have--I have received some legal

1 submissions on whether the Policy is unlawful. We needn't go
2 into that, but it's extremely unfortunate, isn't it, that the
3 only policy was not publicised and, therefore, applicants who
4 may have put in their applications after 10 years, didn't know
5 that they would be put on a shelf for 10 years. That seems to
6 me to be very unfortunate.

7 THE WITNESS: (Mr Smith-Abbott) Yes.

8 COMMISSIONER HICKINBOTTOM: It's--any observations you
9 want to make, but it's not ideal.

10 THE WITNESS: (Mr Smith-Abbott) Yes. I think that the
11 potential unlawfulness of consideration--this is in the context
12 of consideration--whether there is an expectation that, after 10
13 years at least I can reasonably be considered for Belongership,
14 and yes, I'm aware of that submission.

15 So, to the extent to which it is unfortunate, as you
16 characterised it, it is unfortunate that a much longer period
17 has been imposed for consideration, not necessarily grant, which
18 is totally separate and distinct; right? It is unfortunate. I
19 look into the future, I think--and I think that what I would
20 like to do at this time is to perhaps speak to what that--what
21 the Immigration Board and Department have been doing with
22 respect to a little more than just simply the 20-year benchmark
23 because, inherent in the practice, there is, of course, the due
24 care and concern with respect to the actual character of that
25 individual who at some point will be integrated.

1 COMMISSIONER HICKINBOTTOM: I think we will come on to
2 that because I think Mr Rawat may have some questions on that
3 aspect, but in terms of unlawfulness--and as I say, I don't want
4 to get into the submissions--I've got the submissions; I'll make
5 of those what I can--but generally speaking as a proposition of
6 public law, if the State, if the Government have a policy which
7 they apply, which is not published, that's unlawful, and here
8 there is a policy. It appears arguable that it's contrary to
9 the statute, but it is an unpublished policy, certainly strongly
10 arguable that it's unlawful. But it just seems to me to be very
11 unfortunate, that because people have been making applications,
12 leaving lawfulness aside, that people have been making
13 applications after 10 years not knowing that they will simply
14 sit on a shelf for a long time. As I say, that's not
15 your--certainly no blame attaching to you because that's the
16 policy to which you're working but it just seems to me to be
17 very unfortunate, that's all.

18 BY MR RAWAT:

19 Q. You've spoken, both of you, about the backlog, and
20 obviously the 2019 effort to reduce what was a significant
21 backlog, but did the fact that the use of a benchmark contribute
22 to the backlog? Because you would have somebody applying when
23 they had completed not less than 10 years, and effectively have
24 their application be put on hold, and it would just be sitting
25 there until the 20-year benchmark was reached, and that

1 presumably must have happened every year, so you would actually
2 build up a pile of pending applications.

3 Do you think that contributed to the backlog at all?

4 A. (Mr Penn) No. No, I don't think so. But what I would
5 like to say here is that, even though the Acts would state seven
6 or ten-years and the guidance talk about 20, although it was--it
7 wasn't published, we're a small community, and, you know,
8 persons would get hold of, you know--you know, what is happening
9 in Immigration because a number of persons would probably
10 inquire or call or come to the Department and, therefore, you
11 know, the word or the message would spread in the community and
12 say that, you know, this is what is happening with Immigration,
13 with submissions of applications and stuff like that.

14 So, at this stage in point, the population knows that
15 when submitting application, they have to submit it at their
16 20th anniversary. Not saying that, you know--you know, it's
17 correct because you talk about it being published, we have no
18 record of it being published. And however, we have been
19 carrying out this policy in that light.

20 And I can say for now we do not have such a backlog
21 per se because we discussed earlier that the Policy talked about
22 25 applications and stuff like that, but that has been done away
23 because we cite more efficient to try to do more applications
24 because year after year more applications will come into the
25 Territory--I mean, to the Department and, therefore, we had to

1 act in terms of processing those applications as fast as they
2 come in to deal with them as quickly, you know, and efficient to
3 get them processed and go before the Board and before Cabinet.

4 COMMISSIONER HICKINBOTTOM: But in respect of that,
5 Mr Penn, firstly, you say that people know that, in practice,
6 it's 20 years, not 10, but it seems to me that applicants are
7 entitled to have a policy that's being adopted published as
8 opposed to relying upon rumors to the practice in the
9 Immigration Department.

10 But in terms of the backlog, just to go back to
11 Mr Rawat's question, when you have a backlog, that presumably is
12 a number of applications which are pending, and that surely
13 includes those applications that are in the 10- to 20-year
14 period, so the backlog, whatever the number is, at any time
15 includes people who have applied after Year 10, and are waiting
16 for Year 20, so the backlog number includes these people who are
17 just sitting on a shelf.

18 THE WITNESS: (Mr Penn) Well, I won't go away from the
19 fact, Commissioner, that, yes, it should be published. And as
20 I've stated, you know, we're a small community and the word
21 would get around, but from my recollection, I cannot--I
22 cannot--I cannot state categorically that there was a number of
23 applications of person or persons who made application, you
24 know, after 10 years--after 10 years. That could have probably
25 been the situation before 2004, before the policy, and that's

1 where--and that's where the backlog perhaps, you know, came by.

2 However, that background was dealt with. I cannot
3 recall applications coming in to the Department, you know, for
4 ten-years or seven years in the Department.

5 COMMISSIONER HICKINBOTTOM: Thank you, Mr Penn.

6 Yes, Mr Rawat.

7 BY MR RAWAT:

8 Q. If we could just turn--and probably this may fall into
9 the ambit of Mr Penn's work, and just an outline of the
10 application process as it currently stands, and that's primarily
11 focused on Belongership by tenure. But as a starting point, I'm
12 right, aren't I--and I apologize if I'm repeating myself--but
13 unless you are going to get status under 16(5), which is the
14 Rockefeller provision, you're going to have to make an
15 application?

16 A. (Mr Penn) Yes.

17 Q. And there are--and you've said this, that there are
18 instructions on the Immigration Department's website, at least
19 an application can find the relevant forms on the website; is
20 that right?

21 A. (Mr Penn) Yes.

22 Q. And I think the Affidavit acknowledges that the
23 website needs updating, but leave aside the Policy, it's right,
24 isn't it, you don't publish the statutes on the website?

25 A. (Mr Penn) The Immigration statute, I--no, but--but it

1 should be part of our process to have it on the website.

2 Q. Do you know where someone would go if they wanted to
3 find a copy of the Act?

4 A. (Mr Penn) They would either come to the Department or
5 to the AG Chambers.

6 Q. And members of the public can go to either?

7 A. (Mr Penn) Yes.

8 Q. In fact, I mean, in fairness, you do say or the
9 Affidavit does say that applicants are encouraged to visit the
10 Immigration Department.

11 A. (Mr Penn) Yes.

12 Q. How are they encouraged?

13 A. (Mr Penn) Publicly, if we have--if the Department have
14 any announcement that they would like to make from time to time,
15 persons are encouraged to come to the Department if they have a
16 question, or call numbers that are given, and they can call or
17 come to the Department if they have a question of any process
18 that would affect them immigration-wise.

19 Q. And again, an outline, is that the applicant has to
20 use the required form and has to provide all the necessary
21 documentation?

22 A. (Mr Penn) Yes.

23 Q. Now, the Internal Auditor, in 2012, suggested the form
24 was outdated. Do you know whether the form has been updated at
25 all since 2012?

1 A. (Mr Penn) There was some minor--there was some minor
2 alteration to the form as to the information that person has to
3 provide that was put in front of the form; a checklist as to
4 what persons need when submitting a form to the Department, so
5 that was an improvement.

6 And so when an individual collect the form, they know
7 exactly what they have to, you know, submit with the form, so I
8 think that has been helpful.

9 Q. If we look at page 1337, paragraph 15 sets out the
10 process, and as I understand it, Mr Penn, is that once the form
11 is received it will go to a Member of the Immigration Status
12 Unit for review, and that person will check that all the
13 necessary documentation has been provided; is that right?

14 A. (Mr Penn) Yes, that is correct.

15 Q. And what's recorded at 15.3 is that, after the form
16 has been submitted, the applicant is notified by e-mail of their
17 application status, and by that that means whether they've
18 submitted all their necessary documents or whether additional
19 information is required. Those who, it said here, have applied
20 prematurely, which is before they've reached the 20-year of
21 residence in tenure cases or the 5th year of residence in
22 marriage cases, are informed that the application will be placed
23 on hold until the appropriate period can be demonstrated.

24 And then the application is then placed in a queue to
25 come before the Immigration Board.

1 Now, I think if you look at 15.5, it says that under
2 the Act, the Board is empowered to make such inquiries as they
3 consider expedient. Now, we will come to the process of the
4 Board in a moment, but outside what the Immigration Department
5 gives the Board, does the Board in practice make any further
6 inquiries itself?

7 A. (Mr Penn) There is a process before--before it goes to
8 the Board. There is an interview, which includes a board Member
9 or person from the Status Unit, and in some cases--some cases
10 someone from the Surveillance Unit, so Board Members--Board
11 Members who sit would normally conduct the interviews, conduct
12 the interviews and therefore, would otherwise glean from the
13 interview then, you know, that--then that would be put forward
14 to the Board in terms of, you know, in the overall
15 recommendation, you know, process of the whole Board.

16 Q. Could I come back to that, Mr Penn. I will just try
17 to take the process in order.

18 I think when the Internal Auditor produced her Report
19 in June 2012, she noted that the Immigration Board was using
20 various tools to evaluate applications and then to make
21 recommendations, and those were what was called a point system,
22 an interview, and a cultural questionnaire. And is that the
23 same system that's still used today?

24 A. (Mr Penn) Yes.

25 Q. And so, as I understand it from the Affidavit, the

1 current process is that the applicant attends for an interview.

2 A. (Mr Penn) Yes.

3 Q. Just as you say will be actually not--it's not lead by
4 the Immigration Department, it's an interview with a Member of
5 the Immigration Board.

6 A. (Mr Penn) Yes.

7 Q. But you will have someone there from the Status Unit
8 to administer the cultural test as it's now known; is that
9 right?

10 A. (Mr Penn) Right, and also to take notes.

11 Q. What's the purpose of the cultural test?

12 A. (Mr Penn) Well, one of the purposes of the cultural
13 test is to--it goes to show that--if you desire to make the
14 Territory your home, your intention to, you know, make the
15 Territory your home, the intention is to see how much you know
16 about the Territory and not just, you know, you're here for 20
17 years and, you know, you're expected to get a Residence Status
18 or a Belonger Status, and, you know, you don't know anything
19 about the Territory.

20 So, which means--it's like giving a status--giving a
21 status, you know, to someone in the Territory of such high
22 magnitude, and they don't have any ties to the Territory or they
23 don't know anything about the Territory. So, therefore, you
24 know, that is one of the criterias that we want to make sure
25 that if persons state an intention that they wish to make here

1 the permanent home, one of the criterias is that, you know, they
2 have to be versed or know something about the culture of the
3 Territory in order to do so.

4 COMMISSIONER HICKINBOTTOM: It's sort of evidence of
5 commitment to the Territory, really.

6 THE WITNESS: (Mr Penn) Yes.

7 BY MR RAWAT:

8 Q. So, presumably a test, for example, whether they know
9 something about the history of the Territory?

10 A. (Mr Penn) Yes.

11 Q. And the Affidavit explains that the cultural test has
12 several--

13 A. (Mr Penn) Variations.

14 Q. --versions to help prevent cheating.

15 And it consists of 10 questions related to the Virgin
16 Islands culture and government, and the applicant has 10 minutes
17 to deal with it.

18 Just clarify this, though: Under the--or is there a
19 pass mark for the culture test, the cultural test?

20 A. (Mr Penn) The cultural test is out of 20, and the pass
21 mark is 10.

22 Q. What the Affidavit records--and this is at
23 paragraph 1510 on page 1339, is that a low score on this test
24 doesn't automatically prevent a person from being awarded
25 Belonger Status. Will there be a score that is considered so

1 low that it will lead to the person not being recommended, full
2 stop?

3 A. (Mr Penn) Well, we take--we take the point system, the
4 whole point system, into consideration. So the cultural test is
5 part of the point system, but we take the point system,
6 cumulative points that are built up.

7 However, if where persons scores low on the cultural
8 test, yes, it can be looked at that, you know, that that person
9 is in the Territory for a long period of time and they don't
10 know anything about the Territory. However, it is not outright
11 a disqualifier because, as I said, it is part of a
12 cumulative--cumulative test from the point system.

13 COMMISSIONER HICKINBOTTOM: So, is it fair to say on
14 the point system that it is, as you say, cumulative--I
15 understand that--so that the cumulative score matters, but if
16 any individual had a very low score, possibly on any or at least
17 more than one of the subjects, that might mean that he or she
18 would fail overall?

19 THE WITNESS: (Mr Penn) Not necessarily because they
20 could have a very low score on one matter, but the other scores
21 are very high.

22 COMMISSIONER HICKINBOTTOM: And so what matters really
23 is the cumulative score?

24 THE WITNESS: (Mr Penn) In a sense, yes.

25 COMMISSIONER HICKINBOTTOM: Thank you.

1 BY MR RAWAT:

2 Q. I mean, what's also said is that the Department is
3 fairly flexible depending on any disability or lack of aptitude
4 suffered by a particular applicant. And this is in relation to
5 sitting in the cultural test. How does that flexibility work?
6 Is that in terms of giving someone more time to do the test,
7 or...

8 A. (Mr Penn) Well, there could be persons who are
9 dyslexic or have a challenge and, therefore, we would have to
10 improvise and, you know, try to deal with that person, you know,
11 on a case-by-case basis.

12 Q. And do you have any written guidance in relation to
13 how you deal with such situations, or is it just you have to
14 deal with it on a case-by-case basis as it happens?

15 A. (Mr Penn) Yes, case-by-case basis.

16 Q. Now, on that day there is the cultural test but there
17 is also the interview.

18 A. (Mr Penn) Yes.

19 Q. And we will look at the points-based system or point
20 system in a moment, but are interviews given--as I understand
21 it, the interviewer is a Member of the Immigration Board?

22 A. (Mr Penn) Yes.

23 Q. Is the interviewer given any written guidance on how
24 to conduct the interview or otherwise assess the candidate?

25 A. (Mr Penn) Yes, they do have written interview

1 guidance, yes and they can, you know, ask questions outside of
2 the guidance that they have as well.

3 Q. I see.

4 Do you ever conduct telephone or Skype interviews, or
5 does it have to be face-to-face?

6 A. (Mr Penn) There have been occasions--there have been
7 occasions where there were interviews conducted on Skype or
8 other means, which--which is very rare, but I know that there
9 have been interviews conducted in that way.

10 Q. If we turn up 1569 in the bundle, I think this is the
11 point system form. In the Affidavit it's described as being
12 used to capture the applicant's responses in the interview.

13 Does anything else happen in the interview other than
14 the process of completing this form?

15 A. (Mr Penn) Well, this form is completed--is completed
16 based on the questions that are being asked and the answers
17 provided, and then, therefore, you know, the points are added
18 up.

19 However, you know, during the interview process, there
20 are the questions that the Board Member may ask of the
21 applicant, you know, to make sure that this applicant, you know,
22 has, you know, submitted an application and has had such an
23 intention to make, you know, the BVI their permanent home.

24 Q. So, it's not just a question of simply of interviewer
25 going through and answering the questions and filling in the

1 form.

2 A. (Mr Penn) No.

3 Q. That they'll look at the application form, they may
4 ask additional questions.

5 A. (Mr Penn) Yes.

6 Q. And the officer from the Station Unit is there to make
7 a note of the interview?

8 A. (Mr Penn) Yes.

9 Q. What would you say, Mr Penn, is the benefit of having
10 a point system?

11 A. (Mr Penn) The benefits of having this point system is
12 to--is to rate the application and to--and to, you know, give
13 validation that, you know, that they, you know, have an
14 intention to make the Territory their permanent home.

15 And also--and also to, you know, to look at the fact
16 that we're dealing with persons who may not--who may not just
17 come to make an application because of application's sake, you
18 know, to ensure that, you know, that those persons had genuine
19 applications and to make sure that, you know, there's no, you
20 know--you know--you know, false statements or anything, you
21 know, they have made to other departments or on their
22 application.

23 Q. We spoke about the factors that apply to Cabinet. You
24 remember I asked you whether they informed this process. Some
25 of the answers you have given suggest they do, because you've

1 spoken about people demonstrating their commitment to the
2 community, you've spoken about what a significant step a grant
3 of Belongership Status is or involves.

4 And so, would it be fair to say that, as the design of
5 this form and the purpose of the interview is to look at whether
6 the question of economic balance with someone, an applicant
7 cause a loss of revenue elsewhere, look at personal connection,
8 look at character and conduct, and look at whether they will
9 benefit the Territory?

10 A. (Mr Penn) Yes, I would say that.

11 And I would also go back to say that one of the
12 purposes of the form as well is because the information from the
13 point system--most of it--you know, goes on the--goes on a
14 person profile that goes to Cabinet and therefore, it gives
15 Cabinet, you know, an informed data to make--you know, to make a
16 decision on whether to approve the application or not.

17 So, it is very--it is important to Cabinet as well.

18 Q. And what we see at 1569, this is the form that's in
19 current use, is it?

20 A. (Mr Penn) Yes.

21 Q. You can see that there are what can be called
22 "factors", a number of them, which attract a certain amount of
23 points, and underneath there's a box which says "explanation".
24 And this must be guidance to the interviewer; is that right?
25 Things to keep in mind.

1 A. (Mr Penn) Yes.

2 Q. Aside from what's written on the form, does the
3 interviewer get provided with any other guidance?

4 A. (Mr Penn) They give guidance--they give guidance on,
5 you know, the type of questions, you know, that they can ask,
6 some generic questions that they can ask. However, they are
7 not, you know, they can change and ask their own questions or
8 formulate their own questions.

9 Q. I see.

10 And we can see, if we take the first page as an
11 example, it's got--it's employment status attracts 20 points
12 maximum, and a retiree gets 10 points. You can be full time,
13 part time, or none.

14 Is it just up to the interviewer, individual
15 interviewer, to decide how many points to allocate?

16 A. (Mr Penn) Well, the points allocate to the information
17 that is extracted from the applicant and then the points are
18 awarded in that sense because you can have someone who have
19 applied, and they're not currently--they're currently unemployed
20 because of COVID or, you know, for some other reason, so that
21 person would get--would, you know, would get zero--would get
22 zero for that, okay?

23 Q. So if you're unemployed, you will get zero?

24 A. (Mr Penn) Yes.

25 But, as I said before, if you get zero there, it

1 doesn't necessarily mean that you have been disqualified. I
2 mean, you're unemployed, you know, for a good reason. You know,
3 a lot of businesses--a lot of businesses have closed down, and,
4 therefore, there are other points--other points on the point
5 system that can bring you over that threshold in terms of a pass
6 mark.

7 COMMISSIONER HICKINBOTTOM: The explanation suggests
8 that you get 20 points if you're in full-time employment and you
9 paid tax and you paid your SS contribution--

10 (Overlapping speakers.)

11 THE WITNESS: (Mr Penn) Right.

12 COMMISSIONER HICKINBOTTOM: --that's at the one end of
13 the scale.

14 THE WITNESS: (Mr Penn) Yes.

15 COMMISSIONER HICKINBOTTOM: But the other end of the
16 scale is a failure to secure any employment without any
17 reasonable excuse. That's at the no point end.

18 THE WITNESS: (Mr Penn) Yes.

19 COMMISSIONER HICKINBOTTOM: And then there are going
20 to be gradations in between, for example, someone's been in full
21 employment but isn't fully paid up on tax or SS contributions or
22 someone who is temporarily unemployed because of something like
23 COVID or something like that, so there will be gradations
24 between those two points.

25 THE WITNESS: (Mr Penn) Yes.

1 COMMISSIONER HICKINBOTTOM: Yes.

2 BY MR RAWAT:

3 Q. The form if we turn to 1572, the form seems to suggest
4 that you can lose as well as gain them because if you look at 6
5 where it says assimilation, and then there's not a part of the
6 BVI community, there should be points deducted.

7 So somebody could--if the interviewer forms the view
8 that somebody, after 20 years, is actually not a part of the BVI
9 community and has made no efforts to become a part of the BVI
10 community, does that mean that the interviewer could actually
11 give them a negative mark?

12 A. (Mr Penn) Well, it all depends on how much they have
13 scored already. But if they have scored high, say maybe 90 or
14 80 points, it doesn't necessarily mean that it will take them
15 dramatically, you know, in a failure mark or whatever the case
16 may be. But it is expected that if you're going to be here in
17 the Territory for 20 years, you know, as part of your wanting
18 to, you know, making it, you know, your permanent legal home,
19 you know, you are expected to, you know, give back to the
20 community or be a part of the community.

21 Q. But if you can't throw any evidence to that. Let's
22 assume that you have just spent your time in full-time
23 employment on one of the islands building a rocket, but you
24 haven't actually spoken to anybody else at all, so you can't
25 show any evidence that you've assimilated with the community.

1 I mean, let's assume you've got the maximum 20 points
2 for employment but you cannot under 6 show assimilation. Is it
3 open to the interviewer to say I'm actually going to deduct you
4 10 points because you haven't assimilated?

5 A. (Mr Penn) Well, there is no--there is no points
6 allotted to on the 6, and therefore it's discretionary, based on
7 the information--based on the information that would come out in
8 the interview. As you suggested, there could be someone who had
9 been here living for 20 years working somewhere. And because of
10 their work and because of what they do--

11 Q. Or because they just don't want to.

12 A. (Mr Penn) Well, it could come to that as well, but
13 that information would have to come out in the interview, and
14 then a determination would be made.

15 Q. Okay. Because the other area which seems to be
16 deductible is item--Factor 9, which is headed "BVI Police
17 record" deductible points, see schedule. And what we've got on
18 page 1574 is a list of offenses, and it appears that you can
19 lose points if you have committed various offenses, and there
20 seems to be a range. Am I writing this right, Mr Penn?

