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CAUSE NO: G2023-0257

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 23(2) OF THE IMMIGRATION (TRANSITION) ACT (2022 REVISION)

AND IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES (REVISED)

AND IN THE MATTER OF SCHEDULE 2 TO THE IMMIGRATION REGULATIONS (2019 REVISION)

AND IN THE MATTER OF THE DISMISSAL OF AN APPEAL AGAINST A DECISION OF THE CAYMANIAN STATUS AND PERMANENT RESIDENCY BOARD BY THE IMMIGRATION APPEALS TRIBUNAL

BETWEEN:

ELYSIA TARA MURRAY-FORBES

Appellant

-and-

IMMIGRATION APPEALS TRIBUNAL

Respondent

Appearances:	**Mr Dennis Brady of Brady Attorneys-At-Law for the Appellant**
	Ms Heather Walker of the Attorney General's Chambers for the Respondent
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**20 June 2024**
Judgment:	**18 July 2024**

Immigration—permanent residence—bar on Government employees re-applying within 9 years of refusal of prior application

Immigration—proper approach to valuation of local investment in property—whether value should include outstanding mortgage owed

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JUDGMENT

A. Introduction

1. Mrs Murray-Forbes is a teacher employed by the Ministry of Education. She has been resident in the Cayman Islands, and has worked here as a teacher, since 2008.

2. In 2017, Mrs Murray-Forbes applied for permanent residence. By a letter dated 19 February 2018, the Chief Immigration Officer informed her that her application had been refused on the basis that she had scored 100 points, but the requirement was 110 points.

3. Mrs Murray-Forbes commenced an appeal against that decision in April 2018, but she withdrew her appeal on 19 September 2018, before submitting any grounds of appeal. I was shown an email from her counsel at the time to the Department of Immigration confirming that she would not be appealing.

4. In December 2019, Mrs Murray-Forbes submitted a fresh application to the Caymanian Status and Permanent Residency Board (the Board) for permanent residence, dated 1 November 2019.

5. By letter dated 6 May 2021 sent to Mrs Murray-Forbes' attorneys, the Board informed her that her application had been refused because she had scored 85.57 points against the minimum requirement of 110 points and provided a breakdown of the points she had been awarded against each factor. The letter indicated that Mrs Murray-Forbes had 28 days to appeal to the Immigration Appeals Tribunal (IAT).

6. Mrs Murray-Forbes was not happy with this decision, particularly in light of her higher score in 2018. On 29 June 2021, she filed an appeal to the IAT, with supporting documents, and sought leave to appeal out of time on the basis that her agent had not informed her of the IAT's decision letter until 2 June 2019. The Chair of the IAT allowed Mrs Murray-Forbes's appeal to proceed out of time.

7. On 23 July 2021, Mrs Murray-Forbes was notified that she had 28 days to file detailed grounds of appeal. She did not comply. Eventually, Mrs Murray-Forbes submitted her grounds of appeal on 21 January 2022 and filed further supporting materials on 1 February 2022.

8. The IAT met on 28 April 2022 and decided that Mrs Murray-Forbes had established grounds of appeal in respect of three factors within the points system. The IAT deferred further consideration of Mrs Murray-Forbes' appeal to allow her to submit updated information.

9. On 17 June 2022, the IAT informed Mrs Murray-Forbes' attorneys of its decision and requested that she submit any further material on which she wished to rely within 28 days. The letter included a prominent warning that the IAT was considering reducing the points awarded to her in respect of her local investment as it considered that the Board had calculated those points incorrectly. The letter explained why the IAT had reached that conclusion.

10. Mrs Murray-Forbes did not respond.

11. The IAT wrote again on 25 January 2023, giving Mrs Murray-Forbes a further 14 days to submit any additional material on which she wished to rely.

12. Mrs Murray-Forbes' attorneys replied on 30 January 2023, providing some new documentation.

13. The IAT met on 9 February 2023 to consider Mrs Murray-Forbes' appeal. The appeal was heard *de novo*. The IAT considered that Mrs Murray-Forbes should be awarded a total of 108.32 points. This was, again, insufficient to meet the threshold required of 110 points. Mrs Murray-Forbes's appeal was therefore refused.

14. The IAT's decision was communicated to Mrs Murray-Forbes' attorneys by a letter dated 2 March 2023. This included a detailed breakdown of the points awarded to her in respect of each factor and sub-category within each factor, along with an explanation of the IAT's reasoning. Notwithstanding the warning in its letter of 17 June 2022, it is clear that the IAT did not reduce the points awarded to Mrs Murray-Forbes for local investment. In fact, the IAT increased her points in respect of this factor.

15. Notwithstanding that the appeal had already been determined and they had been informed of the outcome, on 10 March 2023, Mrs Murray-Forbes' attorneys submitted further documentation to the IAT concerning the community involvement of Mrs Murray-Forbes and her family.

