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CAUSE NO: OF 2021

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF SECTION 23 (2) OF THE IMMIGRATION (TRANSITION) ACT, 2021

IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES

IN THE MATTER OF SECTION 23 OF THE BILL OF RIGHTS

AND IN THE MATTER OF AN APPLICATION FOR A RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE  
PURSUANT TO SECTION 30 (1) IMMIGRATION ACT (2015 REVISION).

LEON SUNIL CARMO D'SOUZA

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

1<sup>st</sup> Respondent

-and-

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

2<sup>nd</sup> Respondent

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NOTICE OF  
ORIGINATING MOTION

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**TAKE NOTICE** that the Grand Court at the Law Courts, George Town, Grand Cayman will be moved on the \_\_\_\_\_ day of \_\_\_\_\_ 2021 at \_\_\_\_\_ a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of Leon Sunil Carmo D'Souza ("the Appellant") for an order in the following terms:

- i. The decision of the 1<sup>st</sup> Respondent dated 9 June 2020 to refuse to grant the Appellant's appeal from the decision of the Caymanian Status and Permanent Residency Board ("the Board") is wrong in Law, and that the said appeal be remitted to the 1<sup>st</sup> Respondent to be reconsidered and decided according to the law; and

This Motion was filed by HSM Chambers, Attorneys at Law for and behalf of the Appellant herein whose address for service and correspondence is 68 Fort Street, George Town, PO BOX 31726, Grand Cayman KY1-1207, Cayman Islands

- ii. Or the decision of the 1<sup>st</sup> Respondent dated 9 June 2020 to refuse to Grant the Appellant's appeal from the decision of the Board is unreasonable / amounts to a Breach of Natural Justice and therefore the matter to be remitted to the 1<sup>st</sup> Respondent to reconsider their decision and reach a decision in accordance with the Law and Natural Justice.
- iii. A declaration that the Respondent and any decision maker, when considering an application for Permanent Residence must consider an applicant's right to a family life and private life pursuant to Section 9 of the Bill of Rights when considering whether not grant or reject an application for Permanent Residence, or;
- iv. Section 37 (3) Immigration (Transition) Act 2021 is incompatible with Section 9 of the Bill of Rights.

And for an order that the costs of and incidental to this Application be paid by the Respondent.

**AND FURTHER TAKE NOTICE** that the grounds of this Application are:

1. The Appellant is a 43 year old Indian national. On 7 November 2018, when the Appellant was 40 years old he applied for Permanent Residence of the Cayman Islands and a Residency and Employment Rights Certificate ("RERC") pursuant to Section 30 (1) of the Immigration Act (2015 Revision) ("the 2015 Act").
2. On 25 January 2019, the Appellant sat the History and Culture Test ("the Test"). The test is 40 multiple choice questions which are designed to test an applicant's integration into Caymanian Society. Applicants are awarded 0.5 points for every question they answer correctly.
3. Prior to sitting the History and Culture test, Applicants are contacted by the Department of Immigration (now Workforce Opportunities and Residency Cayman ("WORC")) and provided a document entitled History and Culture Test Advisory which notifies Appellants that they can attend at the University College of the Cayman Islands ("UCCI") to enroll in the course "The History, Culture, Politics and Economy of the Cayman Islands". They are also informed could read the following books:

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- Bodden, J.A., **The Cayman Islands in Transition: The Politics, History and Sociology of a Changing Society** (ISBN-13:978-9766373221)

- Craton, Michael and the New History Committee (2003): **Founded Upon the Seas: A History of the Cayman Islands and Their People** (Kingston: Ian Randle Publishers, ISBN-10:0972935835)

- Goring, Kevin (2008) **Caymanian Expressions: A collection of sayings and phrases used in the Cayman Islands** (Grand Cayman: Gapseed Publishing)

- **Foundation – the Arts and Culture of the Cayman Islands** Volumes 1-4 (available at the Cayman National Cultural Foundation)