21 A. (Mr Penn) Yes.

22 Q. So, let's say if it comes out in the interview that
23 you have committed an Immigration offense or a Customs offense
24 or a drug offense, or criminal damage, for example, at the
25 bottom there, the interviewer can deduct from a range; is that

1 right?

2 A. (Mr Penn) Yes.

3 Q. So, is there any guidance given to, you know, how many
4 points to deduct? Or is it just left to the interviewer to
5 decide?

6 A. (Mr Penn) Well, there's a range that, if you look
7 under the points, there is a range from zero to twenty or
8 thirty. And it depends on the--on the offense, the seriousness
9 of it. So that information--once the information is received
10 from the--from the relevant authorities, it is looked at, you
11 know, to see the seriousness of the offense, and therefore, our
12 decision is made as to how many points should be deducted.

13 Q. So, it's not a decision made by the interviewer
14 filling in this form. Is there further discussion?

15 A. (Mr Penn) Depending on the matter, yes, further
16 discussion--further discussion with myself--with myself, as
17 Chief Immigration Officer, could be taken on a situation like
18 this.

19 Q. And this process, you said that you will get
20 information, so were you actually sort of doing some drilling
21 down to find out what the person did, what sentence they got,
22 how serious it was, it's not just simply write on their Police
23 record is says that they committed an act of criminal damage,
24 they lose 10 points. Part of the process is that you actually
25 look deeper and try and find out more information, is it?

1 A. (Mr Penn) Yes, exactly.

2 Q. I see.

3 So, you will look at, for example, somebody who gets
4 sentenced to prison, may be deducted more points than someone
5 who doesn't?

6 A. (Mr Penn) Yes.

7 Q. If people have spent convictions, are they obliged to
8 disclose them to you?

9 A. (Mr Penn) Yes.

10 COMMISSIONER HICKINBOTTOM: How does--the point system
11 is really to, in some part, to identify whether the conditions
12 set out in section 16 are satisfied, for example, the intention
13 of making the Territory one's home, that that intention is a
14 real intention. Some of this goes to that, such as the cultural
15 questionnaire and so on, but how does this deducting points in
16 what's essentially an assessment exercise, a broader assessment
17 exercise, fit together with the condition in section 16,
18 precondition in section 16 for most categories of the applicant
19 being of good character? That's a precondition. It's nothing
20 to do with putting it into a pot to make a general assessment.
21 If an individual is not of good character, that's that, that's
22 the end of that. Because it's a precondition.

23 THE WITNESS: (Mr Smith-Abbott) Commissioner, if I
24 may, I think first and foremost there is the assumption under
25 the provision of the determination of "good character" that

1 there has to be a reasonable way of assessing such. And on the
2 strength of application and the interview that the way to pry
3 this information would be a combination of sources, so the
4 questionnaire, if you consider it as a questionnaire, of course
5 there would be the assumption that there would be disclosure of
6 any matters that may in some way adversely paint that individual
7 conviction as described in this particular schedule, and that
8 there would be some discretion based on severity of the offense
9 because not all offenses, as we know, are--can be treated the
10 same.

11 So, my understanding of the schedule of offenses and
12 the range of points is to afford the Board at the time when
13 they're considering that applicant in their face-to-face,
14 whether you consider that individual--electronically, I guess is
15 a different story, or at least most of the interviews happen in
16 a live setting--and the nature of the dialogue would be more
17 dynamic, than, say, the disclosure of any offense.

18 So, I guess that some discretion will have to be
19 applied.

20 COMMISSIONER HICKINBOTTOM: Well, I mean it depends on
21 what you mean by "discretionary", Mr Smith-Abbott. That an
22 individual is of good character, no discretion. It's a
23 condition of the statute. What good character amounts to, that
24 may involve some form assessment.

25 THE WITNESS: (Mr Penn) Well, this would be the way in

1 which--as I understand it, this would be the way of assessing
2 good character, to some extent.

3 COMMISSIONER HICKINBOTTOM: But Mr Penn said that the
4 points system is--what matters is the cumulative score at the
5 bottom; and, therefore, if you hit the top in severity of
6 offenses, other than two which I'll refer to Chief Immigration
7 Officer which is homicide and drugs offenses, leaving those
8 aside, if you hit the most severe offense in any other category
9 which might well undermine what--you having a good character,
10 but that simply goes into an assessment, and it can be overcome
11 by money or income, the calls for a questionnaire, and so on, on
12 other things.

13 So, how does the assessment of good character take
14 place? I mean, there must be written guidelines.

15 THE WITNESS: (Mr Penn) To answer that, Commissioner,
16 I would say that, although--that although they are deductible
17 points for offenses, this should be taken seriously. Although I
18 stated, you know, there's cumulative points to be added, this in
19 itself, if someone committed an offense here, despite the points
20 that are here and despite the cumulative points, someone of good
21 character will come into question. You know, even though there
22 are points here, it would mean that their good character might
23 be out of the window and, therefore, they could be disqualified
24 based on that.

25 COMMISSIONER HICKINBOTTOM: And how, in terms of the

1 process, is that done? We're now at the process--Mr Rawat has
2 taken us through the interview and the question--and the form
3 that we've seen, but how is that taken into account? How is the
4 assessment of good character done?

5 THE WITNESS: (Mr Penn) Well, as I said before, all
6 applicants have to submit a Police record--a local one, that is,
7 and, you know, that is looked at to see if they have any pending
8 matters before. And then more investigation is made, you know,
9 and depending on the seriousness of--depending on what it is.

10 COMMISSIONER HICKINBOTTOM: Of course.

11 THE WITNESS: (Mr Penn) You know? Because, I mean,
12 there are some offenses here, Customs offenses, Immigration
13 offenses, there could be other offenses, you know, that are not
14 here because most of the other offenses that are here are very
15 serious. There could be traffic offenses, you know, other
16 offenses but--

17 COMMISSIONER HICKINBOTTOM: But who makes the
18 assessment that somebody is of good character for the purposes
19 of, for example, section 16(3)(a)? It's a precondition of
20 subsection (3). You've got to be of good character. Who says?
21 Well, look, I've looked at his record, I've look at this, that
22 and the other, and this man satisfies that condition. Maybe
23 that he's got some convictions, but I'm satisfied that he's of
24 good character and, therefore, he can go forward into the
25 process.

1 THE WITNESS: (Mr Penn) The Board makes that
2 recommendation. The Board makes that recommendation.

3 So, even if someone has applied and has a questionable
4 character, it still comes before the Board.

5 COMMISSIONER HICKINBOTTOM: Right.

6 THE WITNESS: (Mr Penn) Okay? And therefore, if the
7 Board--if the Board decides that it should go ahead, then they
8 will put "recommended". If the thing that the character of the
9 person is such that, you know, that they shouldn't go forward,
10 then they will put "not recommended".

11 COMMISSIONER HICKINBOTTOM: So, you would gather the
12 information of the criminal record and so on, you put that to
13 the Board and then the Board decide whether the individual is of
14 good character and whether the matter should then go forward to
15 the recommendation or not?

16 THE WITNESS: (Mr Penn) Yes.

17 COMMISSIONER HICKINBOTTOM: Thank you. Thank you very
18 much, Mr Penn.

19 BY MR RAWAT:

20 Q. So, what we have, Mr Penn, is--we will go through
21 it--there's a number of steps, but the first step is I'll call
22 it "the review step"; that's where the Immigration Department
23 looks at the application form and decides whether all relevant
24 documents have been submitted, which can include a Police
25 record. There's then the interview stage which involves sitting

1 for the cultural test, having an interview where the interviewer
2 will have the point system form in front and will be completing
3 it, and you then end up with a mark.

4 Now, I think the total mark on the points system is
5 150, isn't it? That's the highest you can get.

6 A. (Mr Penn) Yes.

7 Q. And I think 50 percent is described in the Affidavit
8 as desirable.

9 A. (Mr Penn) Yes.

10 Q. But there's not, again, there's not a cut-off is
11 there?

12 A. (Mr Penn) There is not a...

13 Q. There is not a cut-off. It's not a point of if you
14 don't score 75, you will not get recommended. It may be harder
15 to get recommended but--

16 A. (Mr Penn) Yes, yes, it may be harder to get
17 recommended.

18 Q. --it's still possible?

19 A. (Mr Penn) Well, it all--it depends on the
20 circumstances. Let me put it that way.

21 Q. And just before I leave the form entirely, the last
22 part of it is--it's just a box that says "surveillance". What's
23 the reference to "surveillance" about?

24 A. (Mr Penn) Which box is it?

25 Q. It's page 1573.

1 A. (Mr Penn) Yes. As I said before, our Surveillance
2 Department within the--the Surveillance Unit within the
3 Immigration Department, they were part of this interview process
4 at one point, but because of manpower, this was temporarily
5 discontinued.

6 So, what Surveillance would do, they would more, you
7 know, be there in the interview, who would, you know, look at
8 all the applicants and get background on all the applicants and
9 look at their Police records, and if there was any offenses on
10 the Police records then they would, you know, get all the
11 information necessary or relevant, you know, for this interview.

12 Q. And I'm going to leave the form, but the other
13 question is--I mean, you've got an interview, but what--how do
14 you ensure consistency of marking across applications? I mean
15 if we take your example, if we take criminal offenses, for
16 example, and say someone discloses a traffic offense-it's
17 possibly not the best example because it's not one on your
18 list--but somebody may take a view that that only deserves
19 deducting 10 points. Somebody else might take a view that that
20 actually deserves much more, 20 points.

21 Is there a system whereby you ensure that there is
22 consistency of marking so that you don't get variability because
23 of the interviewer's own bias?

24 A. (Mr Penn) Well, I wouldn't say here today that the
25 marking of the, you know, of the system is one that is--you

1 know, that is outlined and has all its parameters, you know,
2 that--you know someone can follow. But I would say that, if an
3 offense of a traffic violation and a deduction of 3 or 5 points
4 is done, then if a traffic application comes up on another
5 application, then the same is applied, so I'll put it that way.

6 In terms of other offenses that are here, again, even
7 though there's two that says "refer to the Chief Immigration
8 Officer", you know, most of these are not listed here. Most
9 times, you know, they refer to myself, you know, for final
10 opinion as to how many points should be deducted.

11 Q. If we look at the bottom of the form 1573, it records
12 that the total points available, and this is the current form is
13 150. Then it says deductible points for failure to assimilate
14 and also for criminal convictions, and then concludes (reading):
15 Applicant should obtain at least 50 percent of points from areas
16 which are applicable to them for application to be considered
17 further.

18 So, that suggests that if they don't get 50 percent,
19 they're not going to get recommended. But if you go to 1339, at
20 subparagraph (e), it refers to the total of 150 points. it
21 describes the score--and this is Mr Smith-Abbott's
22 Affidavit--the score of 75, which is 50 percent, as desirable
23 for tenure applications. It notes that the Internal Auditor's
24 evidence was that an applicant had to achieve 50 percent marks
25 on all areas applicable in order for the Board to make a

1 positive recommendation to Cabinet, but then says the Board is
2 not now so confined in the recommendations it might make.

3 And later it says that the Board does consider low
4 scores carefully and gives reasons that might amount to
5 mitigation, an explanation of why the low score might have been
6 achieved, and then concludes the detailed minutes of Board
7 discussions would showed deliberations on such cases.

8 I just want to understand the actual policy approach
9 at the moment because your form says, if you're 50 percent--if
10 you don't make 50 percent, you're not going to get further. But
11 the Board--and we'll look at what--how the Board works in a
12 moment, but it appears to be that the Board can still recommend
13 even if there's a low score.

14 A. (Mr Penn) To answer that, I would say again you would
15 judge those cases on a case-by-case basis, and, you know, there
16 could be some exceptional cases that could fall within those
17 areas.

18 I wouldn't presume at this point in time to give an
19 example, but I would just say that there could be a few cases
20 that could fall within that exceptional below the 50 percent
21 mark.

22 Q. So, you would describe someone who gets below
23 50 percent--I mean, they'd have to show--or the Board would have
24 to find an exceptional case to justify making a recommendation
25 where you're below 50 percent.

1 A. (Mr Penn) Yes.

2 Q. But is there written guidance or criteria which the
3 Board apply when they're considering recommendations, making
4 recommendations, or do they just take each applicant in turn and
5 consider the circumstances?

6 A. (Mr Penn) Yes, they take each applicant in turn. The
7 Board would look at look the scores that the applicant would,
8 you know, would get on every category, and they would look at,
9 you know, all other matters, you know, that are there on the
10 profile and then make a determination.

11 So, it is not a blanket recommendation, you know,
12 when, an application comes before the Board. The Board sits,
13 meets, and, you know, they would discuss each application in
14 turn.

15 COMMISSIONER HICKINBOTTOM: So simply because an
16 applicant has fallen below the 50 percent doesn't--isn't
17 necessarily a knockout blow, but similarly, I assume, that just
18 because he or she is over 50 percent doesn't necessarily mean
19 that the application is going to be successful.

20 THE WITNESS: (Mr Penn) Right.

21 So, as I said, there could be some exceptional cases,
22 you know, that the Board will take interest into and then make
23 that determination.

24 COMMISSIONER HICKINBOTTOM: Yes.

25 BY MR RAWAT:

1 Q. And I think you--we're now back to the Affidavit. If
2 we go to page 1343.

3 A. (Mr Penn) 13?

4 Q. Four-three, which sets out the role of the Board at
5 paragraph 24. So, once you've gone through the interview
6 process--and as I understand it...

7 A. Sorry.

8 Q. Page 1343. It's just at the very bottom there.

9 A. (Mr Penn) Sorry.

10 Q. In terms of additional guidance, there will be
11 guidance on how to conduct an interview, there will be guidance
12 on what questions to ask in the interview, but that's it. And
13 then the whole--does the whole file then go to the Board,
14 including the cultural test score and the point system score?

15 A. (Mr Penn) Yes.

16 Q. Are there ever instances, though, when the
17 applicant--the point system is not applied to an applicant?

18 A. (Mr Penn) No, I don't know of any such cases.

19 Q. If you look in the first bundle, if you go to
20 page 475, please.

21 This is a memorandum to Cabinet which is dated 18th of
22 February 2015. Please don't mention any names, but if we go
23 over to 476 and you look under "Summary of Recommendations" at
24 number 6, it refers to two applicants who scored below the
25 minimum points attainable due to unemployment and retirement

1 respectively, and therefore the point system could not be fully
2 applied.

3 If you then go through to 487 in the bundle, please,
4 Mr Penn.

5 Sorry.

6 Please, Mr Penn.

7 Sorry, if you go to 562, please. If you go through to
8 564, there's a reference there, and this is an application from
9 June 2019, but there's a reference there on 564 to seven persons
10 scoring below the minimum points obtainable in the point system,
11 primarily because two were attending university and not
12 employed, other persons who were not employed, and the point is
13 made, reference is made to businesses being affected because of
14 the 2017 hurricanes. It notes that everyone holds certificates
15 of residence and have contributed to the Territory over the
16 years.

17 And this may be sort of wording in memoranda, and
18 you're not responsible for those, but, it's either that the--it
19 suggests that exemptions are available from the point system
20 either wholly or partially. Is that how it works, or do those
21 notes reflect later deliberations by the Board?

22 A. (Mr Penn) Yes, that's how it works.

23 As I've said all along, it works on a case-by-case
24 basis, depending on the circumstances and, therefore, those
25 decisions are made in terms of, you know, recommendation by the

1 Board. So, this information would go to Cabinet from the
2 recommendation by the Board with those notes to Cabinet, where
3 Cabinet would be informed of all this information, and
4 therefore, Cabinet, you know, in their discretion, you know,
5 would make a determination whether to grant or not.

6 Q. I mean, let me give you one more example. It's at 472
7 in the same bundle, which is a Cabinet Paper from December 2014.

8 At five, it notes in relation to three applicants that
9 they were of the Territory and were exempted from evaluation
10 under the point system. And in relation to another two, it
11 notes that the point system was not fully applied because these
12 ladies are retirees.

13 And in relation to a third, it was recommended that
14 although the person scored below the minimum points obtainable
15 under the Board's evaluation system, there was--the person was
16 recommended because of the person's spouse's support for the
17 application.

18 So, when we get to the Board stage when the answered
19 is considering matters, Board has, in reality, in practice, has
20 discretion to almost start all over again because you can have
21 situations it seems where people score below the minimum points,
22 or, as we see in one example, you have some people who were not
23 evaluated under the point system but still got recommended. Is
24 that how it works in reality?

25 A. (Mr Penn) There can be some circumstances like that.

1 There can also be circumstances where the Board does not
2 recommend, but when it goes to Cabinet, in Cabinet, then Cabinet
3 would, you know, would recommend--I'm sorry, it would approve.

4 COMMISSIONER HICKINBOTTOM: But these are cases, we've
5 seen three instances where the points gained were below
6 50 percent or I think in couple of cases, the point system
7 simply didn't apply because the individuals weren't resident at
8 all. But nevertheless, the Board recommended for Belongership
9 presumably just taking everything they had into account that was
10 before them, I mean, including the number of points that were
11 scored.

12 THE WITNESS: (Mr Penn) Right. Again, I can only go
13 back to, you know, the circumstances. At a point in time, there
14 could have been a number of mitigating circumstances that the
15 Board would have seen in such cases and, therefore, would make
16 such recommendation.

17 COMMISSIONER HICKINBOTTOM: And in the minutes, of the
18 Cabinet Meeting, the Board's reason is set out. I mean, for
19 example, an individual retired or a full-time student or
20 something--

21 THE WITNESS: (Mr Penn) Right.

22 COMMISSIONER HICKINBOTTOM: --but, I mean, the core
23 point is at least set out.

24 THE WITNESS: (Mr Penn) Yes.

25 BY MR RAWAT:

1 Q. And so, what the Board will have when it's considering
2 the application will be, yep, and I think you sit on the Board
3 as Chief Immigration Officer, do you not?

4 A. (Mr Penn) Yes, I do.

5 Q. But you will have the application form and all the
6 documents. You'll have the results of the cultural test. You
7 will have the results of the point system and the interview.
8 And it's on that that the Board then makes its decision.

9 A. (Mr Penn) Yes.

10 Q. And does it--do you see the Board--as a Member of the
11 Board, do you see yourself having a discretion to recommend or
12 not to recommend?

13 A. (Mr Penn) As a Member of the Board, I do not have a
14 voting right. I'm just as ex officio Member.

15 Q. Yes, fair point.

16 A. And so I do not vote on the recommendations.

17 Q. But it doesn't work on the basis of the Board going
18 up, they scored 74, we're not recommending. They will look at
19 everything.

20 A. (Mr Penn) Yes.

21 Q. The--and once that's--the Board has made it's de--or
22 reached a view about recommendation, that then gets put into a
23 Cabinet Paper, and it's then sent to Cabinet for a final
24 decision; is that right?

25 A. (Mr Penn) Yes.

1 Q. And what is provided to Cabinet? You've spoken of a
2 profile that's put together. Is that what's provided to Cabinet
3 or does the Cabinet get provided with all of the information?

4 A. (Mr Penn) They get provided with a profile and other
5 information.

6 Q. So everything that the Board has seen Cabinet can see.

7 A. (Mr Penn) Yes.

8 Q. And as you said, there are instances when Cabinet will
9 not accept the view of the Board?

10 A. (Mr Penn) Yes.

11 Q. And oft--but I think more often than not, Cabinet does
12 adopt the recommendation that's put to it.

13 A. (Mr Penn) Yes.

14 Q. Going through this process now, so we've taken it to
15 Cabinet at least, but is it possible for--I think this is--we
16 can look at this at page 1341 at paragraph 17.1.

17 Mr Smith-Abbott writes (reading): It's not possible for an
18 applicant to obtain Belonger Status other than by the procedure
19 I have described therein.

20 So, there is--that is now the established process and
21 has been for a significant period of time, Mr Smith-Abbott?

22 A. (Mr Smith-Abbott) That is correct.

23 Q. You point out that, at 17.4, where you refer to the
24 Internal Auditor's Report of 2012 and the evidence that--or in
25 that Report that in 2011, 224 people received Belonger Status

1 from Cabinet without going through that process. So, those
2 people were able to--or those applications sidestepped the
3 process of making an application. It had been reviewed by the
4 Immigration Department, been considered by the Board who then
5 make a recommendation, went straight to Cabinet.

6 But you conclude that (reading): We are aware of the
7 need to ensure that such situations do not recur, and we make
8 every effort to see that they do not.

9 I mean, what safeguards can you put in place?

10 A. (Mr Smith-Abbott) Well, I think that the assessment
11 undertaken by the Internal Auditor coupled with the discovery of
12 this particular incident will lend itself to ensure that, moving
13 forward, there is a process even if Cabinet, for instance, is
14 minded to recommend directly that the application and the
15 vetting of that individual or individuals would still have to be
16 a precedent in order to make a determination.

17 So, that effectively becomes at least a possible
18 guideline that can be afforded to Cabinet should it be minded to
19 make a recommendation of that nature.

20 In other words, I identify a worthy person who may
21 have not made an application, so therefore that becomes an
22 individual who has to go through this process that the Chief
23 Immigration Officer would have described, including the vetting
24 of that individual at the Immigration Board level in the manner
25 just described.

1 So, it does not necessarily mean that that individual
2 immediately is approved or disapproved. It just simply means
3 that some of what we will need to provide by way of guidelines
4 and advice to Cabinet will be that, yes, you can be minded to
5 make such a recommendation; but, if you're going to do so, there
6 is a process that must be undertaken, and the process already
7 has been described.

8 Q. But what happened in 2011 was that Cabinet just
9 granted, that there were certain applications that had gone
10 through the process, been vetted, been assessed, but on top of
11 that Cabinet just granted Belonger Status to a number of people,
12 and the risk that that brings is that you not only are granting
13 Belonger Status without somebody going through the process that
14 others are expected to undertake, but you may be granting
15 Belonger Status without going through the mandated process under
16 statute; so, for example, the requirement for consultation with
17 the Board that appears under some section limbs of section 16.
18 But how is it--you know, ultimately it's for Cabinet not to do
19 that, isn't it?