16. On 13 March 2023, the IAT enquired whether Mrs Murray-Forbes' submission of the further documentation was intended to be a request to the IAT for reconsideration of her appeal.

17. Mrs Murray-Forbes did not reply.

18. On 17 May 2023 the IAT followed up for a response to its letter of 13 March 2023. On 2 June 2023, Mrs Murray-Forbes' attorney confirmed that Mrs Murray-Forbes did wish the IAT to reconsider its decision.

19. The IAT met on 5 October 2023. It considered Mrs Murray-Forbes' request for reconsideration of its decision made on 9 February 2023 and refused the request. The IAT noted that it had already allowed Mrs Murray-Forbes the maximum points permissible for community involvement and it could not award Mrs Murray-Forbes any further points for that factor, i.e. the additional documentation that Mrs Murray-Forbes had provided could not change the outcome. The IAT therefore upheld its decision recorded in its letter dated 2 March 2023.

20. The IAT's decision was communicated to Mrs Murray-Forbes' attorneys by a letter dated 20 November 2023. The letter recorded that Mrs Murray-Forbes's time for appeal to the Grand Court was 28 days, i.e. it expired on 18 December 2023.

21. Mrs Murray-Forbes commenced the current appeal proceedings by a notice of originating motion filed on 21 December 2023.

22. The matter came before me for final hearing on 20 June 2024. Mrs Murray-Forbes was represented by Mr Dennis Brady and the IAT was represented by Ms Heather Walker.

23. In advance of the hearing, Ms Walker identified a fundamental obstacle to Mrs Murray-Forbes' appeal. She candidly accepted before me that the point should have been identified at the outset, and that Mrs Murray-Forbes had not been well served by anyone involved in the process, whether her own attorneys or on the Respondent's side.

24. The point in question is that, having made her original application for permanent residence in 2017, Mrs Murray-Forbes had no right to make a second application when she did. As a Government employee, she was barred from doing so by section 37(4) of the Immigration (Transition) Act. This is in the following terms:

> *"(4)* ***Where an application under subsection (1) has been refused and the applicant has not appealed against such refusal or has appealed against such refusal and lost the appeal, the applicant is barred from re-applying*** *under the provisions of that subsection and shall leave the*

> *Islands upon the expiration of any period during which the applicant was allowed to work under section 66(4) unless the applicant is entitled to remain by virtue of any other provision of this Law; and* ***such debarment shall continue*** *—*
>
> *(a) in the case of a worker, until the worker re-qualifies under the criteria contained in this section having taken the break in stay required under section 66(1); or*
>
> *(b)* ***in the case of a Government employee, for a period of nine years following the date of the refusal of the Government employee's application or any subsequent appeal*** *in respect of that application."* (emphasis added)

25. Similar language was included in the Immigration Act before the Immigration (Transition) Act came into force and so this is not a new provision.

26. Ms Walker conceded that the effect of s.37(4) of the Immigration (Transition) Act should have been pointed out to Mrs Murray-Forbes by the Board when she submitted her second application for permanent residence. The Board should have rejected her application outright for that reason. Similarly, it should have been identified by the IAT and Mrs Murray-Forbes' appeal to the IAT should have been rejected. Finally, Ms Walker accepted that this issue should also have been identified by the Attorney General's Chambers earlier.

27. I agree with Ms Walker that this is a fundamental point that should have been identified much earlier, and that it is very unfortunate that it was not. Nevertheless, it is a point that the IAT not only can take, but in my judgment must take, since Ms Walker is right that it goes to the basic question of the court's jurisdiction to entertain Mrs Murray-Forbes' appeal at all. Ms Walker pointed out that both the Board and the IAT are creatures of statute and can only act within the limits of their statutory authority. They do not have jurisdiction to consider applications or appeals where the applicant does not have the right to apply in the first place, and they do not have power to grant permanent residence outside what is permitted by the Immigration (Transition) Act.

28. Ms Walker submits that, as a consequence, the Grand Court does not have jurisdiction to entertain Mrs Murray-Forbes' appeal either. The court cannot make an order to remit for reconsideration when the IAT has no statutory power to consider awarding permanent residence to Mrs Murray-Forbes, and the court cannot make its own determination to grant permanent residence to Mrs Murray-Forbes because it can only make a decision that is within the ambit of the IAT's powers.

29. Ms Walker notified Mr Brady of this issue on 10 April 2024, and of the Respondent's intention to raise it with the court, well in advance of the hearing. In addition, on 16 January 2024, the Respondent had invited Mrs Murray-Forbes to withdraw her appeal with no costs consequences.