4. Once an Applicant has sat the test, they are notified of their results at a later date. The scores that the Applicant receives are non-appealable. In a document entitled "Caymanian Status and permanent Residency Board Policies and Procedures 2012" the procedures state:
2. The H & C Test can only be taken **once** by an applicant. In instances where the Law allows a person to re-apply for permanent residence after initially being refused, the previous score is used again when the Board is scoring the new application.
5. It is not known whether or not WORC maintain a similar policy to date due to the fact that the Caymanian Status and Permanent Residency Board Policies and Procedures 2012 are understood no longer to be relied upon and have not been replaced.
6. In a decision ("the decision") dated 12 March 2019, the Board rejected the Appellant's application. The Appellant was notified that:
  - In considering an application for permanent residence under subsection (1), the Board or the Chief Immigration Officer upon applying the criteria set out in the points system shall grant permanent residence to all applicants attaining one hundred and ten points or more. In this particular case, the total score attained is 99.50

7. By way of a letter dated 29 March 2019, HSM Chambers submitted a Notice of Appeal against the decision on behalf of the Appellant. In this Notice, HSM Chambers requested that the 1<sup>st</sup> Respondent order the Board / Director of WORC to:
  - i. To disclose to the Appellant as part of the Appeal Statement the History and Culture test questions and answers the Appellant sat.
8. It was also requested that the Board provide to the Appellant any policies and procedures they have in respects to the consideration and refusal of Permanent Residence and any relevant anonymised decisions of the 1<sup>st</sup> Respondent.
9. It is understood that upon the 1<sup>st</sup> Respondent receiving the Notice of Appeal they send a Memorandum to the Immigration Appeals Department of WORC notifying them that an appeal has been filed and attaching the Notice of Appeal. They also request:

Please provide the Tribunal the reasoning along with the complete application that was submitted to the Board, including all letters, police records, travel history logs and any other documents.

10. On 2 April 2019, HSM Chambers submitted a Freedom of Information Request ("FOI") to the Department of WORC in respect to the Appellant. It was requested that the following be disclosed:

The Appellant would like the following disclosed to him:

- i. Where the answers that he provided to the history and culture test that he sat are kept.
- ii. A copy of the test that he sat.
- iii. A copy of the answers that he provided.

11. On 15 April 2019, WORC provided to the Appellant an Appeal Bundle. This Bundle contained the Appellant's original application and a number of documents. However noticeably it was missing the following documents:

- i. The Appellant's History and Cultures Test Questions and Answers.
  - ii. The Minutes of the meeting in which the Appellant's RERC application was decided.
  - iii. Any relevant anonymised decisions of the IAT.
12. It is also noticeable that the Board made no reference to considering the Appellant's Constitutional Rights / Human Rights, in particular his Right to a Private Life as per Section 9 of the Bill of Rights ("BOR").
13. On 30 April 2019, the Acting Chief Officer of the Ministry of Human Resources and Immigration provided to the Appellant redacted History and Culture Test questions and answers from the test that he sat in January 2019. From this document it was not possible to ascertain whether or not the History and Culture Test was marked appropriately and that the questions were factually correct. In this letter it was confirmed that the request contained exempt material and it was for this reason that the request was not fully complied with.
14. On 9 May 2019, HSM Chambers appealed the Chief Officer's decision to the Ombudsman of the Cayman Islands.
15. On 10 May 2019, HSM Chambers submitted Grounds of Appeal in regards to the Board's decision to reject the Appellant's application. These Grounds were sent to both the Board and the 1<sup>st</sup> Respondent.
16. In a decision dated 6 December 2019, the Ombudsman of the Cayman Islands upheld the decision of the Acting Chief Officer of the Ministry of Human Resources and Immigration and concluded that the History and Culture Test questions and answers that the Appellant sought were exempt from disclosure under the Freedom of Information Law.
17. In a decision dated 9 June 2020, the 2<sup>nd</sup> Respondent rejected the Appellant's appeal against the rejection of his PR application. In particular they held:

Cayman Islands Constitution Order 2009 – Section 9 – the Tribunal determined that the CS/PR Board’s decision does not infringe on the Appellant’s rights as the decision was not in breach of procedural fairness, or at variance with the Regulations; nor acted unreasonably or contrary to the principles of natural justice.