20 A. (Mr Smith-Abbott) Yes. But it is for the Ministry to
21 define a process, taking on board the Internal Auditor's
22 recommendations, to ensure that there is published
23 guidelines--there are published guidelines that will speak to
24 such consideration.

25 So, therefore, when I say that there is a need to

1 ensure that such situations do not recur and that we make every
2 effort to see that they do not, that places a burden on the
3 Ministry to define that particular path, so to speak, if you're
4 going to call it that. So, therefore, it requires that the
5 Ministry disclose the way in which such an applicant, if you
6 want to call it that for the moment, can reasonably be
7 considered.

8 And what I am suggesting in no uncertain terms is that
9 the process that the Chief Immigration would have described
10 would need to be--are clearly articulated. It's not to say they
11 cannot consider it, but there must be some consideration after
12 some due care and due diligence as any applicant would have.

13 So, I cannot say anything about what happened in 2011.

14 Q. Of course.

15 A. (Mr Smith-Abbott) what I can say is that--and I cannot
16 say that any Cabinet may be minded to repeat that, but what I
17 can immediately say is that, again, based on the lessons
18 learned, so to speak, and the assessment by the Internal
19 Auditor, that again places a burden on the Ministry to be
20 extremely clear about the manner in which something like this
21 can happen.

22 COMMISSIONER HICKINBOTTOM: I mean there are two
23 steps, aren't there, Mr. Smith-Abbott? One is the setting up of
24 a scheme, a process, which is open and transparent for all
25 applications, and Mr Penn has taken us through that scheme.

1 And secondly, because they will have to go up to--once
2 we've got the recommendations from the Board, they go to the
3 Cabinet who make the final decision on the applications. It's
4 also incumbent on the Cabinet not to bypass that scheme.

5 THE WITNESS: (Mr Smith-Abbott) Correct, yes.

6 So, therefore, as a response, it would be reasonable
7 to suggest that the point system effectively becomes a good
8 basis for disclosing exactly how this process is to be
9 undertaken; right? There is no reason why we cannot, as a
10 matter of immediate action, take the due care and concern and
11 the due diligence expressed in this point system and make it
12 public, make it a document that is palatable in terms of the
13 disclosure of the guidelines for the due care and consideration
14 that will be exercised. And by the Department in its
15 administrative functions and certainly the Board in its
16 consideration, it would generate some interest in the public
17 sphere because, of course, at least there will be a public
18 disclosure of--notwithstanding this process that we are
19 undergoing right now. But moving forward, it would be
20 reasonable to say that we will take this point system, transfer
21 it into some kind of--whether you call it policy or guideline or
22 whatever the case may be--as a means of disclosing that this is
23 what the Board looks to in considering an application.

24 And furthermore, an applicant could be minded to
25 assess these guidelines that are clearly stated here,

1 notwithstanding the fact that we had some discussion about
2 whether points can or should be arrived based on some
3 discretion. That's not really the point at hand.

4 The point is that the Belonger stat--what we're
5 calling "the point system" is the Belonger Status and Resident
6 Status assessment. So, that means that this becomes the
7 Benchmark, the guideline beyond just simply stating that 20
8 years becomes the Benchmark. That is really absolutely not the
9 case in a functional, practical way. It's just that simply
10 we've not published it.

11 So, this now becomes, in our minds, a means of
12 addressing this whole question of disclosure in terms of good
13 governance and the transparency that will be required of us with
14 respect to how--

15 (Overlapping speakers.)

16 COMMISSIONER HICKINBOTTOM: So, it's in relation to
17 the scheme, the point system. I think what you said amounts to
18 this, that the system is not perfect, and it may be capable of
19 improvement, but basically the point system is sound, it should
20 be published so that the--so that applicants and everyone else
21 knows the basis upon which the scheme is processed, but
22 that's--so that's step 1: Publish the guidance.

23 But secondly, it's also important, isn't it, to
24 maintain integrity of the scheme, that nothing is done to bypass
25 the scheme? So, we know that in 2011, for one reason or

1 another, applicants were simply drawn in by Cabinet outside the
2 consideration of the Board at that time of other applicants,
3 individuals simply taken and given Belonger Status, bypassing
4 the scheme that was then in place.

5 And so, to maintain the integrity of the scheme, it's
6 important that it is not bypassed in that sort of way.

7 THE WITNESS: (Mr Smith-Abbott) Yes, yes. I know that
8 there is--in terms of basic principle of good governance, in
9 considering applications, we want to ensure that equity and
10 fairness is maintained. So there is, of course, a whole
11 question of whether it's equitable and fair for someone to be
12 considered over, say, another person who may have gone through
13 the extensive due-diligence process just described by the Chief
14 Immigration Officer, and that, I think, can become a value that
15 can be articulated clearly in any guidance for internal or
16 external consideration.

17 COMMISSIONER HICKINBOTTOM: I mean, as you say, it may
18 be a question of fairness as between those who've gone through
19 the system and those who haven't. But in terms of transparency
20 and openness, simply to bring some people in outside the careful
21 point system and allow them to have Belonger Status without any
22 published or known criteria, it's sort of more than just unfair;
23 it's not good governance. It would not be good governance.

24 THE WITNESS: (Mr Smith-Abbott) I agree.

25 COMMISSIONER HICKINBOTTOM: We're taking

1 hypothetically, but it would not be good governance.

2 THE WITNESS: (Mr Smith-Abbott) But I agree.

3 And I think that again it places the burden on the
4 Ministry to ensure that in the guidance provided, whether it's
5 externally driven and by that I mean published to the public, or
6 internally.

7 COMMISSIONER HICKINBOTTOM: And like, I was going to
8 say "all" but I'll say certainly "most" circumstances in which
9 there is poor governance because governance is intended to
10 reduce the scope for dishonesty and corruption in public office,
11 by not having good governance in place, it at least increases
12 the risk of such dishonesty because if somebody goes through
13 this scheme and comes out--and I appreciate there are some
14 assessments involved by the Board and ultimately by the Cabinet,
15 but good governance in respect to that scheme reduces the scope
16 for dishonesty and corruption, because that's what governance is
17 all about.

18 THE WITNESS: (Mr Smith-Abbott) Agreed.

19 And I think the clear statement here to be made is
20 that, first, there is a process--perhaps not necessarily
21 immediately disclosed prior to this point but there is a
22 process--those individuals who would have gone through that
23 process would have generally been aware of this, and we will
24 build, based on the assessment of the process as it stands. I
25 mean, any process obviously can benefit from oversight and

1 review. That could obviously start with the inputs received
2 from the Internal Auditor all the way across to this particular
3 process. It's a continuum. And that will certainly then inform
4 the way in which the Ministry can structure the Guidelines and
5 the published policy, as the case may be. It can certainly
6 inform the nature of the consultancy to be undertaken as
7 disclosed and described in the Affidavit, and we are now talking
8 through these issues.

9 So, there are several inputs, I think, that would be
10 valuable to take into consideration when defining what an
11 Immigration Policy at the broadest level. I've already made
12 reference, of course, to some of the other inputs received from
13 the public during the fast-track period.

14 All of these things will have to be looked at
15 carefully, and I think that it is also reasonable to suggest
16 that there are two steps to be pursued. I think that, first and
17 foremost, as a priority of priority and urgency, we will want to
18 consider the publication of the point system as a means of at
19 least disclosing to the public how those applications are
20 considered. And the, of course, there is the much broader
21 exercise to be undertaken under the consultancy without
22 prejudice.

23 COMMISSIONER HICKINBOTTOM: Yes. Thank you,
24 Mr Smith-Abbott.

25 Is that a good time to break, Mr Rawat?

1 MR RAWAT: Yes, we can. That's fine. Thank you.

2 COMMISSIONER HICKINBOTTOM: And this may be a
3 difficult question, but I'm just thinking about the Honourable
4 Minister who is coming.

5 MR RAWAT: I've suggested to those who sit behind me
6 that we might alert The Honourable Wheatley that perhaps he
7 should come at 3:00.

8 COMMISSIONER HICKINBOTTOM: Yes. Well, I think that's
9 probably good. So, we'll back at 2:00, if we may, Mr Penn,
10 Mr Smith-Abbott, and finish up your evidence, hopefully by about
11 3:00, and then we'll have evidence from the Minister.

12 Good. Thank you very much.

13 (Recess.)

14 COMMISSIONER HICKINBOTTOM: Good. Thank you,
15 Mr Rawat.

16 MR RAWAT: Thank you, Commissioner.

17 BY MR RAWAT:

18 Q. Gentlemen, welcome back, and thank you for returning.

19 MR RAWAT: Commissioner, just for the purposes of the
20 Transcript, can I just note that in terms of legal
21 representatives appearing on behalf of the participants, there
22 are none who appear to be attending for this afternoon's
23 session.

24 BY MR RAWAT:

25 Q. Could I ask--I think it might be Mr Smith-Abbott I'm

1 hoping might be able to help with this, but if you just turn up
2 paragraph 26 of your--the Affidavit, please, which is in Part 2
3 of the bundle, and it's page 1345.

4 A. (Mr Smith-Abbott) Yes, can I be given the paragraph
5 number, please?

6 Q. Paragraph 26, please.

7 Are you there?

8 A. (Mr Smith-Abbott) Yes, I am. Thank you.

9 Q. At paragraph 36, and this arose in the Letter of
10 Request to Honourable Wheatley for an Affidavit. The point is
11 made that, in evidence that Dr Orlando Smith gave to the
12 Commissioner at an earlier hearing, the suggestion arose that an
13 applicant should be granted or could be granted--I will start
14 this again.

15 The suggestion arose that Cabinet Members could
16 suggest that an applicant be granted Belongership Status but the
17 ultimate decision was for the Immigration Board.

18 The point that the Affidavit makes is--and it begins
19 with great respect to the former Premier Dr Smith but the point
20 is made that it's not for--it is for the Board to make
21 representations and Cabinet to make decisions, and that in the
22 last five years no persons have received Belonger Status based
23 on a recommendation by Cabinet. Persons have done so pursuant
24 to decisions of Cabinet.

25 But the point can be put in a different way because it

1 goes to whether a Minister can intervene in a process, and so
2 could you have a situation whereby a Minister could approach the
3 appropriate officer and say, "I think that this person is
4 suitable for Belongership and should be the subject of
5 recommendation"? And the extension could be made, do you have
6 an intervention from a Member of the House of Assembly on behalf
7 of a constituent saying, "well, this person ought to be
8 recommended for Belongership Status"? And taking those two
9 scenarios into account, it goes back to the point that you were
10 discussing with the Commissioner before the break, and that is
11 the robustness of the system that you have in place. How does
12 the system account for potential interventions from, for
13 example, a Minister or a Member of the House of Assembly?

14 A. (Mr Smith-Abbott) So, just to recall the process, the
15 individual would need to make an application, there will be the
16 collation of information that will comprise the material then to
17 be considered by the Board. The Board would undertake whatever
18 due diligence which we have described, and make a
19 recommendation.

20 Therefore, the--in your hypothetical scenario it will
21 require that that Member not only influence perhaps the
22 administrative branch but then also the Board in the discharge
23 of its functions. I can't say under what conditions that may
24 happen or whether it can or cannot happen.

25 What I can say is that, as you pointed out, the

1 robustness of what we have right now would indicate that it
2 would be somewhat difficult--not impossible, I guess, but
3 difficult--to influence several entities all at once to then
4 derive a decision at a level of Cabinet in favor of that
5 individual.

6 So, going back to the point that the Commissioner
7 inquired about in 2011, Cabinet would need to "by pass" that
8 process of due diligence, so to speak, to result in the
9 disposition, perhaps--favorable disposition of an individual to
10 be granted Belongership.

11 COMMISSIONER HICKINBOTTOM: Or override it.

12 THE WITNESS: (Mr Smith-Abbott) Override it, yes. But
13 to suggest that a Member would be able to influence the various
14 levels of due diligence--not impossible--it would be--it would
15 be something to consider, I guess.

16 BY MR RAWAT:

17 Q. Can we put it this way because you can see from the
18 events of 2011 that Cabinet could simply make a decision outside
19 the process. Cabinet, within the process, can reject or accept
20 recommendations made by the Board. But this is more--not
21 necessarily--it's not necessarily--it's not about the outcome.
22 It's not about whether the Board makes a recommendation when
23 absent the intervention it would not have. It's about, even if
24 it's an attempt to influence the process by a Minister or a
25 Member of the House of Assembly intervening in the process in

1 the hope of influencing an outcome.

2 And the question is: You have a system--you have a
3 system that tells people these are the documents that you need
4 to submit. You then have a paper process that ultimately leads
5 to face-to-face interview and then leads to the Board meeting to
6 consider all of the material. And Mr Penn has explained the
7 circumstances of that. So, it's about--my question goes to the
8 idea that you have a process and then somebody from outside
9 tries to move that process in a particular direction.

10 And my question then goes to the design of the system:
11 How is the system set up to deter any attempt at influence?

12 A. (Mr Smith-Abbott) What I can say is that the process
13 as described by the Chief Immigration Officer is such that you
14 would almost have to influence several levels and individuals
15 all at once, to determine the outcome, which would be a
16 recommendation because effectively--and this is a very
17 hypothetical question which I'm not sure I can reasonably answer
18 any other way than to say that in order for--if a Member of the
19 House of Assembly has a conversation with a particular Board
20 Member and that Board Member then tries to sway the outcome, we
21 would not be able to--I can't say anything more than that.

22 The system is designed, as described, to have vetting
23 process administratively undertaken by the Department with the
24 collation of all of the required documentation to support a
25 recommendation that the Board, after undertaking the due

1 diligence required under the procedures that have been outlined,
2 will then have something to say about whether an applicant is
3 worthy to be recommended for or against.

4 And what we will then want to very clearly suggest
5 then which I have already said is that there will be another
6 layer of experiencing the process by the publication of, say,
7 the point system, the assessment process so that individuals
8 would know beforehand what can be expected of them in
9 considering their applications. Will they then want to use
10 other means of influencing the process? I can't say that, but I
11 think that again the burden of what is imposed on us as the
12 Ministry is to ensure that we can reduce the likelihood of undue
13 influence, if you want to call it that.

14 Q. Or an attempt?

15 A. (Mr Smith-Abbott) An attempt, insofar as that already
16 set out beyond what the Chief Immigration Officer has stated,
17 other measures that we will undertake to--

18 Q. You currently have written guidance available to
19 officers and to Board Members about what they should do if faced
20 with an attempt to unduly influence in a certain direction?

21 A. (Mr Smith-Abbott) Not at present, but I think that if
22 we look at guidance which has been produced for other Boards,
23 for instance, and I can, again, recall an earlier testimony
24 regarding, say, the National Parks Trust, the Social Security
25 Board, with their own Operational Guidelines and especially

1 conflict of interest or undue pressure being applied to--on the
2 Board to have a particular outcome on an application, again that
3 becomes the material that can reasonably be used to craft
4 Operational Guidelines for how the Immigration Board conduct
5 that exercise, which would have nothing to do per se with the
6 procedures as described.

7 It's reasonable to suggest, and point is taken that we
8 can, as any board would be minded to do to operate under
9 guidelines that reduce the risk of undue influence in its
10 decision-making.

11 Q. Thank you.

12 If I could move on to a different topic and if you
13 actually stay on the same page but actually look above.

14 It's right, isn't it, that the present position, and
15 it's one that has pertained for a significant period of time, is
16 that Cabinet does not give reasons when it refuses or rejects a
17 recommendation from the Board?

18 A. (Mr Smith-Abbott) Repeat that?

19 Q. Of course.

20 We have seen the outcomes of Cabinet Decisions where
21 Cabinet accepts recommendations, but there are occasions when it
22 rejects the recommendation from the Board, and it's right that
23 at the moment it doesn't actually give reasons when it does so.

24 A. (Mr Penn) Right.

25 Q. Because, at paragraph 25.9, the Affidavit notes--and

1 it's right at the end of the paragraph--the Board does record
2 its Decisions, and it says "as I have described above", and I
3 will pause there. The Board will have produced Minutes in which
4 it will have recorded the basis on which it makes a
5 recommendation.

6 And correct me if I'm wrong, Mr Smith-Abbott, but that
7 would also inform, therefore, the Cabinet Paper--

8 A. (Mr Smith-Abbott) That's correct.

9 Q. --provided to Cabinet. But it then continues: "I
10 agree with the recommendation with regard to Cabinet, especially
11 if Cabinet does not follow the recommendation of the Board," and
12 that is the recommendation that Cabinet should give reasons.
13 And it seems that you would say, at least from the perspective
14 of Public Officers, that it's a good idea for Cabinet to give
15 its reasons when it rejects a recommendation from the Board?

16 A. (Mr Smith-Abbott) Well, we can certainly recommend
17 that in determining the outcome with respect to an application
18 that that applicant be given a reason. We can certainly
19 recommend that Cabinet be minded to advise that applicant as to
20 why it was rejected, perhaps going to be good solid reasons to
21 do so and just for the benefit of transparency, maybe good
22 order, in good order.

23 Q. Now, in the same section, it's at page 1344, that's
24 the portion of the Affidavit that's discussing the role of
25 Cabinet in the process, and the point is made that Cabinet will

1 make the final decision, and in doing so can receive further
2 advice. And if we take--you give the example there of such
3 further advanced advice very recent. And if we turn up that,
4 it's at page 1733 in this bundle. It's a Cabinet memorandum
5 dated the 5th of February 2021 in relation to applications for
6 certificates of Belonger Status. And before I move to the point
7 that I want to take you to, gentlemen.

8 MR RAWAT: Commissioner, if I just point out, you will
9 note that at the end of the first paragraph is reference to
10 Cabinet having moved away from the capped number of approvals
11 per year, which is a point that's made in the Affidavit.

12 BY MR RAWAT:

13 Q. Now, in this case, if we go to page 1735, the purpose
14 of the paper is recorded at the top, paragraph 6, as to allow
15 persons who are married to BVI Islanders or Belongers for a
16 period of over five years or who have resided in the Territory
17 for 25 years consecutively, to be granted Belonger Status, and
18 the legal advice that is given comes from the Attorney General.
19 And if we begin at paragraph 10, the Attorney General says
20 "insofar as the decision sought at paragraph (c) is concerned",
21 and if you want to see what that decision is, we can turn up
22 page 1737, which is to accept the recommendations of the Board
23 of Immigration to grant certificates to 21 individuals who, in
24 the opinion of the Board have met each of the legality
25 requirements under section 16, so these are applications for

1 Belongership by tenure.

2 And to return to 1735, what the Attorney General
3 advises is, "in addition to consultation with the Board,
4 pursuant to section 16(8) of the Act, Cabinet must also consider
5 the following in deciding whether to grant a certificate", and
6 then it sets out the various sections of 16(8).

7 Now, even with this, the Act sets out that in relation
8 to certain provisions, Cabinet must consult with the Board.
9 What is the consultation process that Cabinet engages in?

10 A. (Mr Penn) If a recommendation goes before Cabinet and
11 Cabinet is not in possession of or is not entirely convinced
12 that they don't have enough information or would require more
13 information, then they will consult with the Board in order to
14 get that information to make a--to make a determination.

15 Q. But it's not routine for a Cabinet in relation to
16 every application to consult with the Board?

17 A. (Mr Penn) No, no, it's not.

18 Q. So Cabinet will rely on the material that the Board
19 puts in front of it?

20 A. (Mr Penn) Yes.

21 Q. Have you ever, as Chief Immigration Officer, been
22 asked to attend, in relation to Belongership applications,
23 attend a meeting of Cabinet?

24 A. (Mr Penn) No.

25 Q. Permanent Secretary, have you ever, in the times since

1 you've been Permanent Secretary, have you ever been asked to
2 attend, to respond in relation to Belongership applications?

3 A. (Mr Smith-Abbott) I don't believe any applications
4 have been considered during my tenure.

5 Q. But what it makes clear, this section that we looked
6 at--and this is a memorandum that the Affidavit draws the
7 Commissioner's attention to is that, in its approach, Cabinet
8 has to consider the section 16(8) criteria certainly when it
9 comes to section 16(3) applications. That's right, isn't it?

10 A. (Mr Smith-Abbott) That is correct.

11 Q. Going back to the Affidavit, what--

12 A. (Mr Smith-Abbott) Can you, please, give us a page?

13 Q. Go back to 1344, please.

14 25.4, what's said is that: "Cabinet will balance any
15 loss of revenue in approving applications with the potential
16 economic benefits of more closely integrating the applicants in
17 the community", and the example is given of the
18 fourth generation applicants.

19 Just clarify or expand a little, please, on what's
20 meant by "balancing any loss of revenue against potential
21 economic benefits".

22 A. (Mr Smith-Abbott) So, as I understand it, some of
23 these individuals would be subject to Immigration control,
24 subject to having work permits, as the case may be, so that
25 represents potentially revenue, which would be offset by, say,

1 the other benefits as described, economic activity generated by
2 that individual or individuals that will offset the direct
3 revenue in to Government, say.

4 Q. And is that part of the subparagraph (a) of 16(8), so
5 it's subsection 16(8)(a) speaks of the economic situation in the
6 Territory as one of the factors that the Cabinet has to
7 consider, is that where this consideration of the balance of
8 loss of revenue against potential economic benefit comes in to
9 play?

10 A. (Mr Smith-Abbott) If I'm understanding the question
11 correctly, which is how do you consider economic benefits in
12 this context? Is that what you're asking about?

13 Q. Let's take you to the Act quickly. If you go to 1439.
14 Actually take us to section 16(8), and subsection (8) reads:
15 "In deciding whether a certificate should be granted pursuant to
16 subsection (2)(a) or (b), in respect of any applicant, the
17 Cabinet shall consider whether (a) the economic situation in the
18 Territory such that the grant of a certificate to the applicant
19 will prejudice the protection afforded under this Act to other
20 persons engaging in the trade or profession in which the
21 applicant is engaged or in which he's likely to engage".

22 And then the other factors are close personal
23 connection, character and previous conduct, and continued
24 residence in association with the Territory may afford some
25 advantage, and it was (a) that I was drawing your attention to.

1 So, where the Affidavit speaks of Cabinet balancing
2 loss of revenue and approving an application against the
3 potential economic benefit that flows from granting the
4 application, does that balance come under section 16(8) (a)?

5 A. (Mr Smith-Abbott) Well, the balance in 16(8) (a) I
6 would say is much, much broader than what I'm suggesting by way
7 of the immediate economic loss of, say, a very narrow source of
8 revenue to the Government directly. Because this section speaks
9 to the broader economic situation within the Territory, and an
10 assessment of how the assimilation of these other--of these
11 individuals may favorably or adversely impact existing persons
12 engaging in the trade or professions in which the applicant is
13 engaged, so this speaks to a much, much broader context than
14 what you would say is loss of revenue because to the extent to
15 which now we're looking at, say, an individual who is going into
16 a particular trade--I'm not going to characterize what
17 trade--and he or she may compete and may adversely impact the
18 existing business as it stands. That has to be weighed, that
19 has to be considered, and that's what I would suggest is the
20 intent and the spirit of that subsection, not necessarily just
21 the loss of revenue because, as I would have stated a few
22 moments ago, the loss of revenue under those circumstances
23 described now speak to sector based losses of revenue impacting
24 existing trade for professions.

25 COMMISSIONER HICKINBOTTOM: But (8) (a) is clearly, as

1 you described, it's--the Cabinet have to consider whether the
2 applicant--whether the grant of the applicant will result in
3 persons in his or her trade or profession finding it more
4 difficult to engage because of the competition.

5 THE WITNESS: (Mr Smith-Abbott) Correct.

6 COMMISSIONER HICKINBOTTOM: So, that's in that sense,
7 quite narrow.

8 But what you've said is bar any loss of revenue in
9 approving applications with the potential economic benefits are
10 more closely integrating applicants in the community. That's a
11 completely different thing.

12 THE WITNESS: (Mr Smith-Abbott) Yes, I recognize that,
13 and so--I think that when you are--when we are speaking about
14 Belongership as a concept and as a construct, it's extremely
15 complex, and depending on scale of what you--at what scale are
16 you considering that economic adverse or beneficial impact? You
17 can get into a situation where we're looking at, say, as I
18 intimated initially, loss of revenue directly to, say,
19 Government in the form of permits and licences that that
20 individual may have to secure against also a much broader
21 societal scale of issues with respect to the integration of
22 these individuals whoever they may be or whatever sector that
23 they may find themselves--or profession that they may find
24 themselves in competing against.

25 So, ultimately, I think that what I would like to say

1 about all of this is that, Cabinet will need to be minded, of
2 course, that all of these scales of impact would have to be
3 weighed. The Affidavit may have just simply specifically
4 narrowed that question to one particular--one scale, but there
5 has to also be a recognition that is a much more dynamic and
6 complex situation when considering economic benefit across
7 varying sectors.

8 BY MR RAWAT:

9 Q. What it points to, your paragraph 25.4 points to is
10 that in addition to matters sets out at 16(8) that we've looked
11 at, there is an additional factor that Cabinet will take into
12 account: The balance, loss of revenue versus potential economic
13 benefit that has been identified in the Affidavit. So that's
14 one more factor for Cabinet to take into account.

15 But are there any others that Cabinet takes into
16 account?

17 A. (Mr Smith-Abbott) I would refer that matter to the
18 Chief because I'm not aware of any others, but...

19 A. (Mr Penn) Well, I won't really be able to answer that
20 fully as well too because I don't sit in Cabinet's
21 deliberations.

22 Q. That's fair enough.

23 A. (Mr Penn) So, they make their decision based on the
24 information before them, and they're quite clearly set out in
25 the Act.

1 Q. I see.

2 So, as far as your understanding goes, Mr Penn, as
3 Chief Immigration Officer, I totally accept you're not in the
4 room when Cabinet is making these decisions, but your
5 understanding has been that they look at the information, they
6 essentially apply the Act, and then they make a decision, and
7 that decision might be to agree with the Board or it might be to
8 reject the Board or it actually might be to ask for more
9 information?

10 A. (Mr Penn) Yes.

11 COMMISSIONER HICKINBOTTOM: I mean, the factors in
12 section 16(8) are mandatory. Those are factors which the
13 Cabinet have to take into account.

14 THE WITNESS: (Mr Penn) Yes, yes.

15 COMMISSIONER HICKINBOTTOM: Over and above those
16 factors, is there any--is there any policy, written or indeed
17 unwritten, that the Cabinet used in respect of factors other
18 than those four that they look at when they're considering an
19 application?

20 THE WITNESS: (Mr Penn) I wouldn't be able to answer
21 that.

22 COMMISSIONER HICKINBOTTOM: You don't know of any?

23 THE WITNESS: (Mr Penn) No.

24 COMMISSIONER HICKINBOTTOM: But you may not know of
25 any even if they exist?

1 THE WITNESS: (Mr Penn) No.

2 COMMISSIONER HICKINBOTTOM: No. I understand that.

3 Thank you.

4 BY MR RAWAT:

5 Q. Thank you. What the Affidavit goes on to say
6 that--and it exhibits a number of Cabinet Memos and decisions we
7 don't need to look at, but Cabinet usually follows the
8 recommendations, but when we go back to 1345, the Affidavit at
9 25.8 says there are earlier examples where Cabinet does not
10 appear to follow recommendations that were given. And if we
11 look at those, if we turn up 1580, this is a Cabinet Extract,
12 record of the Cabinet's decision, it's dated the 20th of
13 April 2011, but relates I think to a decision that was made by
14 Cabinet on the 13th of April 2011. And what's noted--and I
15 won't read the names for obvious reasons--but that Cabinet had
16 noted the Attorney General's advice in respect of section 16 and
17 added the names of Eligible Persons to the list for Belonger
18 Status as follows, and then on the next page, Cabinet then
19 approved the granting of Belonger Status to a number of persons
20 listed. So, that was an example where Cabinet was, of its own
21 volition adding names to the list?

22 A. (Mr Smith-Abbott) That is correct.

23 And earlier evidence provided, because this is the
24 2011's event that was highlighted prior to our break, that these
25 names would not have undergone--these individuals would not have

1 undergone the processes that the Chief Immigration Officer would
2 have outlined in his evidence, but that they were added at the
3 time when Cabinet sat on the 13th of April 2011.

4 Q. And if we go quickly to 1596, an expedited extracted
5 sent on the 1st of May 2015 in relation to I think a Cabinet
6 Decision on the--well, it must be on that day, but certainly
7 May 2015, but we see at (a) that Cabinet reviewed a list of five
8 persons who were not recommended by the Board of Immigration for
9 a grant of Belonger Status in accordance with section 16, and
10 that was on the basis that they scored below the minimum of
11 obtainable points on the point system.

12 And then Cabinet decided not to accept the
13 recommendations, but approved--of the Board, which was to refuse
14 the application, but instead approve the grant of certificates
15 to those five individuals. So, that's an example that your team
16 came up with of where Cabinet was doing the opposite of not
17 adopting the fact of the Board's recommendation, wasn't it?

18 A. (Mr Smith-Abbott) That is correct.

19 So, Cabinet would have exercised its right and
20 discretion to not accept the recommendation of the Board and
21 proceed--would have then proceeded to have given the award.

22 Q. And is it still the practice that all of the
23 applications go to Cabinet, so even those where the Board is
24 recommending that the application be refused, that will still go
25 to Cabinet?

1 A. (Mr Penn) Yes.

2 Q. If we turn quickly to 1575 in the bundle. Can you
3 confirm, Mr Smith-Abbott, this is a table which is exhibited to
4 the Affidavit, but it sets out the numbers of persons granted
5 Belonger Status from 2017 to the present and one can see that
6 there has been since 2017 an increase in number of applications,
7 but the biggest increases are--or the largest grants were in
8 2019 where, firstly, a tranche of 648, which was Belongers only,
9 grants were made. And then it says 541 persons were granted
10 Residence and Belonger Status, so granted both in one event; is
11 that right?

12 A. (Mr Smith-Abbott) Yes, that would have been the
13 fast-track.

14 Q. So, it's the 541 that are the fast-track; is that
15 right?

16 A. (Mr Smith-Abbott) That's correct.

17 Q. So the 648 would have gone through the normal process?

18 A. (Mr Smith-Abbott) The 648, as I understand it, and
19 again, the Chief is here with me--but the 648 were likely
20 residents who would have then applied at that time to become
21 Belongers, so again, understanding that really and truly we are
22 at that particular time we are addressing two groups: Residence
23 who would have already have had some measure of status, so to
24 speak, and then apply for Belongership under that particular
25 programme to be considered; and then the 441 which represents

1 both is just simply the merging as earlier stated.

2 Q. The two processes?

3 A. (Mr Smith-Abbott) Of the two processes, yes.

4 Q. I think actually the point was made that certainly
5 between June 2019 and February 2020, the only way you could make
6 an application was through the fast-track?

7 A. (Mr Smith-Abbott) You're asking that the only way that
8 an application would have been made during that particular
9 period would have been under the fast-track?

10 Q. Because the system--the provisions had been changed,
11 so there were--

12 A. There were--

13 (Overlapping speakers.)

14 Q. --between June--

15 A. (Mr Smith-Abbott) --there was certainly nothing that
16 would have prevented--

17 Q. --two parallel (unclear) systems, did you?

18 A. (Mr Smith-Abbott) There would have been nothing that
19 would have prevented an individual from just normally applying.
20 Fast-track was just simply a program designed to address a
21 backlog in that case, but again, there may have been individuals
22 who may have just simply applied in the normal course of having
23 their applications considered.

24 Chief?

25 A. (Mr Penn) Yes. During the fast-track process, the law

1 was amended, and that the law at the time, for that period.

2 Q. So, whether you made an application in the normal way
3 as opposed to the fast-track process, you were still being
4 considered under the law at the time.

5 A. (Mr Penn) No, I don't think that's how it operated
6 because you'd have had two competing laws because the fast-track
7 went to the House. It was made law so that is the law to
8 follow.

9 Q. Yes. No. I think we're both making the same point,
10 Mr Penn, that there was only one law between June 2019--

11 A. (Mr Penn) Right.

12 Q. --and the beginning of February 2020, and however you
13 applied, that was the law that applied to your application.

14 A. (Mr Penn) Right.

15 Q. I mean--and I think that there's a distinction. The
16 fast-track as a process allowed people to pay additional fees, I
17 assume, to have their application considered--

18 A. (Mr Penn) Yes.

19 Q. --more swiftly.

20 A. (Mr Penn) Right.

21 COMMISSIONER HICKINBOTTOM: And I mean the figures are
22 that, in 2019, there were 204 grants of Belonger Status, either
23 by marriage or through the regular--the pre-fast-track scheme,
24 and then there were 1,189 who were--went through the fast-track,
25 648 on the Belongers only part and 541 on both residents and

1 Belongers' limbs. That's what this table says. So there were
2 1,393 grants in 2019.

3 BY MR RAWAT:

4 Q. In terms of the standard process, how are applicants
5 informed of the outcome of Cabinet's decision?

6 A. (Mr Penn) Once Cabinet have made a decision, a copy of
7 the extract with the decision is sent to the Ministry and then
8 to the Department. Once the Department receives that, then the
9 Department staff notifying persons of, you know, of their
10 approval and then letting them know that they would need to, you
11 know, come to the Department to make payment; and subsequently
12 after that you know, they would be called to receive their
13 certificates and ID.

14 Q. And is there a fee to be paid at the beginning of the
15 process if you want to make an application?

16 A. (Mr Penn) No, there is no application fee at this
17 point in time.

18 Q. So do you--you pay a fee if you're successful?

19 A. (Mr Penn) Yes.

20 Q. I see.

21 Just help me with this, though, in terms of
22 understanding the fast-track process so--and how it worked. If
23 you go to page 1347, you've confirmed, Mr Penn, and we've looked
24 at the statutory amendments that were made so that, in effect,
25 for a time-limited period there was a different law in

1 operation, but I think the points made in the Affidavit are,
2 firstly, that the ordinary residents test didn't change; is that
3 right?

4 A. (Mr Penn) Residence? There was an amendment to
5 residence as well because the--I think the 20-year limit was in
6 there.

7 Q. Yes, but in terms of what "ordinary residence" means.

8 A. (Mr Penn) Oh.

9 Q. That didn't change.

10 A. (Mr Penn) No, no.

11 Q. You still had to--there was still a limit on how long
12 you could be outside the BVI.

13 A. (Mr Penn) Right.

14 Q. What was--I think, if we look at I think it's--you'll
15 see what the test is, if you need to look it up. It's at 10.7
16 of what "ordinary residence" means.

17 A. (Mr Penn) 10.7?

18 Q. Yes.

19 So, that did not change. In effect, anyone on the
20 basis on which you were applying, you still--there was still a
21 maximum number of days that you couldn't exceed to be outside
22 the jur--the BVI, and also the grounds on which absence would
23 not count against you was still illness, study, Government
24 service or service in the Armed Forces.

25 A. (Mr Penn) Yes.

1 Q. And other than that, if you're absent for different
2 reasons--and we've used the round-the-world trip example, which
3 perhaps, given we're just coming out of pandemic, isn't the best
4 example but--

5 A. (Mr Penn) No.

6 Q. --it's a non-pandemic example.

7 A. (Mr Penn) Right.

8 Q. But, if you were doing that, then time would still
9 count against you.

10 A. (Mr Penn) Right.

11 Q. And you've set out, if we go back to 33.4.

12 A. (Mr Penn) 33?

13 Q. 33.4. That helpfully sets out what the Amendments
14 were made to section 16(4) and 16(5). So, in relation to 16(4),
15 the big change was--or firstly, that the Cabinet could decide
16 whether in the exceptional circumstances of any case or any
17 reason, if Cabinet considers it fit to do, it could, in its own
18 discretion, grant a certificate to any person who applies in the
19 prescribed manner and who (a) is of good character, (b) of the
20 date of making the application is ordinary residence in the
21 Territory, and (c) has been an ordinary resident for a period of
22 not less than seven years immediately prior to his or her
23 application.

24 So, that big change there was that there was no role
25 to be played by the Board in the process; is that right?

1 A. (Mr Penn) Well, according to the changes, it would
2 appear that way.

3 Q. Right.

4 And then 16(5), which I think Mr. Rockefeller, the
5 only beneficiary of--so far, the big difference again was that
6 there was no requirement for an application, and there wasn't a
7 requirement that the person had been ordinarily resident in the
8 Territory for a period of at least 20 years.

9 So, the Policy reasoning behind that, you deal with
10 the Affidavit--deals with, at 33.7, and this may be a matter for
11 Mr Smith-Abbott, but what's said is that with regard to the
12 amendments to subsection 16(4) and 16(5), the Government appears
13 to have intended to create a special fast-track process aimed at
14 expatriate workers and those residing in the Territory for 20
15 years or more, so that the--I think the point was to create a
16 process by which either expatriate workers or those who'd lived
17 in the Territory for 20 years or more could combine the
18 residence application and the Belonger application.

19 A. (Mr Smith-Abbott) That is correct, yes.

20 Q. And if we look at 1663 in the bundle.

21 A. (Mr Penn) 16--

22 Q. 1663, please, Mr Penn.

23 What's written there, it's a memorandum from the
24 Ministry of Natural Resources, Labour and Immigration, dated the
25 20th of August 2019, and it's headed (reading): "Application for

1 certificates of Belonger Status, Immigration regularization
2 batch number one". And under "Background information", it
3 refers to the first bill--the first bill that--entitled "The
4 Immigration and Passport (Amendment) Act of 2019", and says
5 (reading): This amendment allowed for a special fast-track
6 process to be developed for expatriate workers and those
7 residing in the Territory for a period of 20 years more, without
8 gaining status to be able to do so. These persons had the
9 opportunity to apply for Residence and Belonger Status, or
10 Belonger Status only depending on their pre-existing qualifiers.

11 Paragraph 2 says (reading): "The clear path to
12 regularisation, Residency and Belonger Status programme is a
13 special project initiated and driven by the Premier, does not
14 require a deliberation of the Board of Immigration for
15 applications received but is approved by Cabinet's discretion as
16 stated within the Act. The process specifically requires
17 applicants to submit their application and make payment up
18 front, complete a written exam, and submit all of the same
19 documentation that persons would have originally submitted
20 through the normal process of the Immigration Department". And
21 it then lists the documents that would be provided and refers to
22 a profile being attached for Cabinet's deliberation.

23 And continues at three (reading): "Under this
24 expedited process a timeline of three weeks was allotted to
25 allow persons to submit the required forms and documents.

1 Applicants were required to pay upon submission of all
2 applications a fee of \$810.

3 So that's--there are some differences there between
4 the standard process. The firstly is the Immigration Board is
5 not involved, so presumably there is no interview, there's no
6 cultural test, there's no point system. Is that right, Mr Penn?

7 A. (Mr Penn) It would appear so.

8 Q. You then have a short period of time which, as we've
9 discussed before, was extended, but the other difference is that
10 applicants were required to pay a fee up front for the process;
11 is that right?

12 A. (Mr Penn) Yes.

13 Q. Now, in practice, was the process this, that the
14 applications would still come in to the Immigration Department,
15 and it would still be for your team to collate the material and
16 review it?

17 A. (Mr Penn) Yes.

18 Q. But after you had done that, you would prepare the
19 profile, and then that would be submitted as part of the Cabinet
20 Paper.

21 A. (Mr Penn) Yes.

22 Q. So, we know that from before the Board made
23 recommendations, was the Immigration Department required to make
24 any recommendations?

25 A. (Mr Penn) No.

1 Q. So, it was just still, as you put it, an
2 administrative task.

3 A. (Mr Penn) Yes.

4 Q. And so the decisions were just down to Cabinet?

5 A. (Mr Penn) Yes.

6 Q. If you look, please, and we've going back just to the
7 first bundle, please, if you turn up page 724 in that first
8 bundle.

9 Give me a moment, please, Mr Penn.

10 (Pause.)

11 Q. 724 is another Cabinet memorandum, again from
12 Mr Smith-Abbott's Ministry, and it's dated the 5th of December
13 2019, so--and it's dealing with a batch of applications that
14 need to be put in front of Cabinet. If you look at 726, you see
15 under "Legal implications" comments of the Attorney General who
16 writes (reading): "The size of the number of applicants," in
17 this case 67, and the short chance for comments on the Cabinet
18 Paper does not provide me with the requisite opportunity to tell
19 me whether or not the applicants have qualified for the grant of
20 resident or Belonger Status, and that there are no disqualifying
21 factors such as criminal convictions, frauds, et cetera, whether
22 in or outside the Virgin Islands, which is a relevant
23 consideration in these matters.

24 I proceed on the assumption that the Ministry has
25 conducted the application and that they do, in fact, qualify

1 under the Immigration and Passport Act for the status that they
2 have applied for. In any event, a certificate granted is
3 subject to revocation for fraud, false representation or
4 concealment of material fact and imprisonment amongst other
5 considerations".

6 If you go to 735, you have a memorandum dated the same
7 day, but this is number 444 of 2019, but the previous one was
8 443. If we turn to 737, the Attorney General again raises a
9 concern there and repeats the standard size of the applicants is
10 48, so in one day, two Cabinet Papers had come in, submitting
11 just over a hundred applications.

12 Now, the Attorney General's Chamber was essentially
13 saying they had not had time to consider the applications. Were
14 those concerns fed back to the Immigration Department?

15 A. (Mr Penn) Not that I could recall.

16 Q. And in terms of the process that your Department had
17 to go through, was it essentially the same as you would do under
18 the standard process?

19 A. (Mr Penn) I can say at that time we had added staff to
20 vet the applications and make sure that, you know, everything
21 was in order, including the Police records of all applicant.
22 All applicant knew that they had to get Police records, and they
23 got their Police records.

24 Now, in the absence of knowing whether those Police
25 records, you know, were done accurately in that space of time

1 and making sure that any offenses that they may have had, then
2 it was up to the Authorities, you know, to make sure that, you
3 know, whatever offenses, you know, appeared on their Police
4 Certificate. And if offenses were not there, then if persons
5 are from note, you know, it would go--that they have obtained
6 Belonger Status by fraud, you know, by, you know, submitting a
7 Police record, you know, which was not true and correct.

8 Q. But you explained the process you go through before in
9 terms of getting the documents in and then checking them.

10 A. (Mr Penn) Yes.

11 Q. You had additional staff this time around.

12 A. (Mr Penn) Yes, yes, yes, and--

13 Q. Essentially, was it the same process?

14 A. (Mr Penn) Right. And that was done, yes.

15 Q. Now, the Policy--in terms of the Policy statement that
16 we looked at from the Cabinet Paper of August 2019--referred to
17 a written exam being completed. Who oversaw that written exam?

18 A. (Mr Penn) The Department, itself.

19 Q. And did--I mean, August 2019, before the pandemic
20 emerged, but were people being asked to come in and sit the exam
21 or--

22 A. (Mr Penn) Yes.

23 Q. So, everyone had to actually come into the Department,
24 sit the written exam.

25 A. (Mr Penn) Yes.

1 Q. And then that would form part of the material that
2 went to Cabinet.

3 A. (Mr Penn) Yes.

4 Q. Thank you.

5 May I just have one moment, Commissioner.

6 (Pause.)

7 MR RAWAT: Commissioner, I've reached the end of my
8 questions. Can I conclude by thanking both Mr Smith-Abbott and
9 Mr Penn for making themselves available today, but also not only
10 for the work that has gone into the Affidavit, which has been
11 very helpful, but also for the way in which they have given
12 their evidence today. Thank you.

13 COMMISSIONER HICKINBOTTOM: Yes. Can I thank you both
14 for your evidence which has been very helpful in an area which
15 is not always straightforward. So, thank you both very much.

16 (Witnesses step down.)

17 COMMISSIONER HICKINBOTTOM: We'll just halt for a few
18 moments.

19 MR RAWAT: Yes, and then we'll set up for the next
20 witness.

21 COMMISSIONER HICKINBOTTOM: Yes. Yes, please. Thank
22 you.

23 (Recess.)

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Session 2

COMMISSIONER HICKINBOTTOM: Good. Thank you,
Mr Rawat.

MR RAWAT: Thank you, Commissioner.

Commissioner, before we continue with our next witness, can I confirm for the purposes of the Transcript that we are joined by the Solicitor General Jo-Ann Williams-Roberts who appears on behalf of the Attorney General and the elected Ministers. The Solicitor General attends remotely.

I should apologize to her because earlier when we started this session, I noted that she wasn't present, but she did join during the course of questions being put to Mr Penn and Mr Smith-Abbott.

But our next witness is The Honourable Vincent Wheatley.

BY MR RAWAT:

Q. Honourable Wheatley, thank you for returning once again to assist the Commissioner with further evidence. I think you probably know what I'm going to say to you at least in terms of an introduction. Firstly, of course, no need to take the oath or the affirmation.

Second, that you have bundles there to your left which we might need to look at as we go through.

Third, you will know to speak up, speak slowly.

A. I'll try.

1 Q. As slowly as you can, perhaps. But--and I've said to
2 other witnesses, if we end up speaking across each other, I will
3 stop and I'll let you finish your answer. I notice you've got
4 your laptop with you. What do you have on there, please?

5 A. The Immigration Act.

6 Q. I see. Thank you.

7 A. As I assume you will be referring to it.

8 Q. Yes, we may do.

9 The topic on which the Commissioner asked for further
10 assistance from you is that of Belongership, and specifically
11 the grant of Belongership under section 16 of the Act.

12 A. Um-hmm.

13 Q. This morning and into this afternoon, the Commissioner
14 heard evidence from your Permanent Secretary, Mr Joseph
15 Smith-Abbott, together with the Chief Immigration Officer,
16 Mr Ian Penn. So, they have done a great deal of work in
17 assisting the Commissioner in understanding the legislative
18 basis on which Belongership is granted, particularly under
19 section 16, but also the process by which applications for
20 Belongership are dealt with within the Ministry by the
21 Immigration Board and then on to Cabinet.

22 As we have learned in 2019, Cabinet introduced or the
23 House of Assembly passed, a process which I think we've been
24 calling the fast-track process.

25 A. Regularisation.

1 Q. Yes.

2 Which, for a time-limited period, changed the law and,
3 in accordance, changed the process.

4 Now, I will ask you some questions in due course about
5 the fast-track process, primarily from the perspective of
6 Cabinet, because, of course, neither Mr Smith-Abbott nor Mr Penn
7 could assist the Commissioner once Cabinet convenes. So, the
8 approach of Cabinet to considering applications is something
9 that we need to ask you about.

10 Now, the first thing to deal with is that you, in
11 July 2021, as Minister for Natural Resources, Labour and
12 Immigration was sent a Letter of Request seeking an Affidavit
13 which answered various questions on Belongership and how the
14 process works. Did you at the time see that letter?

15 A. Yes, I did. Yes.

16 Q. And for reasons that Mr Smith-Abbott has explained, he
17 was delegated to produce the Affidavit, and he, in fact,
18 produced two Affidavits, one shorter and one and a much more
19 detailed one, which, as he explained again, drew on the
20 expertise of colleagues within your Ministry, including Mr Penn.

21 A. Um-hmm.

22 Q. Can you confirm whether you have seen those
23 Affidavits?

24 A. I have, yes.

25 Q. And have you had an opportunity to go through them?

1 A. Yes, I have.

2 Q. Because one thing that we said is that they do have
3 quite a significant number of exhibits attached, so did you have
4 an opportunity to look at those?

5 A. Yes, I did.

6 Q. Thank you.

7 Now, what followed was a Warning Letter, and you will
8 be familiar with that because you have attended to give evidence
9 in response to that when we were dealing with Statutory Boards,
10 and you should see the Warning Letter there. I think that's
11 your written response, and we will go to that in a moment, but
12 the Warning Letter was dated the 15th of September 2021. It is
13 worth explaining once again what it is and what it is not.

14 We call it a "Warning Letter". Historically, it used
15 to be known as a "Salmon Letter", but it might have different
16 meanings in different contexts, and in another contexts, but in
17 the context of an Inquiry, its purpose is to alert you to a
18 potential criticism and the evidence on which that is based and
19 therefore to allow you an opportunity to respond to it.

20 Now, the reason that the Warning Letter was sent to
21 you is because you are the current Minister with responsibility
22 for immigration matters, and--but what we ought to say is that
23 the potential criticism that we put to you, arises in the
24 context of a policy that was in existence and in application, I
25 think, long before you assumed office.

1 A. Yes, indeed.

2 Q. But what I should also add is that, when I refer to a
3 potential criticism what I must explain is that such a criticism
4 does not represent either the provisional or concluded view of
5 the Commissioner. The purpose of the letter is to give you an
6 opportunity to respond so that you can be--we can ensure that
7 you are treated fairly.

8 Now, you did, indeed, respond, and you have prepared a
9 response in writing, which, if I could ask you just to look that
10 up, please, Honourable Wheatley? If you could go to the--

11 A. Is this in the bundle?

12 Q. It's not. It's loose leaf.

13 A. Bundle number two?

14 Q. Yes.

15 If you go, please, to the last page.

16 Can you confirm that it's dated the 24th of
17 September 2021?

18 A. Yes, it is.

19 Q. And it carries your signature?

20 A. That is correct.

21 Q. And are you content that that written response should
22 stand as part of your evidence before the Commissioner?

23 A. Yes, I do.

24 Q. That's helpful because it means that I can hopefully
25 be a little bit more focused in my questions to you. But let's

1 set out the nature of the criticism. And it is something that
2 we have canvassed with Mr Smith-Abbott and Mr Penn today, and
3 that is that in 2004, the Executive Council, as it then was,
4 published and approved a number of administrative guidelines for
5 what was then the Board of Immigration, and those guidelines
6 related to the Board's processing of applications for Residence
7 and Belonger Status. And that included that once the backlog,
8 as it then was, had been cleared, the Board should make
9 recommendations as applicants reached the 20th anniversary of
10 their arrival in the Territory after the normal screening
11 process.

12 Now, the Affidavit, as you will recall, the Second
13 Affidavit that Mr Smith-Abbott provided on Belongership
14 described that 20 years as a benchmark, and the approach that
15 has been taken by government by Public Officers since at least
16 2005, it would appear, is that, in considering applications for
17 Belonger Status, the threshold is 20 years, so after you have
18 had 20 years' residence, then your application for Belongership
19 will be considered.

20 A. Yes.

21 Q. Now, the Act provides--and we can look at it, if you
22 need to, but it provides that you can gain Belongership by
23 tenure on the basis of a number of conditions and this is under
24 section 6(3), but what you have to also show is that you have
25 been ordinarily resident in the Territory for a period of not

1 less than 10 years immediately prior to the application.

2 And so, what the potential criticism that arises is
3 that the Policy that has been applied by Cabinet since its
4 promulgation is one where, in adopting that policy, Cabinet has
5 acted unlawfully or--and/or acted ultra vires--that is
6 outside--the Act or otherwise because an individual applying for
7 Belonger Status would have a legitimate expectation that, once
8 they had attained 10 years' residence in the Territory they
9 could make an application which would be considered in
10 accordance with the Act. And so, what's said, is that by
11 adhering to the policy as it did, Cabinet acted inconsistently
12 with the principles of good governance.

13 Now, that's the background, and I've tried to set some
14 of the position where we've reached on the facts from
15 Mr Smith-Abbott's Affidavit to you. So in effect, it would seem
16 that the approach that has been taken is that, if someone
17 applies having established ordinary residence of not less than
18 10 years, and there are other conditions they have to fulfill,
19 for example, they have to be of good character.

20 A. Yes.

21 Q. But what--the effect of what the approach of the
22 Immigration Department would be to essentially put that
23 application on hold until the Benchmark had been reached.

24 Now, you have dealt with this criticism in your
25 written response, and you make a number of points which I would

1 like to ask you for some assistance, please.

2 And I'm going to do it slightly differently from when
3 we did it on the last occasion when we dealt with Warning Letter
4 number one to you. But firstly, if I could, what I'm going to
5 do is just ask you some clarificatory questions and then I'd
6 like to invite you to just set out your written response to the
7 Commissioner, if I may?

8 A. Certainly.

9 Q. You say that the Department typically receives on
10 average 110 applications per annum and it has limited resources
11 to meet that demand.

12 A. Um-hmm.

13 Q. The first question is, 110 a year is considerably less
14 than one a day.

15 A. Um-hmm.

16 Q. What factors have caused that to have resulted as it
17 appears to have done in backlogs from time to time?

18 A. I think if you go back to the Auditor's Report, you
19 will see there was a human resource deficiency in the
20 Department. The unit was in one person for many years and then
21 two persons most times. So, I do believe simply a human
22 resources deficiency within the Department.

23 Q. And from whatever inquiries you have been able to
24 make, does that lead you to the conclusion that that has been an
25 issue that has persisted over a significant period of time?

1 A. I would say "yes".

2 The issue of a backlog is a very old issue. As a
3 matter of fact, the first time I recall the issue being
4 addressed was in 2004, there was a committee set up to look at
5 the backlog, I was on that Committee, so I am very familiar with
6 this issue from 17 years ago. And that's why when we got into
7 office, we worked right away to address this money for
8 consultation, it was due to happen before because of COVID, is
9 due to happen second quarter of this year, which is now money
10 for Consultant to come in to address and to modernize our
11 Immigration laws. One of the things that the new Board is
12 charged with is not only to remove the backlog, which we've
13 spent our first couple of months addressing but to ensure it
14 doesn't happen again, to come up with new policies and new
15 everything to make sure the backlog is addressed as something
16 that shouldn't happen. That's going forward.

17 Q. If you have a human resources issue, how would a new
18 policy improve things unless you address the human resources
19 issue?

20 A. That will be part of the recommendations, hopefully in
21 the new Policy. To adequately address this problem, you must
22 first get to the public service, human resources part of it.
23 Two persons probably can't do this. It may require, at least in
24 the short-term, five persons. During the fast-track we brought
25 in extra persons, maybe 14 or 15 persons to assist the

1 Department to get this thing under control.

2 Q. How many do you have now?

3 A. I think it's back to probably one or two.

4 Q. But isn't that going to create the very problem that
5 you're trying to avoid in that you're going to now accumulate
6 another backlog?

7 A. And that was a time waiting for the Consultant to come
8 to the Board. Now we've got a backlog that's pretty much almost
9 gone. I can't verify if it's totally gone or not, but if it's
10 not gone, it's not too far from being resolved. We will now go
11 to that process to avoid a backlog ever happening again.

12 COMMISSIONER HICKINBOTTOM: Just to go back one step,
13 Minister, there is a backlog of applications--

14 THE WITNESS: There were.

15 COMMISSIONER HICKINBOTTOM: --and we can look at why
16 that occurred. I mean, one reason might occur from 2004 was
17 there was a maximum quota of 25 imposed in 2004 following that
18 report that I understand you were involved in, so there are a
19 number of reasons for that. But isn't there--isn't there a
20 policy step before all of this? This is--I was going to say
21 purely process, process is important--but this is a matter of
22 process.

23 But is there an overarching policy? We discussed this
24 with Mr Smith-Abbott as well today, but is there an overarching
25 policy which puts Immigration, the number of people who should

1 be allowed into the Territory either as residents or as
2 Belongers or whatever in the context of a long-term plan, a
3 long-term sustainable plan for the Territory?

4 THE WITNESS: Um-hmm.

5 COMMISSIONER HICKINBOTTOM: Now, Mr Smith-Abbott's
6 response, I think was this--Mr Rawat will correct me if I'm
7 wrong--as to what he said, and you can correct me if we've got
8 the wrong end of the stick. There is no policy. The only
9 policy is the 2004 policy document, and of that, the only policy
10 remaining is 20 years. Everything else has fallen away either
11 because of time or because in terms of the quotas, they have
12 simply fallen away. Mr Penn said at least before 2014 when he
13 became involved, so that's the only policy document.

14 But there is no policy document establishing that the
15 appropriate number of people who should be granted Belongership
16 Status because that is sustainable over a period of time, that's
17 not a question that's addressed by process and by letting in X
18 number of people a year purely on the basis of the number of
19 applications and the number of applications that you can
20 process.

21 But is there such a policy?

22 THE WITNESS: No. But we are on the way towards that.
23 We've had several studies like the e-vision, envision 2014 that
24 looks at infrastructure demands as population grows. We had
25 just finished Dr Suma's National Development Policy, the report

1 should be ready I would guess in a month's time, that projects
2 what the population is likely to be. The admission policy--no
3 country in the world has easy Immigration issues. Only a few.
4 The Immigration issue must feed into, which caused a very big
5 conversation what would the BVI population be like or what would
6 we like it to be at particular times going forward? It has huge
7 implications for several sectors. We know from studying various
8 population models, that certain businesses cannot thrive under
9 certain populations. We are around 30,000 now. It limits our
10 economic activity, that we know. That bigger conversation of
11 what are we willing to do, what population can we sustained.

12 For example, we can decide tomorrow we want to
13 increase our population by 10,000, one policy statement. The
14 question is, if you grow to a greater population to consider
15 things like economic activity, you must also consider schooling,
16 you must consider sewage, you must consider water production,
17 you must consider power. So, this is not a simple little
18 two-day conversation, this is a big conversation that we are
19 going to embark on very soon.

20 Because we have to make those kind of decisions now.
21 Then you walk backwards and say what immigration policies do we
22 need to put in place to facilitate that, which is a model.
23 Let's say, like Dubai, in Dubai, their model is we will build a
24 population on immigrants, they are almost 90 percent immigrant
25 population. The question that we have to ask ourselves is that

1 way we want to grow our numbers to sustain the economy or do we
2 want to grow naturally, do we encourage our people to get more
3 babies and grow it that way or where is that balance in between.
4 We're now starting those very difficult discussions with our
5 people.

6 COMMISSIONER HICKINBOTTOM: Okay.

7 THE WITNESS: Those decisions then feedback into what
8 kind of Immigration Policy gives us that particular outcome.
9 The outcome of the study we're doing now, we cannot inform where
10 the projections are likely to be for the next 20, 30 or 40
11 years, and then it feeds back to the Immigration Policy.

12 COMMISSIONER HICKINBOTTOM: I understand. Thank you.

13 BY MR RAWAT:

14 Q. And is that what the Consultant is going to primarily
15 be advising on?

16 A. Again, the Consultant would do exactly that. What is
17 the ambition as a people, where it's trying to get to with the
18 country? Economics, your infrastructure, your environment, what
19 population are you striving for? And based on what we feed to
20 him or her, then this is these are the policies you need to
21 achieve that. That's the model of a long-term thing. In the
22 short term, it might be how do we prevent a backlog or what do
23 you want your population to look like.

24 Q. Don't you already have the answer to how do we prevent
25 a backlog?

1 A. No, not yet.

2 Q. Well, isn't the answer have more people in the unit?

3 A. Well, that's too simple an answer because we have to
4 look at--we have to look at what creates a backlog.

5 Q. Well, as--the evidence suggests, and it's the evidence
6 from--it includes your evidence, is that the backlog was created
7 by a human resources issue?

8 A. Well, that's part of it.

9 Q. May I finish?

10 A. Sorry.

11 Q. The backlog was created by a human resources issue
12 because you explain in your response, you pointed as you have
13 done to the Internal Auditor's Report of 2012?

14 A. Um-hmm.

15 Q. So, that creates it.

16 Your answer is that, when your administration came in,
17 you introduced the fast-track process, and you got rid of the
18 backlog?

19 A. Reduced.

20 Q. Reduced the backlog.

21 A. Significantly, yes.

22 Q. You didn't reconstitute, you have reduced the backlog.

23 But you did that because you put 14 people to work on
24 the job, but now you've gone back down to one. It might be a
25 bit simplistic as an analysis, but do you not then have the risk

1 that the backlog will start building up again?

2 A. Again, it goes back to what creates a backlog. Apart
3 from the human resources dealing with it, it has to do with the
4 number of persons allowed to come into the country and how long
5 they are allowed to stay before they can qualify to even being
6 considered.

7 And it must be a holistic approach--it goes back to
8 what I said earlier. We have to, as a people, decide what we
9 want the population to look like in the future. Are we going to
10 build a population on immigrants, imported labour, or are we
11 going to build a population organically from inside. If you are
12 getting enough locals for the workforce then you have less
13 persons to import. There will never be a backlog if you're
14 importing few people and they are staying here long enough to
15 get on the ladder to Belongership.

16 So we have to look at this very holistically because
17 one thing effect the other. Immigrants are not a very simple
18 thing, and you have to tread very, very carefully.

19 COMMISSIONER HICKINBOTTOM: The proposition you put,
20 isn't it true, Minister, that even--the Territory is small, and
21 it's "smaller" because a high proportion of it is on quite a
22 gradient, so it's the number of people who can live here is a
23 relatively small finite number.

24 For many people, for all sorts of reasons, it is a
25 potentially attractive place to live and, therefore, you are

1 going to get people who want to come here, and they will come
2 here, and they will apply to come in, they will apply to work,
3 they will apply for residency, and they will apply for
4 Belongership, probably in that order. And there is an issue
5 about the efficiency with which applications can be dealt with,
6 a high proportion may be negatively dealt with in the future,
7 depending on the Policy. But they do need to be dealt with
8 efficiently or else there will be a backlog?

9 THE WITNESS: I agree with that, I fully agree with
10 that. Dealt with efficiently. I think persons waiting 15 or 20
11 years after applying is ridiculous. I think persons should be
12 dealt with in a much shorter time, even if it means a denial.
13 Maybe we have a challenge of denying persons for Belonger
14 residents but to keep somebody waiting I think is a disservice
15 to them. I agree on that. I would like to see things happen,
16 responses in the service in general happen more efficiently
17 across the board, not only in this particular instance but
18 services in general.

19 Q. If I can move on. Would you agree with this
20 proposition, Honourable Wheatley, and that is that a grant of
21 Belongership is a significant step?

22 A. Absolutely, it should be treated sacredly.

23 Q. And because it provides or conveys a number of
24 important privileges.

25 A. Yes.

1 Q. And noticeably, firstly, the right to vote.

2 A. Um-hmm.

3 Q. And that you are then free from Immigration control?

4 A. The right to own property without the License.

5 Q. And so, it requires--I mean, that grant justifies any
6 administration taking care over how Belongership is granted?

7 COMMISSIONER HICKINBOTTOM: And furthermore, Minister,
8 all of those rights and privileges are more or less on a
9 permanent basis.

10 THE WITNESS: Yes.

11 COMMISSIONER HICKINBOTTOM: I mean, not quite on a
12 permanent--

13 THE WITNESS: I know a few have been retracted, but
14 pretty much a permanent basis.

15 COMMISSIONER HICKINBOTTOM: It's effectively on a
16 permanent basis.

17 BY MR RAWAT:

18 Q. And we will look at the detail of the section 16
19 criteria, but to pick up a theme that emerged from the evidence
20 of Mr Penn and Mr Smith-Abbott, some of the factors that can
21 legitimately be considered when looking at whether an applicant
22 should have Belongership Status, and that's ultimately the
23 decision of Cabinet, but it is, for example, and it's reflected
24 through the process that the Immigration Board goes through,
25 looking at the extent to which someone has assimilated in the

1 BVI community, so it's not just enough to have lived here the
2 right number of years, it is an important feature of the
3 consideration is the question to what extent have you
4 assimilated.

5 A. And integrated, how much have you anticipated, because
6 there are persons who, like the Commissioner said, it's a very
7 attractive place to live and work. Some persons come here just
8 for that, they have no interest in our culture, they have no
9 interest in our people. They are interested in just being here.
10 We take a strong view at persons like that. We prefer persons
11 who are more integrated, who assimilate into the culture, into
12 our way of life, and into our values more importantly.

13 Q. That reflects the use of a cultural test which, as I
14 understood from Mr Penn and from the Affidavit, is part of the
15 process because it's a way of asking people to demonstrate their
16 knowledge of the history of the Islands, their knowledge of BVI
17 culture, and that's an important part of it, isn't it?

18 A. Very much so.

19 Q. And there, again, it's not for me but I'm saying
20 critically, but a legitimate question to ask is what advantage
21 do you bring to these islands if you get Belongership Status?

22 A. That is important. I asked for counsel to clarify,
23 you want to enhance your community, so you want persons who
24 brings something, expertise or community service or some skill
25 that we don't have, yes. It was that considerations, also.

1 Q. And you don't want anyone, for want of a better word,
2 who devalues Belonger Status because again, something that
3 emerged from the evidence this morning is that it's the question
4 that is asked of applicants is and what they have to show is, do
5 you intend to make BVI your permanent home. And would it be
6 right to say that you would not welcome a situation where
7 Belongership Status was acquired relatively easily to the point
8 by people, who in reality were not making the BVI their
9 permanent home?

10 A. It shouldn't be treated trivially. It should be
11 cautiously handled because Belongers, when you travel, we are
12 all judged as one person, just one BVI Islander you may meet.
13 So, you want to make sure that the persons who are given this
14 privilege represent pretty much who we are as a people.

15 Q. And you described it as sacred?

16 A. Yes. It should not be treated trivially at all.

17 Q. Is that something that you feel strongly about?

18 A. In my opinion, yes.

19 Q. Thank you.

20 If I just again returning to your written response,
21 please, Honourable Wheatley, but I think, hopefully, again these
22 are propositions I hope you accept. As we understand it, the
23 Policy that emerged in 2004 in essence really has one aspect of
24 it still left, and that is this benchmark of 20 years.

25 A. Yes.

1 Q. That is what it has become.

2 A. Um-hmm.

3 Q. And you accept that that has been applied when
4 considering--

5 A. I would say pretty much, they have been pretty
6 consistent.

7 COMMISSIONER HICKINBOTTOM: I think to correct one
8 point in your response because I'm not sure that this is what
9 you mean. In paragraph A on page 2, the first paragraph of your
10 response says, the application of the Policy by way of benchmark
11 was an administrative practice deployed by the Immigration
12 Department, you say, as a method of establishing an order of
13 priority for consideration of applications. My understanding of
14 the evidence we've heard so far from Mr Penn and
15 Mr Smith-Abbott, but also from you Minister, is that's not
16 really right because the 20 years doesn't help with
17 prioritisation. It's a bar. Until you get to 20 years, your
18 application is not going to be considered.

19 THE WITNESS: Commissioner, if I can go back to that
20 2004 situation, when that Committee was put together, we were
21 given a list of persons--I don't recall what the numbers, I
22 think I saw the numbers somewhere around 300.

23 Q. 365.

24 A. Right. Those persons the years ranged from about 50
25 years all the down to a few years, 20 years. Because there was

1 so many at that time, I think 20 became like the lowest number
2 of the bunch to consider. The most number of persons were 20 or
3 above in that particular set of persons. I think that's where
4 the 20 came from as a way to let's start here.

5 COMMISSIONER HICKINBOTTOM: But, as a policy
6 guideline, it had nothing to do with the backlog. The backlog
7 was going to be determined in a different way, sets of 50
8 applications that were, as you say, long outstanding, were going
9 to be considered by the then-Chief Minister and dealt with until
10 the backlog went.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: The 20 years came in once
13 the backlog had gone, the 20 years was a benchmark.

14 THE WITNESS: That was the intention of the 20 year
15 but I would be corrected.

16 BY MR RAWAT

17 Q. It's 1577, if you want to look at it.

18 COMMISSIONER HICKINBOTTOM: Thank you. 1577.

19 THE WITNESS: I guess--can I review the full issue of
20 the 20 years, why it's 20 years? I'm not going to attempt that.

21 BY MR RAWAT:

22 Q. If you just take up bundle 2 of those two bundles,
23 please, Honourable Wheatley, and if you turn just to page 1576
24 in the first instance.

25 A. Um-hmm.

1 Q. 1576 is a document dated the 24th of August 2005 and
2 it's headed "Policy on The Grant of Residence of Belonger Status
3 Memo NO. 367/2004", so it's I think the earliest example that
4 could--was found by Mr Smith-Abbott to show the policy that was.
5 And if you turn to 1577, you will see there listed the actual
6 administrative guidelines. And I think the point the
7 Commissioner was drawing your attention to is really (c),
8 because (c) is, on the evidence that the Commissioner has
9 received today, is essentially the last standing part of the
10 administrative guidelines as of 2021.

11 And so, the idea was that once a backlog to be
12 addressed at (b) had been cleared, the Board would make
13 recommendations as applicants reached the 20th anniversary of
14 their arrival in the Territory after the normal screening
15 process, and what we understand from the Affidavit and from the
16 evidence today is that statement has crystallized into a
17 benchmark.

18 A. Yeah, but I think this should go along with the policy
19 change from the same period. I don't think policy ever happened
20 that it was, because it was probably passed in Cabinet but I'm
21 not sure it was enacted.

22 Q. You're right because if you turn over to the next
23 page, and I think this is obviously promulgated by the Executive
24 Council?

25 A. Hm-umm.

1 Q. So the Executive Council then make or invites the
2 Attorney General to draft amendments to the Immigration and
3 Passport Act and also invites the Chief Minister's Office to
4 take certain steps.

5 A. Um-hmm.

6 Q. And again, I think work that has gone into the
7 Affidavit of Mr Smith-Abbott and he acknowledges that it's the
8 work of a number of offices, but nobody has--actually none of
9 these steps were ever taken. There were amendments--

10 A. To be made, right.

11 Q. They were amendments made to the Act, for example, in
12 2006, but nothing was taken forward here because one of the
13 recommendations, if you look was at, if you look at 1348(d) was
14 to increase the qualifying period for Belonger Status from seven
15 and ten to 25 years.

16 A. Right. I don't think it ever happened.

17 Q. It didn't. So, what you have is you have an Act that
18 says that Belongership by tenure in the standard way would be
19 not less than 10 years. An exceptional grant of Belongership by
20 tenure would require not less than seven years, and that was the
21 Act--that was the public framework. And then we have this, as
22 I've said, what crystallized into the Policy which is
23 using--uses--I'm using the word from your written response and
24 from the Affidavit, it's 20 years and in effect, if you put in
25 an application at 10, 11, 15, it would not be considered until

1 you had reached 20 years.

2 A. So, it took 17 years to figure this out, okay.

3 Q. Well, I think to be fair, it was something that the
4 Internal Auditor figured out in 2012.

5 A. Oh, and still nothing happened.

6 Q. She also drew attention to it in her 2014 follow-up
7 review report. But that takes us neatly, Honourable Wheatley,
8 back to your written response, because that is the tension that
9 you are asked to address in a potential criticism because on one
10 side you have a policy that says 20 years, and it is a policy
11 that has not been published, so it's just an internal policy to
12 the Department, and on the other side you have an Act that says
13 not less than 10 years. I think you're nodding signals that you
14 get the point?

15 A. Yes, I have the point.

16 Q. And it's what I would like to give you is just an
17 opportunity to perhaps, if you wish, to elaborate on your
18 written response to the Commissioner. And answer the direct
19 potential criticism that by adopting that policy Cabinet has
20 acted unlawfully or contrary to the purpose of the Act.

21 A. Well, when we came in, we started to fast-track to
22 address this very soon, so we have moved to address it. We've
23 gotten the backlog down. We have now bringing a consultant in
24 that would examine these things to make sure we are compliant.

25 If you do this Audit to any country, you find the same

1 kind of problems, we're going to address it. It will be
2 addressed. We came in--

3 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt
4 because what is going to happen is or may be important, but on
5 the face of it, the Act and the policy are inconsistent because
6 not less than 10 does not equal not less than 20.

7 And secondly, the not less than 20 was unpublished.
8 The evidence we heard from Mr Smith-Abbott, in fact, from his
9 Affidavit, says that if somebody made an application between
10 Years 10 and 20, they would be sent a letter saying we're not
11 going to consider this until Year 20. But the Policy has not
12 been published. And that seems to me to be unlawful.

13 THE WITNESS: I can't verify it was published or not,
14 but I can tell you everybody knows the Policy.

15 COMMISSIONER HICKINBOTTOM: Which was also what
16 Mr Smith-Abbott said.

17 THE WITNESS: And I'm not sure the person that sent
18 the letter is saying they wouldn't be considered. I think in
19 some cases they might refuse the application or they might take
20 the application and put it aside. I'm not sure I understand the
21 physical letter saying you won't be considered. I have never
22 seen one.

23 COMMISSIONER HICKINBOTTOM: All right. Okay. Thank
24 you.

25 BY MR RAWAT:

1 Q. I think the evidence from the Affidavit is that it is
2 just put on hold.

3 A. Quite possibly.

4 COMMISSIONER HICKINBOTTOM: That's worse, isn't it,
5 because an applicant who sees the Act thinks that they have a
6 right at least to have the application considered after 10 years
7 because that's the condition in the Act. Their application gets
8 put on a shelf.

9 THE WITNESS: And I do believe that if it was
10 challenged in court, and maybe it has been challenged, I really
11 don't know, I think that they would have a very good case.

12 COMMISSIONER HICKINBOTTOM: And to be fair to you, the
13 Attorney General--the Attorney General has put written
14 submissions in, and I think this is fair, Mr Rawat, isn't it,
15 she says that she doesn't accept unequivocally that it's
16 unlawful but I think she says it may be.

17 THE WITNESS: I read her submission and I fully agree
18 with her, and I wouldn't go beyond what she has said.

19 BY MR RAWAT:

20 Q. I think you've made that point at page 5 of your
21 written response, Honourable Wheatley, because you say there
22 that the Attorney General has pointed out the potential for
23 significant questions to arise as to its lawfulness--

24 A. We have taken steps.

25 Remember, we are in the middle of a pandemic, things

1 are not happening as quickly as we would like. I think had it
2 not been for the pandemic, we would have been further along with
3 all of what we are trying to do.

4 Q. I appreciate what you said about the use of the
5 fast-track and the Consultant that would be brought in in due
6 course, but it's right, isn't it, that this policy still applies
7 today?

8 A. Like today-today? I'm not sure. I'm sure if anyone
9 listening to the COI took an application today, pretty much they
10 would be accepted today. So, I can't say, but I get your point.

11 Q. You haven't, as a result of either the preparation of
12 this Affidavit or receipt of the Warning Letter or preparation
13 of your written response said we have to stop applying this
14 policy.

15 A. I'll have to refer to the Chief Immigration Officer if
16 he has done that or not.

17 Q. I think as I understand from the evidence of some
18 Ministers and also some former Ministers, section 56 makes you
19 in charge of policy.

20 A. Yes.

21 Q. And this is a policy. Have you issued a policy--

22 A. No, I haven't.

23 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
24 but--nor published a policy?

25 THE WITNESS: No, not as yet.

1 BY MR RAWAT:

2 Q. But other than that, is there any other matter that
3 you wish to draw the Commissioner's attention to in your written
4 response, Honourable Wheatley?

5 COMMISSIONER HICKINBOTTOM: I have obviously read the
6 response and taken it all into account.

7 THE WITNESS: No, I think it's quite straightforward.

8 BY MR RAWAT

9 Q. Thank you.

10 Could I ask you now for your assistance on some other
11 matters.

12 A. Sure.

13 Q. Can I explain how I have been approaching things? So,
14 the--we've been speaking about the fast-track programme, or the
15 fast-track process, which was time limited, and I would like to
16 ask you some questions about that.

17 A. Certainly, I will do my best to answer them.

18 Q. Not immediately, not immediately. Because prior to
19 the implementation of the fast-track process, there was what I'm
20 calling the standard process, and that has with some changes
21 resumed as from the 1st of February 2020 because the changes
22 that were brought in under the fast-track expired after a period
23 of time. If you'd keep with the second bundle, please, and you
24 just turn up--just turn up, first of all, page 1328, please.
25 This is the--it's the Seventh Affidavit that Mr Smith-Abbott has

1 provided to the Commission, the second one in which he provided
2 some information on Belonger Status. If you work through to
3 page 1331, please, Honourable Wheatley. If you see at paragraph
4 9.2, what the Affidavit does is to set out section 16 of the
5 Immigration and Passport Act which is I think the key provision
6 that we are concerned with, as in force as of the time of
7 drafting of the Affidavit, which is the 10th of September 2021.
8 And so we have there a number of different ways in which
9 individuals can be granted Belongership, and in particular I
10 think what I would focus our attention on is section 16(3) which
11 says that a person may be granted a certificate of Belongership,
12 and it would be granted by Cabinet after consultation with the
13 Board, where they are of good character, not less than 18 years
14 of age, have been ordinarily resident in the Territory for a
15 period of not less than 10 years immediately prior to the
16 application, have had a Certificate of Residence for a period of
17 not less than 12 months, and has stated in the application that
18 the intent to make the Territory his or her permanent home.

19 There are provisions, if I ask you just to turn up
20 1334, you will see at paragraph 10.7, the Affidavit sets out the
21 law in relation to what it means to be ordinarily resident, and
22 that means that the applicant can only be absent from the
23 Territory for a specified period of time. And if they exceed
24 that time, that will affect the application.

25 And if you look at 10.8, it refers to subsection

1 16(10) where it says that there can be grounds where absence can
2 stop time running against you.

3 A. Um-hmm.

4 Q. So, for example, if you're on Government service and
5 you have been posted, let's say, to London, it will be wrong
6 to--not to allow you to continue to accumulate the appropriate
7 time for ordinary residents.

8 That page also allows me to draw your attention,
9 Honourable Wheatley, to subsection 16(8), which gives the
10 factors that Cabinet has to consider when dealing with an
11 application, and that is I'm going to summarise, but I'm sure
12 you will be familiar with them, but the economic situation in
13 the Territory.

14 A. Um-hmm.

15 Q. And that means--it's a specific one because what you
16 are asked to consider is whether if you grant Belongership
17 Status to an individual, would that affect the ability of
18 another to work.

19 You then have to look at whether the person has
20 established a close personal connection with the Territory, and
21 you then have to consider whether the person's character and
22 previous conduct are unexceptional, and then whether their
23 continued residence in and association with the Territory may
24 afford some advantage to the Territory.

25 Now, some of this we've canvassed because when we were

1 having--when I was asking you questions about your own
2 perception of the importance of Belongership Status, but they
3 are reflected in these provisions, are they not, Honourable
4 Wheatley?

5 A. Can I ask a question?

6 Q. Of course.

7 A. In (a), I think it's kind of a bit of a narrow
8 interpretation of (a). The economic situation, I think it mean
9 just that the overall situation in the Territory, not so much
10 the individual. As I believe, once you have a period of
11 devastation like we are now not simply how the persons are
12 affected but also the country. That's how I kind of see that
13 also.

14 COMMISSIONER HICKINBOTTOM: Well, yes. These are
15 factors which Cabinet have to take into account, it's mandatory.

16 THE WITNESS: Right.

17 COMMISSIONER HICKINBOTTOM: The Cabinet aren't
18 prevented from taking other things into account, so the fact
19 that this may be quite narrow, that is that Cabinet have to
20 consider whether somebody's coming in to a trade which is
21 "poor", that's something they consider that's quite narrow, but
22 they've got to consider that. But there's nothing to stop
23 Cabinet from considering, as you say, other economic factors.

24 THE WITNESS: Okay, thank you.

25 BY MR RAWAT:

1 Q. And that is a point that Mr Smith-Abbott makes in his
2 Affidavit. If you go to page 1344, please, Honourable Wheatley.
3 At paragraph 25.3 when discussing the process and the point that
4 is made in the Affidavit is, up until it gets to Cabinet
5 everything is a recommendation?

6 A. That's correct.

7 Q. It could be a recommendation to say "no", it could be
8 a recommendation to say "yes" but it's Cabinet that must make
9 the decision.

10 At 25.3, the point is made that Cabinet can receive
11 further advice, and the example is given, the example, actually
12 we looked at it with Mr Smith-Abbott, it's actually the Attorney
13 General as it says there, referring Cabinet to the criteria that
14 they have to apply.

15 But if you look at 25.4, what the Affidavit then
16 continues is that Cabinet will balance any loss of revenue in
17 approving applications with the potential of economic benefits
18 of more closely integrating the applicants in the community. So
19 the point that Mr Smith-Abbott made was that if you approve an
20 applicant, you lose a certain amount of revenue because they
21 don't have to pay for work permit--

22 A. That's correct.

23 Q. --or anything else. But you have to balance that
24 against the potential economic benefits of having someone who is
25 integrated in the community, wants to live here, maybe someone

1 who creates jobs, et cetera. So that may go to your point about
2 that there may be wide economic considerations--

3 (Overlapping speakers.)

4 A. Sorry. That persons now belong--before they become a
5 Belonger might be sending money because they're not sure if
6 they're going to be here as a Belonger or move to someplace
7 else, might be sending funding someplace else, or investing in
8 someplace else.

9 Now, when that person become a Belonger and they have
10 that sense of attachment to this country, all of a sudden they
11 may buy property, they may build a house, they may open a
12 business because there is more certainty about their future.
13 And that's what this is referring to. So, yes, they may lose
14 their \$700 in the work permit, but that same person has now
15 spent half a million dollars in new economy, that's what we're
16 looking at here, the opportunity cost of giving that person
17 Belonger Status.

18 Q. Thank you.

19 Now, against that background, and I could take you to
20 more parts of the Act if you need it, but when as we understand
21 it, the standard process was application is made, Mr Penn's team
22 collate the material?

23 A. That's correct.

24 Q. It then goes to--there is then an interview process
25 which involves a Member of the Board of Immigration?

1 A. That's correct.

2 Q. Cultural test is taken, there is a points system. And
3 all that information goes to the Board which makes a
4 recommendation.

5 A. To Cabinet.

6 Q. To Cabinet.

7 A profile is prepared.

8 A. Um-hmm.

9 Q. And all of that material underpins a Cabinet Paper
10 which you as Minister will take to Cabinet.

11 A. Take to Cabinet. That is correct.

12 Q. So what Cabinet will have is the profile as well as
13 all of the other documents. And so then Cabinet can make its
14 Decision.

15 But in terms of how Cabinet makes its Decision and the
16 Act is clear, it's made, so it's not automatic that if you have
17 scored 150 points on the points system, the Board is unanimous
18 in its recommendation, and Cabinet says this is a credible
19 application, you still don't have to say "yes", but--and this is
20 obviously speaking of your time in ministerial office and as a
21 Member of the Cabinet, would a fair assessment be that the
22 approach of Cabinet is to look at the application in the context
23 of the Act?

24 A. Technically, yes. We do expect our technical persons
25 to be compliant with the Act. To certainly look at every single

1 applicant like that would be impractical because sometimes we
2 may have 200 applicants, we have a finite time to meet at
3 Cabinet. So, if you don't get the paper in time, get through
4 every single one, because I can't say we go through every single
5 one, but I can say we go through every single one, it may take a
6 lot of times sometimes, depending on how much time we have to
7 consider these things. But we do depend heavily that all the
8 proper vetting was done before it got to Cabinet.

9 Q. But the factors that you will have in mind, though,
10 must be--

11 A. Yes.

12 Q. --is someone of good character.

13 A. Yeah. The paper will say, under what section this
14 person is granted this, and here are any concerns they may have
15 will be in the paper.

16 Q. But you--I mean, you have to exercise a degree of
17 independence as the Minister--

18 A. Yes.

19 Q. --as the Cabinet Member making the decision. So will
20 you be asking yourself the question, you know, am I satisfied
21 this person is of good character.

22 A. A sort of person I wouldn't even know, so I have to
23 depend on the others, Immigration, that they have done that
24 vetting for me.

25 COMMISSIONER HICKINBOTTOM: But my understanding of

1 Mr Penn's evidence was that he provides all of the information--

2 THE WITNESS: Right.

3 (Overlapping speakers.)

4 THE WITNESS: --we go through on it--

5 COMMISSIONER HICKINBOTTOM: --to the Board, and they
6 then make a recommendation--

7 THE WITNESS: --to Cabinet.

8 COMMISSIONER HICKINBOTTOM: --to Cabinet.

9 But who considers what--because this is a precondition
10 under the Act, a precondition under the Act, who considers
11 whether somebody is of good character?

12 THE WITNESS: I think everyone who comes in contact
13 with that application will--

14 (Overlapping speakers.)

15 COMMISSIONER HICKINBOTTOM: So Cabinet would consider
16 is this man a good of good--

17 THE WITNESS: Well, we'll go through the list of
18 names. Anybody jumps out, you go through the various
19 attachments that they have there. There are instances where he
20 may have a question about, well, I heard this thing about this
21 person, can we go and verify. Is this the same person I heard
22 about or something like that?

23 COMMISSIONER HICKINBOTTOM: But also you'd get details
24 attached to the application--

25 THE WITNESS: Yeah. As I'm saying, the profiles are

1 there.

2 COMMISSIONER HICKINBOTTOM: Previous convictions and
3 all that--all of that.

4 THE WITNESS: The profiles are there.

5 But they shouldn't really come to us with previous
6 convictions. I don't think they would pass the Board with
7 certain things. I don't know how many applications are denied,
8 but I think the ones that come to Cabinet have pretty must been
9 vetted and in good standing, so to speak, with all these things.

10 BY MR RAWAT:

11 Q. We understand the process on the evidence is that all
12 of the applications come to Cabinet, so Cabinet--

13 A. I wouldn't know that.

14 Q. Well, because the Board cannot make a decision. It
15 can only make a recommendation. The practice seems to be that
16 let's say there are five applications that the Board--the
17 Board's recommendations is that they should be refused. That
18 recommendation is still put to Cabinet to make the decision.

19 A. Well, okay, let me clarify. When persons submit the
20 application to Immigration Department, I am not sure where they
21 go. I don't think they all go anywhere. They may be missing
22 documents, they are probably sent back or rejected there, so I'm
23 saying I wouldn't know how many persons have applied and how
24 many were rejected. I would only know the ones that the Board
25 has considered and sent to Cabinet.

1 Q. Yes.

2 A. There are others besides those I'm sure that I will
3 never know about.

4 Q. Well, I think what the Affidavit explains is that when
5 Mr Penn's team does the review--and I'm saying it's Mr Penn's
6 team. I may be just that he has an under-resourced team of
7 one--but when that review is done, if there are missing
8 documents--

9 A. Right.

10 Q. --that the person--the applicant will be told about
11 that, but you're quite right that you get everything--you will
12 see everything that the Board sees as a Cabinet Member.

13 A. That is correct.

14 Q. But the point I was making, Honourable Wheatley, is
15 that you get all of the applicants. So you--what the Board
16 doesn't do is act as a filter. It doesn't separate the
17 applications into a pile of "refuse" and "accept". It will make
18 recommendations in that way, but it will then put everything to
19 the Cabinet for a decision because there is--on the papers,
20 there are instances when Cabinet has said we don't accept the
21 Board's recommendation to refuse. We will approve the grant of
22 Belonger Status.

23 A. That is correct.

24 Q. So it takes us back to the point that obviously
25 Cabinet has an important role in this. It's only Cabinet that

1 can make the decision.

2 A. The final decision is Cabinet's.

3 Q. And those factors that you have to consider must be
4 the ones that you have in mind. You must ask yourself is the
5 person's character and previous conduct unexceptional. That's
6 right, isn't it?

7 A. Yes.

8 Q. And you will ask yourself about whether continued
9 residence in association with the Territory affords some
10 advantage to the Territory because these all feed back to the
11 key points you, yourself, were making. It's really about--

12 A. Mm-hmm.

13 Q. --your point that it's sacred. It all comes back to
14 that, doesn't it?

15 A. Very much so.

16 But we do--depending on the number we do, it goes
17 through meticulously all the paperwork involved.

18 Q. Can I--that is the standard process. Can I look with
19 you, just in relation to the fast-track process. If you turn,
20 in the same bundle, please, Honourable Wheatley, to 1663,
21 please. Cabinet memorandum from your Ministry, Memorandum 289
22 of 2019 and 20th of August 2019, and it's useful as the starting
23 point because it sets out what I'm going to suggest, Honourable
24 Wheatley, was the sort of policy behind the decision to have the
25 Act amended in 2019. And we see that--and this--we know that

1 there were two Acts in 2019. This is in relation to the first,
2 which was assented to be sent to the Governor on the 12th of
3 June 2019, and it explains in the paper (reading): This
4 amendment allowed for a special fast-track process to be
5 developed for expatriate workers and those residing in the
6 Territory for a period of 20 years or more without gaining
7 status to be able to do so. These persons had the opportunity
8 to apply for Residence and Belonger Status, or Belonger Status
9 only depending on their pre-existing qualifiers.

10 The clear path to regularization, residency and
11 Belonger Status programme, is a special project initiated and
12 driven by the Premier, does not require a deliberation of the
13 Board of Immigration for applications received but is approved
14 by Cabinet's discretion as stated within the Act. The process
15 specifically requires applicants to submit their application and
16 make payment up front, complete a written exam, and submit all
17 of the same documentation that persons would have originally
18 submitted through the normal process at the Immigration
19 Department.

20 It then lists--

21 A. Mm-hmm.

22 Q. --a number of documents and refers to, as you've
23 mentioned, the profile of an applicant that comes to Cabinet.

24 A. Um-hmm.

25 Q. And on the third paragraph (reading): "Under this

1 expedited process, a timeline of three weeks was allotted to
2 allow persons to submit the required forms and documents.
3 Applicants were required to pay upon submission of all
4 applications a fee of \$810".

5 Now, I think this came in on the 3rd of June 2016, the
6 second Act--and I can take you to it if you need to see it--the
7 second Act--

8 A. In September.

9 (Overlapping speakers.)

10 Q. --in the same time period. So, in fact, the period
11 was 1st of--I think 3rd of June 2019 to 1st of February 2020 and
12 you then dealt with it in that process. And when we talk about
13 the fast-track, I think we need to separate the legislative
14 change from the procedural change--

15 A. Um-hmm.

16 Q. --because the effect of, in terms of procedure, was
17 firstly that the Immigration Board was not involved. That's
18 right, isn't it?

19 A. That is correct.

20 Q. And so, it was the job of the Immigration Department
21 to collect the material and submit it to the Cabinet. That's
22 Mr Penn's evidence.

23 A. But we had brought in extra workers as one Immigration
24 Department. We brought in some retired Immigration Officers and
25 personally trained to work along with the Immigration Officers

1 to replace the work of the Board, so to speak.

2 Q. Yes. But--

3 COMMISSIONER HICKINBOTTOM: And I'm sorry to
4 interrupt, but that's not quite the evidence we've heard,
5 Minister. More people were brought in--

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: --to do the job of the
8 Immigration Department, that is collect the information. That
9 didn't replace the job of the Board. The Board had a
10 completely--

11 THE WITNESS: Legislation, no.

12 COMMISSIONER HICKINBOTTOM: The Board had a job to
13 look at these, analyze and make recommendations s. That's
14 not--the evidence is that that's not what the--

15 (Overlapping speakers.)

16 THE WITNESS: No, the Board department. No, the Board
17 had a stake in this one here. This actually applied in this
18 case because we didn't amend that part.

19 COMMISSIONER HICKINBOTTOM: No. So, the Immigration
20 Department did somewhat quicker because they had more people.

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: But they did their usual
23 job, as it were, but then sent everything to Cabinet rather than
24 the Board.

25 THE WITNESS: That is correct.

1 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.

2 BY MR RAWAT:

3 Q. So, it was down to Cabinet to do the business, so to
4 speak, and on the procedural side, and this was from
5 Mr Smith-Abbott, what the process created was that if you
6 already had Belongership Status--

7 A. Residence.

8 Q. --if you already had Residence Status, you could apply
9 for Belongership.

10 A. That's correct.

11 Q. Pay your money up front and go through the fast-track
12 process. But if you had not yet achieved Residence Status, you
13 could do a combined application. And so--

14 A. Because in our process, you first get residency and 12
15 months after--

16 Q. And what was removed was the 12-month requirement--

17 A. That is correct.

18 Q. --between Residence and Belongership.

19 A. That is correct.

20 Q. Now, we've seen the figures. You--there was obviously
21 an increase in applications that were considered and grants of
22 Belongership, but can you deal with this, please? You've
23 spoken--the effect of the fast-track was that if you had someone
24 who was sitting at home and they were a resident, they could
25 make an application for Belongership. If you had someone who

1 was sitting at home and they were neither resident nor Belonger,
2 they could make a combined application; that's right?

3 A. That is correct.

4 Q. All they needed was \$810?

5 A. That is correct.

6 Q. Provided they fulfilled all the other requirements.

7 A. Um-hmm.

8 Q. But how did that clear the backlog because the backlog
9 was already there? So the applicants were already there.

10 A. They--

11 Q. --how did creating a new basis for people to come and
12 make applications, fresh applications, help with the backlog?

13 A. The persons saw the persons who got Belong were
14 already in the system. The extra help. Some were new
15 applicants, but some were already there in the system. We
16 simply speed it up.

17 COMMISSIONER HICKINBOTTOM: So, is this true, that
18 most of the people who were in the backlog made an application
19 under the fast-track system?

20 THE WITNESS: I can't verify that.

21 COMMISSIONER HICKINBOTTOM: No, no, okay.

22 THE WITNESS: I can't verify that.

23 COMMISSIONER HICKINBOTTOM: But at least anyway--

24 THE WITNESS: It may seem so.

25 COMMISSIONER HICKINBOTTOM: --some of them.

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: So some of the backlog
3 made an application of the fast-track.

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: And that sort of got rid
6 of--

7 THE WITNESS: Significant persons.

8 COMMISSIONER HICKINBOTTOM: Significant numbers.

9 Thank you.

10 BY MR RAWAT:

11 Q. If you turn, please, Honourable Wheatley, to page 1--

12 A. What's--if I may.

13 Q. Of course.

14 A. Because I notice there's a concern here about who
15 these persons were, that the Board wasn't involved. These
16 persons who would enter the fast-track were persons who may have
17 been married to persons already and had significant presence in
18 the Territory. They were not strangers.

19 COMMISSIONER HICKINBOTTOM: I think the evidence is
20 that those who applied under marriage were suspended for the
21 period of the fast-track, I think.

22 THE WITNESS: I can't be sure. I know there is only
23 one system at a time.

24 BY MR RAWAT:

25 Q. Well, I think marriage was--marriage remained

1 unchanged.

2 A. I think marriage remained unchanged, yeah. I don't
3 think it was changed.

4 Q. Before we--I'll take you to the Act in a moment, but I
5 mean, your point perhaps illustrates that the purpose of the
6 regularisation, the clear path to Regularisation Act, it wasn't
7 called "the fast-track", but the--what you were intending to do
8 was to facilitate Belongership applications for as that Policy
9 Paper that we looked at for expatriate workers and those who
10 were residing in for a period of 20 years or more.

11 A. Um-hmm.

12 Q. I mean, would it be fair to say that the purpose of
13 the Policy wasn't to allow someone who arrived three years ago
14 to make an application--

15 A. And I--I don't think--

16 Q. --because it was really intended to try and facilitate
17 those--

18 (Overlapping speakers.)

19 A. --(unclear) here for a significant time, yeah.

20 Q. And this takes us back, I think, to a point that I
21 canvassed with you before, that 20 years points to a period
22 during which you might have expected someone to have
23 assimilated.

24 A. That is correct.

25 Q. And so, again, that's a safeguard, isn't it? It's not

1 about a rush to granting Belongership. It's actually about
2 safeguarding--safeguarding Belongership while facilitating the
3 process. Would that be a fair way of putting it?

4 A. I think so.

5 COMMISSIONER HICKINBOTTOM: I mean, just to close this
6 point up because I don't think this matters in the context of
7 what we're talking about, but at 1575, which is a table of the
8 numbers of persons granted Belonger Status, and that says at the
9 bottom (reading): No applications by marriage were processed
10 during the fast-track initiative. That was the only point I was
11 making, Minister.

12 THE WITNESS: Okay.

13 COMMISSIONER HICKINBOTTOM: So, I think--and as you'll
14 see from the numbers--all of these people who were granted
15 Belonger Status during the fast-track period, there were about
16 1200, none due to marriage.

17 THE WITNESS: Okay, according to the table.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 BY MR RAWAT:

20 Q. Could I ask you to go back to 1348, please, Honourable
21 Wheatley. If I take you to paragraph 33.4. Do you have that?

22 A. I do.

23 Q. Thank you. Now, that is a helpful part of the
24 Affidavit because it sets out the changes that were brought in
25 by the 2019 Amendments, and so the two parts of the Act that

1 were changed was 16.4 and 16.5. And, 16.4--

2 A. Um-hmm.

3 Q. --provided that wherein the exceptional circumstances
4 of any case or for any other reason the Cabinet considers it fit
5 to do so, it may, in its own discretion, grant a certificate
6 referred to in subsection (1) to any person who applies for the
7 same in the prescribed manner and who (a) is of good character--

8 A. Good character, um-hmm.

9 Q. (b) at the date of making the application for such a
10 certificate ordinary resident in the Territory, and (c) has been
11 so ordinarily resident for the period of not less than seven
12 years immediately prior to his or her application.

13 A. Um-hmm.

14 Q. And then at five is (reading): "Where in the
15 exceptional circumstance in a case the Cabinet considers it fit
16 to do so, it may in its own discretion grant a certificate
17 referred to in subsection 120 any person who applies for same in
18 the prescribed manner and who in its opinion has made
19 significant and consistent contributions to the economic and
20 social development of the Territory, or has been ordinarily
21 resident in the Territory for a period of at least 20 years".

22 So, I think section 16(5) in its original incarnation
23 was what I've called "the Rockefeller provision".

24 A. Rockefeller, absolutely.

25 Q. Because it seems to be only Mr Rockefeller that ever

1 benefited from it.

2 A. I think so.

3 Q. And it's going back to it needing to be 50 years
4 anyway after February 2020. But that's the two changes.

5 So the--what your Amendments kept was ordinary
6 residences are still the same, you still have to--

7 A. Yeah.

8 Q. --there are only still limited grounds on which you
9 can be absent from the BVI.

10 Good character was still an important characteristic.
11 A need for a time period of not less than seven years in this
12 case.

13 A. Um-hmm.

14 Q. Now, the--again my questions are now, against that
15 background, firstly, what did you understand--we've looked at
16 the policy but what did you, yourself, as a Cabinet Member and
17 as Minister for Immigration understand was the purpose of these
18 two changes, these 16(4) and 16(5)?

19 A. Well, it took persons who were here over 7 or 10 years
20 to get regularised, using 20 as was the practice benchmark.

21 Q. So, the 20 years' benchmark was still an important
22 part of that.

23 A. It was. We promoted it. We had several town meetings
24 about it. Several numbers were thrown around as what is the
25 best number to use. Some said 15, some said 19, some said 25.

1 We settled on 20 after public consultation.

2 Q. I see. Can you help--

3 A. It caused a lot of heated debates.

4 Q. Can you help a little further, though, with that. So,
5 before promulgating the changes in the law, you had a number of
6 public meetings.

7 A. Oh, yes.

8 Q. And what--you were asking the public what should be
9 the Benchmark, and so it was clearly known to anyone who applied
10 under the fast-track that--

11 A. Not at the beginning. A time wasn't set.

12 Q. No. Well, I mean, your reference to 20 echoes the
13 Policy, doesn't it, because it talks of people who've been
14 resident for the 20 years or more. But was it--I mean, when you
15 set out on the fast-track, was the--the Benchmark was going to
16 be 20 years?

17 A. No.

18 When we set out with this fast-track, we had public
19 consultations. The first meeting was at the college, and we
20 went to, I think, every village in the BVI discussing this very
21 issue of what should the time be. The time ranged from 15 years
22 up to 25. After much consultation, we settled on 20. After
23 heated debates, we settled on 20. That came after the public
24 consultation, 20 was settled--it wasn't that we started out at
25 20.

1 Q. Right. Fair point. You ended at 20.

2 A. Ended at 20.

3 Q. But what--

4 A. For the sake of the fast-track.

5 Q. All right. But what does the 20 signify? How did the
6 20 operate in relation to these provisions?

7 A. That was why I said earlier, I think in the person's
8 mind, notwithstanding what the law says, by this time you would
9 have assimilated well into the BVI culture and to BVI life. In
10 person's mind, I think they figure because it was proposed one
11 time, why not make it ten years or 15 years? No, no, we're not
12 sure you've properly assimilated by that time.

13 Q. Was there any reason why, when you were amending, you
14 did not think of amending the period in 16(4) to not less than
15 20 years?

16 A. This came after consultation, 20 years came after the
17 consultation, if memory serves me right.

18 Q. I may have misunderstood you. I mean, what I assumed
19 is that before passing the law, you had consultation.

20 A. Yeah.

21 Q. Right.

22 So, you did appear in consultation. From the feedback
23 you had from consultation, you came to the view that actually
24 it's going to be 20 years as the Benchmark?

25 A. Right, by popular demand.

1 Q. Popular demand asked for 20 years.

2 And then you've got to take the Act--the Bill through
3 the House of Assembly. Why not--given the popular demand that
4 had been made of you, why not amend section 16(4) to say "not
5 less than 20 years"?

6 A. Oh, I see. I really can't say at this point in time
7 why that wasn't changed to 20.

8 Q. But--so, if I can try and summarise it, we've seen the
9 changes in the law that went through the House of Assembly and
10 were given--

11 A. 4(c)?

12 Q. 4(c), yes.

13 But what you're saying is, again going back to popular
14 demand, but the point you're making--

15 A. Fast-track.

16 Q. --the Benchmark for the fast-track was going to be 20
17 years, and no one could have been in doubt of that.

18 A. And ended up at 20. Now, when we started out, there
19 was no benchmark.

20 Q. Yep. It's my phrasing.

21 A. The public consultation we ended up at 20 years, and
22 the minutes of those consultations were short, with different
23 numbers that were proposed.

24 COMMISSIONER HICKINBOTTOM: I'm sorry, just to look at
25 the news of the changed subsection (4), it's actually at

1 page 1348.

2 THE WITNESS: Um-hmm, that's where we are.

3 COMMISSIONER HICKINBOTTOM: (4) is "where exceptional
4 circumstances in any case or any other reason", that means
5 whether the circumstances are exceptional or not, so it's
6 otiose, "the Cabinet considers it fit to do so, it may, in its
7 own discretion, grant certificate referred to in subsection or
8 to any person who applies", so they have to make an application,
9 "is of good character, is as of the date of making the
10 application for such a certificate ordinarily resident in the
11 Territory, and it has been so ordinarily resident for a period
12 of not less than seven years immediately before--immediately
13 prior to the application".

14 THE WITNESS: If memory serves me right, 20 is more
15 than 7, so say not less than 7.

16 COMMISSIONER HICKINBOTTOM: No, no. Just leave 20 to
17 one side for a minute.

18 THE WITNESS: Oh, sorry.

19 COMMISSIONER HICKINBOTTOM: So, subsection (4) is
20 seven years--

21 THE WITNESS: Not less--not less than seven years.

22 COMMISSIONER HICKINBOTTOM: Not less than seven years.
23 So, that is, as it were, seems to me to be the main provision
24 that was changed. But a change is also made to subsection (5),
25 which has only ever been used once for the Rockefeller

1 provision, and that was--well, there had to be exceptional
2 circumstances, and the Cabinet again is giving its discretion to
3 grant a certificate on the basis of an application where an
4 individual has made significant and consistent contributions to
5 the Territory or has ordinarily--been ordinarily resident in the
6 Territory for a period not at least 20 years.

7 But I assume that most applications would have been
8 dealt with under the new subsection (4).

9 THE WITNESS: Well, there are two separate categories
10 of persons: One is economic and one is tenure. One is tenure
11 only. One's economic and tenure, then it's (5).

12 COMMISSIONER HICKINBOTTOM: (4) is tenure.

13 THE WITNESS: (4) is clearly tenure, yeah.

14 COMMISSIONER HICKINBOTTOM: Clearly tenure.

15 THE WITNESS: Yeah.

16 COMMISSIONER HICKINBOTTOM: (5) used to be--

17 THE WITNESS: 50.

18 COMMISSIONER HICKINBOTTOM: --and is now again
19 significant consistent contributions to the economic and social
20 development of the Territory. But then it says "or has
21 ordinarily been resident in the Territory for at least 20
22 years", so that's both.

23 THE WITNESS: Yeah.

24 COMMISSIONER HICKINBOTTOM: Sorry, either/or.

25 THE WITNESS: Either.

1 COMMISSIONER HICKINBOTTOM: So it's economic or 20
2 years residence?

3 THE WITNESS: In (5). (4) is strictly tenure.

4 COMMISSIONER HICKINBOTTOM: But strictly tenure, but
5 it has good character, and you have to be ordinarily in
6 residence at the time of the application as well? Most
7 applications would have been dealt with under (4) because 7 is
8 less than 20.

9 THE WITNESS: Yeah.

10 COMMISSIONER HICKINBOTTOM: That's--most of the
11 applications based on tenure would have been dealt with under
12 (4)?

13 THE WITNESS: That's correct.

14 COMMISSIONER HICKINBOTTOM: It's me being slow, I'm
15 sure. I just wanted to make sure I understood that question.

16 BY MR RAWAT:

17 Q. Yes.

18 Could I ask you, Honourable Wheatley, to just look up
19 the second--the first bundle. I'm just going to take you to
20 some Cabinet Memos. As we understand the process, Cabinet was
21 served with batches of applications--

22 A. Yes.

23 Q. --under cover the Cabinet Paper.

24 A. Yeah. As they process, they're batched and sent to
25 Cabinet.

1 Q. I ask you as we look at these to lease just don't
2 mention anybody's name, and I will try to remember to do the
3 same, but it's a relatively small point. If I take you to 724
4 in the bundle, please.

5 It's 5th of December 2019 memorandum from your
6 Ministry dealing with batch no. 6, and it's memorandum 443 of
7 2019, and it sets out--and we see the purpose at (5) is to allow
8 for persons who have resided within the Territory for a period
9 exceeding 20 years to be granted Residence and Belonger Status.
10 And then you look under "Legal Implications", this is the point
11 I wanted to take you to, what the Attorney General's Chambers'
12 input into the paper is that the size of the number of
13 applicants, and it said in this case it's 67, and the short
14 notice of comments for Cabinet Paper "does not provide me with
15 the requisite opportunity to determine whether or not the
16 applicants have qualified for the grant of Residence or Belonger
17 Status, and that there are no disqualifying factors such as
18 criminal convictions, frauds, et cetera, whether in or outside
19 the Virgin Islands, which is a relevant consideration in these
20 matters. I proceed on the assumption that the Ministry has
21 conducted the application during the fact qualified under
22 Immigration and Passport Act for the status that they have
23 applied for. In any event, a certificate granted is subject to
24 revocation for fraud, false representation, or concealment of
25 material fact or imprisonment amongst other considerations".

1 If you then turn to 735, we see a different paper, but
2 it's batch no. 7. It's dated on the same day, but it's memo 444
3 of 2019. And again if you turn through to 737, please,
4 Honourable Wheatley, you will see that the Attorney General's
5 Chambers have made the same comments under "Legal Implications"
6 but this time referring to the size of applicants as 48, so the
7 two batches go in on the same day, it's over a hundred
8 applications.

9 A. Um-hmm.

10 Q. And the Attorney General is raising concerns that
11 there's insufficient time to consider them.

12 Were those concerns of which you were aware?

13 A. I'm sure it would have been discussed in Cabinet, and
14 if maybe concern or answers--or concerns were answered for the
15 AG whatever it was at the time. I don't recall discussions, but
16 I would imagine that there were discussions--concerns of this
17 magnitude that people might have gone forward to resolve, and
18 I'm not assuming that they were resolved the concerns.

19 COMMISSIONER HICKINBOTTOM: The Attorney's concern was
20 that you haven't had enough time to go through all the
21 applications to make sure that the preconditions had been
22 satisfied, and that--well, the preconditions had been satisfied.

23 But given that there was no Board to look at these and
24 make recommendations, who did that exercise? The Attorney
25 didn't, we know he says he didn't. Who did that exercise?

1 THE WITNESS: It would be the Immigration Officer and
2 his team would have done that at Immigration.

3 COMMISSIONER HICKINBOTTOM: No, they gathered together
4 the information, so they gathered whatever convictions somebody
5 might have had.

6 THE WITNESS: Yeah, uh-huh.

7 COMMISSIONER HICKINBOTTOM: But who made the
8 decision--who assessed whether an individual, one of those
9 individuals, was of good character?

10 THE WITNESS: Oh, okay, I understand your question.

11 COMMISSIONER HICKINBOTTOM: The information is there.

12 THE WITNESS: Yeah, yeah, it's clear that it went to
13 Cabinet at that point in time to look at all of the names being
14 brought forward.

15 COMMISSIONER HICKINBOTTOM: So, I mean, the Board
16 would have looked at--

17 THE WITNESS: Right, if the Board--

18 COMMISSIONER HICKINBOTTOM: The Cabinet did that
19 assessment?

20 THE WITNESS: We would have had to.

21 COMMISSIONER HICKINBOTTOM: Yes.

22 THE WITNESS: To go through each of the names here.

23 COMMISSIONER HICKINBOTTOM: Yes.

24 THE WITNESS: So this concern must have been
25 addressed. I would assume it was addressed.

1 COMMISSIONER HICKINBOTTOM: Yes, thank you.

2 BY MR RAWAT:

3 Q. Could I just ask you to, they should be on the table
4 in front of you, Cabinet Minute No. 32 of 2019.

5 A. Um-hmm.

6 Q. That's a minute from the 22nd of November 2019.
7 Again, please don't mention any names, but if you go through,
8 Honourable Wheatley, to the--it's four pages in, so it's at
9 page 8, if you like. The pages are not numbered, unfortunately,
10 but go to the fourth page, and then the back of the fourth page.