30. In response to Ms Walker's contention that the appeal is barred, Mr Brady argued that the behaviour of the Board and the IAT in entertaining Mrs Murray-Forbes' application and appeal gave her a legitimate expectation that they would not rely on s.37(4) of the Immigration (Transition) Act against her.

31. However, I agree with Ms Walker's reply to this that it is well established that one cannot have a legitimate expectation that a body will act in a manner which is *ultra vires*.

32. In these circumstances, it seems to me that Mrs Murray-Forbes' appeal must be dismissed on the basis that the court lacks jurisdiction to hear it.

33. I will, nevertheless, deal briefly with the other arguments put forward on both sides, in case I am wrong in my primary view. The remainder of this judgment proceeds on the basis, contrary to my decision above, that the court does have jurisdiction to hear Mrs Murray-Forbes' appeal and that the Board and the IAT have power to grant Mrs Murray-Forbes permanent residence.

34. Ms Walker's second argument as to why Mrs Murray-Forbes' appeal should be dismissed is that it was commenced out of time. I have mentioned above that the IAT's decision was dated 20 November 2023. Under GCR O.55, rr.3 and 4, an appeal against a decision of the IAT must be commenced by an originating motion filed and served on the IAT's chairperson within 28 days after the date of the decision in question. Time for filing and serving Mrs Murray-Forbes's appeal therefore expired on 18 December 2023.

35. Mrs Murray-Forbes did not file her notice of motion until 21 December 2023. Moreover, she did not serve it on the IAT's chairperson. Instead, her attorneys purported to serve it on the Attorney General's Chambers on or around 27 December 2023.

36. The court clearly has power to extend time under GCR O.3, r.5 in a proper case: see *Smith v IAT* (unreported, 02/01/24). However, as the learned Chief Justice indicated in that case, the applicant must actually make an application under GCR O.3, r.5, i.e. by summons with supporting evidence, in order for the court to be able to consider whether to grant relief. Mrs Murray-Forbes has not done so in this case, despite the IAT having raised this issue in correspondence on 16 January 2024, at an early stage of the progress of the appeal.

37. Any application for an extension of time to appeal would have to deal with the reasons why the time limit was not complied with, the merits of the appeal and the prejudice to the applicant if the extension is not granted and to the respondent if it is. In the absence of evidence to support such an application, there is nothing on which to found any exercise of the court's discretion.

38. I do not know Mrs Murray-Forbes' explanation for failing to file her appeal in time and for failing to serve it on the correct person. If I did have to consider an application by Mrs Murray-Forbes for an extension of time, it is not a foregone conclusion that I would accept that there was an excuse for her breach of the rules. Whilst the delay is relatively short, it follows a lengthy pattern of repeated non-compliance with dates fixed by the Board or the IAT throughout the history of this matter. This would have to be addressed.

39. In any event (and putting to one side the jurisdiction issue), I would refuse any application for an extension of time for Mrs Murray-Forbes' appeal because, for the reasons that follow, I conclude there is no substantive merit in her appeal.

40. I therefore turn to the question of the arguments on the merits put forward by Mr Brady on Mrs Murray-Forbes' behalf in support of her appeal.

41. Mr Brady's submission was that the IAT's decision was irrational. He appeared to base this on the fact that the Chief Immigration Officer in 2018, the Board in 2021 and the IAT in 2022 had each awarded Mrs Murray-Forbes different numbers of points. Mr Brady did not appear to accept that this could be a function of each of them being provided with different information and making their own assessments of the appropriate points to be awarded to Mrs Murray-Forbes in accordance with the Regulations. Neither did Mr Brady appear to accept that the explanation could be that the Board had made an error in 2021 which was corrected by the IAT in 2022. By that time, Mrs Murray-Forbes' circumstances had changed, which would be the explanation for the increase in points from 100 in 2018 to 108.32.

42. Mr Brady's main point was that the IAT had failed to give Mrs Murray-Forbes sufficient points for her investment in the Cayman Islands. The material before the IAT included a letter from Fidelity Bank concerning Mrs Murray-Forbes and her husband's investment in property in the Cayman Islands. This indicated that they had jointly bought a property for a certain sum. They had a large outstanding mortgage on the property and had made substantial repayments as well as paying stamp duty on the purchase. The IAT credited Mrs Murray-Forbes with points to reflect the total amount of

her and her husband's mortgage repayments and stamp duty. It is clear from the detailed explanation of their decision, which was provided to Mrs Murray-Forbes, that the IAT used the calculation methodology set out in and required by Schedule 2 to the Immigration Regulations (2019 Revision).

43. However, Mr Brady argued before me that the IAT should have treated Mrs Murray-Forbes's investment as being the full price paid for the property, notwithstanding that this ignored the outstanding mortgage taken out by Mrs Murray-Forbes and her husband to fund their purchase. Mr Brady relied on the Court of Appeal's decision in *Jack-Chowtee v IAT* (unreported, 16/09/22).