### **Wrong in Law**

18. It is the Appellant’s case that that prior to the decision of the Board and the decision of the 1<sup>st</sup> Respondent he had established a Private Life in the Cayman Islands pursuant to Section 9 of the BOR and Article 8 of the European Convention on Human Rights.
  
19. Furthermore, it is the Appellant’s case that decision of the Respondent dated 9 June 2020, is wrong in law in that:
  - i. The 1<sup>st</sup> Respondent failed to grant the appeal despite the fact that the Board had not seemingly considered the Appellant’s right to a private life in the Cayman Islands.
  - ii. The 1<sup>st</sup> Respondent applied the wrong test when considering whether or not the Board had considered the Appellant’s Right to a private life in the Cayman Islands.
  - iii. The 1<sup>st</sup> Respondent failed to grant the Appellant’s appeal despite the fact that the Board have failed to set out their decision in a manner in which it could be understood, i.e. they failed to fully explain their decision.
  - iv. The 1<sup>st</sup> Respondent failed to grant the appeal despite the Board failing to comply with it’s obligations to disclose relevant matters to the Appellant and the 1<sup>st</sup> Respondent.
  
20. Further and in the alternative, it is the Appellant’s case the decision is unreasonable / amounts to a breach of natural justice in that the 1<sup>st</sup> Respondent:
  - i. Failed to require the Board / Department of WORC to disclose to the Appellant the History and Culture Test Questions that he sat and the answers that he provided.
  - ii. Failed to ensure that the appeal process was fair.

- iii. Failed to identify the fact that the Board had failed to consider the Appellant's right to a Private Life pursuant to Section 9 of the BOR and Article 8 of the European Convention on Human Rights.
  - iv. Failed to set out in sufficient detail the rationale for their decision to reject the appeal in relation to the Appellant's Section 9 Rights.
21. It is the Appellant's primary contention that both the Board and the First Appellant are required to consider the Appellant's right to a private life in the Cayman Islands pursuant to Section 9 of the Bill of Rights ("BOR") when considering to grant the Appellant PR. Any failure to consider Section 9 of the BOR (and Article 8 of the ECHR) and apply a reasonably justifiable test / proportionality would render the decisions unlawful. The Appellant avers that the Board and the 1<sup>st</sup> Respondent are required to first consider Factors One to Nine and award points based upon the evidence submitted. In the event that the Appellant does not satisfy the required score, the Board and the 1<sup>st</sup> Respondent are then required to consider whether or not it would be proportionate / reasonably justifiable to interfere with the applicant's Section 9 (and Article 8 of the ECHR) Rights.
22. In the event that Section 37 (3) of the Act or any of the earlier iterations prevent the Board or the 1<sup>st</sup> Respondent from carrying out a proportionality / reasonably justifiable considered it is averred that those laws and in particular Section 37 (3) of the Act and Section 37 (3) Immigration (Transition) Act, 2018 are incompatible with Section 9 of the BOR and therefore the Court are required to make a declaration to that effect.

### **Conclusion**

23. Further to the above, it is averred that the 1<sup>st</sup> Respondent acted erroneously and unlawfully and in breach of natural justice. Accordingly, the decision of the Respondent should be set aside so that the Applicant's application can be reheard in accordance with law.

DATED: 14 May 2021

This Motion was filed by HSM Chambers, Attorneys at Law for and behalf of the Appellant herein whose address for service and correspondence is 68 Fort Street, George Town, PO BOX 31726, Grand Cayman KY1-1207, Cayman Islands

HSM CHAMBERS

**HSM CHAMBERS**

Attorneys for the Applicant

TO: The Clerk of the Court

AND TO: The Chairman  
Immigration Appeals Tribunal  
Government Administration Building  
Elgin Ave,  
George Town  
Grand Cayman

And to: Attorney General of the Cayman Islands.