11 A. The table?

12 Q. Next page after that.

13 A. Okay. Operations.

14 Q. So, you should go to reach a point where it says
15 "Decision Sought number 20" at the top. Do you have that? And
16 if you look further there, you should get to a point where there
17 is a list beginning number 43 at the top.

18 A. Okay. I'm not sure we are on the same page.

19 Q. If you start from the beginning.

20 A. I'm sorry, I see it now, yes.

21 Q. Have you got it?

22 A. Yes, I do.

23 Q. So, there is a long list of names which starts at
24 number 43 and then end at 100; is that right?

25 A. No, I'm not seeing that list 43 to 100. I'm not

1 seeing a list.

2 Q. Shall we start together. I think it's quicker if we
3 just start together with the first page.

4 A. This is 20, top of the page? Number 403?

5 Q. Right.

6 If you turn over, and you get to memo 404 of 2019.

7 A. Okay.

8 Q. You've got that.

9 Turn over again, and you will get to the bottom of
10 memo 485 of 2019. Do you have that?

11 A. I have it now.

12 Q. Right.

13 So, this is memo 405 of 2019 which you presented, and
14 it is headed "Applications for Certificates of Residence and
15 Belonger Status, Immigration Regularization, Batch No. 4".

16 Now, again, I'm not going to mention names, but if I
17 just read out the deliberation: "The Minister for Natural
18 Resources, Labour and Immigration presented this paper. The
19 Attorney General raised the issue of the applicant", and then
20 the name of the person is given, who was currently imprisoned in
21 the US and serving a ten-year sentence for rape. The Premier
22 responded, the applicant's parents had made representation and
23 informed him that the U.S. Court had indicated that they would
24 allow the applicant to serve out his sentence in the Territory.
25 The Premier made it clear that he was not condoning the crime

1 but that the BVI was the only place that the applicant knew.
2 The Attorney General said that the Cabinet has discretion but as
3 the Attorney General has he brought this matter to the Cabinet's
4 attention this is the status of the imprisoned applicant. The
5 Premier mentioned there was another case involving"--and this is
6 another name is given--"who would be applying for a similar
7 consideration. That person was not born in the Territory but
8 had lived here for over 30 years. The Chairman said, while we
9 want to be sympathetic to these persons, what was the plan for
10 further rehabilitation for them? The Chairman stated that the
11 BVI should not be a dumping ground for persons who did not
12 behave in a good manner while overseas or considered a place
13 that was a home for non-law-abiding citizens. The Premier and
14 his Ministers conferred on the matter and agreed that the
15 applicant be deferred". And Cabinet then decided on the 99
16 other applications but deferred that one application for three
17 weeks.

18 Now, I should make clear that the Chairman at that
19 point was the acting Governor, Mrs Rosalie Adams.

20 So, going back to 438, what you have is a
21 convicted rapist serving a sentence in the US applying for
22 Belongership under, it seems, the fast-track programme, and
23 then you have another person who is also--certainly it
24 appears we could presume in prison for a serious
25 offense--applying under the same basis.

1 What was the basis upon which Cabinet was
2 considering giving two serious criminals--one we know is a
3 rapist--Belonger Status?

4 A. The other one who consider here are persons who
5 are known to us personally or whose families we know
6 personally. In this case, the persons I went to school
7 with. Things happen in life, and I went to school with
8 him.

9 Q. Sorry, your voice dropped a little bit.

10 A. I'm sorry.

11 Q. So just speak up.

12 A. These are persons being strangers to us, the one
13 person here. This is sympathy, somebody I went to school
14 with who I guess was caught up in a situation.

15 Q. Pause there. There were two people mentioned
16 here.

17 A. Yes. One of them--one of them I had known all my
18 life. I went to school--

19 Q. Is that the other person?

20 A. Yes.

21 Q. Not the person serving the sentence--

22 A. No, the person serving sentence.

23 Q. The person serving the sentence?

24 A. The other one.

25 Q. Let's call them Criminal 1 and Criminal 2.

1 A. So, Criminal 2. Criminal 2 is someone I went to
2 school with who I know personally, and to have--we thought
3 it was the humane thing to do in this case, and just--there
4 are things you do against their better judgment, so to
5 speak, but the humanitarian aspect says this probably the
6 right thing to do. It might not be but it's the right
7 thing to do.

8 The other one, I know his parents very
9 well--these are upstanding persons--we were just trying to
10 be sympathetic to their cause to have their son here with
11 them. So that's what that was.

12 COMMISSIONER HICKINBOTTOM: Did you make an
13 assessment that these two individuals were of good
14 character? That's a precondition.

15 THE WITNESS: These are persons that lived here
16 for a period of time.

17 COMMISSIONER HICKINBOTTOM: No--

18 THE WITNESS: They are good people who have been
19 caught for some reasons in a situation.

20 COMMISSIONER HICKINBOTTOM: So, you made an
21 assessment these two people were of good character?

22 THE WITNESS: Yes, notwithstanding the situation
23 they were in. Things happened to persons. Sympathy call
24 more than anything else just to bring some relief to
25 families.

1 BY MR RAWAT:

2 Q. Did you ultimately, as Cabinet, grant these two
3 individuals Belonger Status?

4 A. I really can't recall. I really can't recall.
5 There were several hundred persons. I can't recall. It
6 might have been done in the end. I really can't recall.

7 Q. I appreciate that as part of the fast-track that
8 you were dealing with several hundred persons, but not many
9 of them are rapists serving a sentence--

10 A. These are anomalies, yes.

11 I remember the cases very well.

12 Q. Given that you remember the cases, Honourable
13 Wheatley, did the Cabinet grant Belonger Status to them?

14 A. I have to go back to the record because as it was
15 before, we didn't make a decision here. I don't know if
16 that happened subsequently. That I can't recall. It
17 didn't happen here. They were removed, the paper said.

18 Q. The person serving the ten-year sentence for rape
19 was deferred for three weeks. That's the reason I asked
20 the question.

21 A. The question is what happened after the three
22 weeks? I'm saying I don't recall what happened after three
23 weeks.

24 Q. I see.

25 A. So maybe it just brought back after three weeks

1 and granted, and maybe it came back and was just thrown
2 out. I really can't remember. The record would have to
3 show what happened after three weeks.

4 Q. But the questions that arise relate to the
5 process.

6 A. Um-hmm.

7 Q. I will come back to--and it relates to the
8 process in two ways. If you turn up, please, page 1348.

9 A. This here?

10 Q. Bundle 2. We were back to bundle 2.

11 A. What's the number?

12 Q. 1348, please, Honourable Wheatley.

13 A. I understand the point of the character--it's not
14 lost on me here--but there are more ways to be considered
15 in those technical cases. The Attorney did make--138?

16 Q. 1348.

17 If we take it in stages, please, Honourable
18 Wheatley.

19 (Pause.)

20 Q. I think you're in bundle 1.

21 A. I see 1348.

22 Q. Thank you.

23 Just so that you have it in front of you, I'm
24 taking you back to the changes in the law that were made,
25 and so those are where you have an application for

1 Belongership under the fast-track scheme, the
2 regularization scheme. There were two ways in which people
3 can get Belongership Status, and you have spoken of
4 Belongership as a sacred thing.

5 Now, what appears from the minute is that
6 Cabinet--and what appears, in fact, from your very candid
7 evidence today--is that the Attorney General and the
8 Chairman of Cabinet raised concerns; but Cabinet, although
9 they deferred it, considered that these were viable
10 applications, and the question is--I mean, if you just take
11 the example we have to take--you have a man who is serving
12 a ten-year sentence for an offense of violence. Under
13 16(4) or under 16(5), what is the basis on which Cabinet
14 can reasonably reach a conclusion that a rapist should have
15 the sacred gift of Belongership?

16 A. His family's here in the BVI. It was more a
17 humanitarian gesture in this case. If I'm not mistaken, I
18 think the person was supposed to serve the jail time here,
19 so it's not we are getting him out of jail, relieving them
20 out of jail; they would serve jail time in the BVI.

21 COMMISSIONER HICKINBOTTOM: When you say that
22 this was on humanitarian grounds or whatever--

23 THE WITNESS: So to speak.

24 COMMISSIONER HICKINBOTTOM: --when the Cabinet--
25 because the Board weren't involved in these cases, when the

1 Cabinet came to assess the applications which, as you said,
2 they had to do because nobody else was going to do it, did
3 they have any guidelines, first of all written guidelines,
4 for considering the applications?

5 THE WITNESS: I don't recall the written
6 guidelines, no.

7 COMMISSIONER HICKINBOTTOM: Did they have any--

8 THE WITNESS: The process you need to submit to
9 be considered is prescriptive. You need to put--for this
10 record, you need a birth certificate.

11 COMMISSIONER HICKINBOTTOM: But things like good
12 character require a judgment because somebody may have--

13 THE WITNESS: And I understand that.

14 COMMISSIONER HICKINBOTTOM: Somebody might have a
15 parking ticket or have a conviction a long time ago for
16 shoplifting.

17 THE WITNESS: Commissioner, I would say this case
18 is an anomaly. It's probably a one-in-a-million chance of
19 this happening.

20 COMMISSIONER HICKINBOTTOM: We'll come back to
21 this case, no doubt, but in terms of the process which I'm
22 most interested in, there were no written guidance--there
23 was no written guidance as to how you approached, say, good
24 character which requires an assessment. Nobody else
25 considered it, so Cabinet, as you accept, had to consider

1 it. So, if there were no guidelines, how did you approach,
2 just generally? Forget about these two cases.

3 THE WITNESS: Again, knowing the persons
4 involved, personal knowledge or the application whether it
5 is a record or not.

6 COMMISSIONER HICKINBOTTOM: So you--

7 THE WITNESS: Again, I'm saying I don't recall
8 that this person ever was granted Belonger Status. It was
9 deferred. During the period of deferment, I'm not sure
10 what happened in there, if something was done in there.
11 I'm not sure what happened. I really don't recall.

12 COMMISSIONER HICKINBOTTOM: But looking at the
13 process--

14 THE WITNESS: Yeah.

15 COMMISSIONER HICKINBOTTOM: And as I said, just
16 putting these two individuals aside for a moment, who went
17 through the papers and said--and came to an assessment that
18 this person was of good character?

19 THE WITNESS: All of us.

20 And the AG flagged that one. In the
21 circumstances here were one of just character, but the AG
22 flatly--we went through all of them. All of us went
23 through all of them.

24 BY MR RAWAT:

25 Q. The--

1 A. And different persons would have different
2 concerns.

3 Q. But if you look at 16(4)--

4 A. Um-hmm.

5 Q. --the two things that a person has to show you
6 is, firstly, not just good character, they have to be
7 ordinarily resident, and the Act does not allow time in
8 prison as an excuse for time not running against you. If
9 you are on Government service or if you're serving in the
10 armed forces--

11 A. I understand.

12 Q. --it doesn't count against you. If you're in
13 prison, it does.

14 Now, you have two serious criminals serving
15 prison time outside the jurisdiction, and what again--
16 taking it back to the Commissioner's point about process,
17 how did you assess the notion of "ordinarily resident"?

18 A. I can't say I know how long they were in prison,
19 saying there was ten years or whatever. It doesn't say
20 they were in prison for any period of time. That I don't
21 know.

22 Q. Well, you--

23 A. They were sentenced to ten years. They didn't
24 say they were in prison already.

25 Q. Well, did you ask those kind of questions of

1 yourselves?

2 A. The paper was there for a reason, so
3 investigations could be done to answer those kinds of
4 questions.

5 Q. Because the--

6 A. But I can't recall--this is a long time ago. A
7 lot has happened.

8 Q. But the other thing for us to take into account
9 is 16(5), and 16(5) says that someone has been ordinarily
10 resident in the Territory for a period of at least 20
11 years.

12 A. Um-hmm.

13 Q. Now, the point there is that it brings again that
14 ordinarily--the phrase "ordinarily resident" is important.
15 And did you not have at the time any guidance or any
16 guidelines that you decided amongst yourselves as I
17 Cabinet--you're the decision-makers--to say this is how we
18 will approach the concept of "ordinarily resident"?

19 A. As a formal prescriptive written down, the answer
20 is "no".

21 Everyone would have a general notion of what good
22 character is, not involved in nefarious activity of X, Y,
23 and Z.

24 Q. I think, with respect, it's very difficult to
25 understand how any rational Cabinet can come to a

1 conclusion that someone serving--that is, they have been
2 convicted--serving a ten-year sentence for rape qualifies
3 as an individual of good character.

4 A. Like I said, other considerations were given in
5 is this particular case.

6 Q. Well, that takes me to the next question about
7 process because you say "other considerations" were taken
8 into account.

9 A. Family ties.

10 Q. Family ties. You personally knew the family. I
11 mean, in different ways you had contact with both
12 criminals.

13 A. One individual, yes.

14 Q. The Premier spoke to the parents directly.

15 Going back to the process that you instituted
16 under the fast-track, where in that scheme does it allow
17 for Cabinet to import into the process its subjective
18 assessments?

19 A. I think when we envisioned the fast-track, I
20 don't think anyone expected something--this to actually
21 show up, this kind of--it wasn't envisioned that a case
22 like that would honestly be sure. I think it surprised all
23 of us that we had the situation here. It's just an
24 anomaly. It was never foreseen. Most of the persons who
25 envisioned would be fast-track, of persons living here,

1 they have children here. They have families there. They
2 have strong ties here. This was never envisioned. I can
3 honestly say I never envisioned this. It was sprung upon
4 us, and we had to make a decision. It was not an easy
5 decision to make for the reasons you have clearly pointed
6 out.

7 Q. Within the Programme, was there a promulgated
8 policy? Did people know that they could make
9 representations to the Premier?

10 A. I don't see why they would do that. They would
11 submit the application to Immigration. We were not
12 involved in that.

13 Q. But if you look at 37--
14 (Overlapping speakers.)

15 A. I say the gentlemen was not in the BVI at the
16 time, so the parents who are here would have gone to the
17 Premier to make representations on his behalf. The parents
18 lived here would have gone to the Premier, but you can
19 consider this from your heart. I think that's what
20 happened. That's an anomaly. We could look back in
21 hindsight and say maybe we should have done X, Y, and Z.
22 This is what happened, one individual--somebody I went to
23 school, somebody I grew up with.

24 Q. Don't you think that could affect your
25 perspective in the wrong way? If this is someone that you

1 went to school with, how do you balance that against the
2 obligation on you as a Member of Cabinet to public safety?

3 A. Yeah, again, it's an anomaly. No one saw it
4 coming going forward. We were very mindful of going
5 forward, that these things do exist. I had never seen it
6 before, nor even heard it before in this particular
7 situation here.

8 Q. If you look--and this is more specific, but if
9 you--I mean, at the time what we have is one application in
10 front of Cabinet which is the application from the rapist
11 in the US, you have the other one which is pending so it's
12 not something that the Cabinet has to consider, and you
13 defer the first application.

14 Now, in deferring it, what the Chairman raises--
15 and it's that the BVI should not be a dumping ground, and
16 the BVI should not be considered a home for non-law-abiding
17 citizens. Did you ask--and you mentioned that the
18 individual may be coming back to serve a sentence in the
19 BVI. Did you ask for a risk assessment?

20 A. I personally didn't. I don't recall asking for
21 that.

22 Q. Well, do you know if anybody else did?

23 A. I don't remember.

24 Q. Do you not think that that would have been a
25 sensible step for Cabinet to take?

1 A. What I'm saying the individual's done, maybe
2 that's why it was deferred, to get further information
3 about that situation.

4 And I can't say at this point in time if, in the
5 end, it was granted. I don't know if it was actually
6 granted, in the end. I do not know.

7 Q. But you've explained that you had hundreds of
8 applications.

9 A. Yes.

10 Q. You described it as an anomaly, which leads to
11 the conclusion that there weren't many applications being
12 made by serious criminals; is that right?

13 A. Only two I know of. Two I know of.

14 Q. That you know of.

15 Given that it's only two, how is it that you
16 cannot remember--

17 A. It was granted--

18 Q. --whether you granted a Belonger Status or not?

19 A. You keep using the word "the rapist". And I have
20 to see the person as a human being who probably made a
21 mistake.

22 Q. Rape is an act of violence, isn't it?

23 A. I agree, but still at the same time we have to
24 show our human side, and very specific situation, said the
25 parents, I guess in their devastation, went to the Premier

1 and asked for mercy to assist them to at least--and again,
2 I don't recall in the end he actually got his status. I
3 really don't recall. Honestly, I'm not--I don't recall.
4 Maybe he did. Maybe after three weeks of the formal
5 investigation was carried out and it was decided maybe it's
6 not a good thing to do. I'm not sure what happened. I do
7 not know. I can't remember.

8 Q. That's a fair point, but it's just going back to
9 the process and just where you have people who have--who
10 are--firstly, cannot be said to be of good character; and
11 secondly, cannot be said to be ordinarily resident if
12 they're serving a prison sentence elsewhere.

13 A. I don't know how long he's out of the country. I
14 don't know that.

15 Q. But the point is just take you back to the
16 process. If you can help the Commissioner with this, how
17 did Cabinet approach those questions when considering how
18 it applied its discretion under the law?

19 A. I guess somebody who had to go through these
20 things, each Member who would go through, I would know
21 some, somebody would know some. And if anything is
22 flagged, person seeing something or knowing something is
23 flagged. Or from the documents submitted, I think this was
24 part of our attention, when the document came in and said
25 this person is charged. That's how we would have known, AG

1 would have known, and brought it and said, "Look, say, I'm
2 concerned about this here. I'm concerned about this." We
3 look at each person being a concern. The other concerns is
4 the person brought to the other Ministers, too.

5 Q. But just taking you back to the law.

6 A. I get that there.

7 Q. Forget about the two individuals, but it's just
8 where you have someone who has committed a serious crime,
9 not speeding or something like that. But take you back to
10 the law as you were applying it in 2019, what was the basis
11 on which Cabinet considered you could grant that kind of
12 status?

13 A. I can't say I know what the conversation was
14 between the parents and the Premier, but it must have been
15 based on that discussion, whatever that discussion was.

16 COMMISSIONER HICKINBOTTOM: But did you and the
17 Cabinet consider the conditions that still applied under
18 subsection (4)?

19 THE WITNESS: Oh, absolutely.

20 COMMISSIONER HICKINBOTTOM: Well, in terms of
21 condition (c), ordinarily residence for the period not less
22 than seven years immediately prior to the application--this
23 was a fast-track application.

24 THE WITNESS: Yeah, but I'm saying I don't know
25 how long the person was out of Territory. It doesn't say

1 how long he was out of the Territory.

2 COMMISSIONER HICKINBOTTOM: But this was a
3 fast-track application, so it couldn't have been made until
4 the 3rd of June 2019, so I just don't understand how this
5 individual could have been ordinarily resident for not less
6 than seven years immediately prior to the application.

7 THE WITNESS: I don't know the circumstances of
8 the gentlemen out of the country; that I don't know. Maybe
9 through the deferral period, maybe that was investigated in
10 further details, and what was reported back at that point
11 we made a decision to either grant or not grant, but I
12 can't say it was done.

13 BY MR RAWAT:

14 Q. Part of the process--and we saw that in the
15 Policy Paper--was that if you were applying under the
16 fast-track programme, you would have to sit a written exam.

17 A. Um-hmm.

18 Q. And Mr Penn's evidence was that applicants would
19 actually have to come into the Immigration Department and
20 sit for that exam. I mean, you've got a situation--if
21 someone is outside the jurisdiction and not in the BVI, how
22 was it--was there a system whereby, if you were outside,
23 you could still sit that written exam?

24 A. I don't know the specific case. Again--

25 Q. I'm not asking specific--

1 A. I think the answer to that would be "no", we want
2 you to be here in person to do it.

3 Q. I see.

4 A. This is strictly an anomaly, very strange and an
5 anomaly, that this young man found himself in the situation
6 where the parents just came to the Premier to make
7 representation, "Is there anything you can do to help my
8 son at least spend his days in prison here?"

9 COMMISSIONER HICKINBOTTOM: You may not know the
10 answer to this, so don't answer it if you don't know the
11 answer, but does that mean that these two applications, but
12 certainly the application of Criminal 1 was considered
13 outside the provisions of subsection (4) and
14 subsection (5)?

15 THE WITNESS: I would almost--I can't say for
16 sure, but on the face of it, it would seem so; more from a
17 humanitarian gesture to the family than the prescriptive
18 law. I don't recall.

19 BY MR RAWAT:

20 Q. Again, moving it away from these individuals and
21 these circumstances, but--and you may not be able to answer
22 this, but I take you back to the fact you were on the
23 Committee in 2004, but if you have Belongership, you can
24 sit--you can, as you say, own property, you buy property,
25 you're free from Immigration control.

1 A. And you can vote.

2 Q. And you can vote.

3 Can you still vote if you're serving a prison
4 sentence?

5 A. I think they made an amendment in 2015 that
6 prisoners can vote for the first time--I think so--but
7 ordinarily prisoners aren't allowed to vote. There might
8 be have been an amendment. I would have to doublecheck
9 that, but I don't think prisoners are allowed to vote.

10 MR RAWAT: Commissioner, I think I have reached
11 the conclusion of my questions, and can I conclude firstly
12 by thanking Honourable Wheatley for coming this afternoon.
13 I know that we expected him at 2:00, and he expected to be
14 here at 2:00, and we started a little later than that, and
15 I thank him for his patience.

16 Can I also thank him for the way that he has
17 given his evidence once again to the Commission.

18 COMMISSIONER HICKINBOTTOM: Yes, can I echo that,
19 Minister. Thank you for your time, which is we know--I
20 know it's at least valuable, and thank you for the helpful
21 and frank way in which you have given your evidence. It's
22 much appreciated.

23 THE WITNESS: My pleasure.

24 (Witness steps down.)

25 MR RAWAT: We're not sitting tomorrow, but we

1 resume Thursday.

2 COMMISSIONER HICKINBOTTOM: Good. Thank you very
3 much.

4 (End at 5:22 p.m.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in cursive script, reading "David A. Kasdan", is written above a solid horizontal line.

DAVID A. KASDAN