44. In that case, the IAT had adopted a two-stage process to considering appeals – first, it considered whether a ground of appeal had been made out and then, if so, it held a *de novo* hearing of the appeal. The appellant was in the course of purchasing land while her application for permanent residence was under appeal and had put new material before the IAT to demonstrate that fact, with a view to increasing her points for local investment. The IAT had refused to consider that material at the first stage of its consideration and therefore determined that there was no ground of appeal made out and refused to move to the second stage. This was the basis of Mrs Jack-Chowtee's appeal to the Grand Court and to the Court of Appeal, when the Grand Court judge dismissed her appeal.

45. The Court of Appeal considered that the IAT's approach was illegitimate. Rix JA, giving the judgment of the Court, said that the IAT was obliged to take the new material into account at the first stage when determining whether the new material raised a *prima facie* realistic prospect of success. This was the *ratio* of the judgment.

46. However, Mr Brady fastened on a different passage in the judgment, at [47], where Rix JA said:

> *"47. However, Mrs Jack-Chowtee had in fact put forward much new material to support her case of investment … it shows that the Chowtees' purchase of the parcel had been not merely contracted for but completed; which gave them an equitable title even if legal title had to await formal registration. In any event, the test of 'Financial Investment' was investment, not formal ownership."*

Mr Brady submitted that this supported his argument that the IAT should have had regard to the full amount paid by Mrs Murray-Forbes and her husband for their house, ignoring the amount of the outstanding mortgage over it. His argument was:

> *"… the IAT's conduct in this case, demonstrates that, in not too dissimilar fashion, it fettered its discretion, in failing to recognise and observe, the 'true' value of the 'investment' to be credited to the Appellant at the material time, and consequentially, failed to give credence and adherence to, the mandated points to be awarded …*

> *… the 'investment' at the material time, was in fact and in reality, five times plus what was the minimum investment required by law …"*

47. I simply do not follow Mr Brady's argument. The IAT was required to consider Mrs Murray-Forbes' investment. The investment that she and her husband had made was the amount that they had paid for the house, less the amount of the outstanding mortgage, i.e. their net equity in the property. The amount of the outstanding mortgage was not their money. It was the bank's money. I do not see how it could possibly be treated as part of their investment.

48. One can test it another way by considering what would happen if Mrs Murray-Forbes and her husband were to sell their house. They would receive the proceeds of the sale but would have to repay the outstanding mortgage from the sale money. The balance they would be left with would be equivalent to their net equity in the property, i.e. the amount they have invested in it. It was a figure based on this (but modified as explained in the following paragraph) that the IAT took into account when calculating the appropriate points for Mrs Murray-Forbes under this category. In my judgment, the IAT was right to do so.

49. In fact, the Immigration Regulations are more generous to applicants than simply crediting them with the value of the net equity in any property bought, because the Regulations mandate that the Board and IAT use the full value of the mortgage repayments made, i.e. including the interest element of the mortgage repayments paid by the borrowers, which do not go towards paying down the capital borrowed.

50. The IAT applied the calculation methodology prescribed by the Immigration Regulations (2019 Revision). Mr Brady did not appear to challenge that the IAT was obliged to do so. Apart from his point about the value of the total investment, Mr Brady did not challenge the calculation performed by the IAT. I therefore cannot see on what basis Mr Brady can support an argument that the IAT should have reached a different figure for Mrs Murray-Forbes' local investment to the one that it calculated, or that its approach to this task was irrational.

51. Finally, Mr Brady pointed out that, following her appeal to the IAT, Mrs Murray-Forbes was only 1.62 points short of the required 110 points. He initially argued that I should order the IAT to re-count the points, which did not seem to me likely to result in a different outcome. He then pivoted to argue that, given the very small shortfall in points, I should increase Mrs Murray-Forbes' points to 110. Mr

Brady did not explain the source of my power to do so, other than describing it as being an exercise of natural justice, nor from where these additional points would come.

52. Mr Brady urged on me that I should uphold justice and fairness. But justice and fairness equally require that, if there is a scheme of rules in place, those rules are applied rigorously to all those who come through the system, and that the rules are not bent to suit a particular applicant. That may produce some hard cases, where an applicant like Mrs Murray-Forbes falls only a few points or fractions of points below the required threshold, but that is the nature of a system that depends on a particular score being obtained. I do not have power to "magic up" points outside the operation of the Immigration Regulations. It is for Parliament to change the system, if it wishes to do so.

53. For the reasons set out in detail above, Mrs Murray-Forbes' appeal is dismissed. I invite the parties to agree a form of order and will hear them on the issue of costs if they are not able to agree.

Dated 18 July 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT