IN THE GRAND COURT OF THE CAYMAN ISLANDS **CAUSE NO: OF 2021**

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).

FLORIA PATRICA MURPHY

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

1st Respondent

July 2, 2021

-and-

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

2nd Respondent

NOTICE OF
ORIGINATING MOTION

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 Avril Lorna Fredericks ("the Appellant") for an order in the following terms:

i. The decision of the 1st Respondent dated 4 June 2021 (but received on 6 June 2021) to refuse to grant the Appellant Permanent Residence ("PR")/ Residency and Employment Rights Certificate ("RERC") is wrong in Law / not in accordance with the law, and that matter should be remitted to the 1st Respondent to be reconsidered and decided according to the Law; and / or

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 1st Respondent dated 4 June 2021 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 1st 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 30 (4) Immigration Act (2015 Revision) ("the 2015 Act") 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 67 year old Jamaican National. The Appellant resided in the Cayman Islands between May 1996 and February 2006, when she was required to leave the Cayman Islands due to her term limit expiring. The Appellant returned in June 2007 and has been a resident in the Cayman Islands since then. Prior to 1996, the Appellant had strong ties with the Cayman Islands due to the fact that her mother was Caymanian and that her daughter was born in the Cayman Islands in 1980.

2. In May 2016 (when the Appellant was 62 years old), the Appellant applied for Permanent Residence ("PR") of the Cayman Islands and a Residency and Employment rights Certificate ("RERC").

3. PR / RERC applications can be considered by:

    i. The Director of WORC (previously known as the Chief Immigration Officer of the Cayman Islands ("the CIO") or their administrators; or

ii. The Caymanian Status and Permanent Residency Board ("the Board")

4. Both the Board and the CIO are creations of statue and their powers are defined in the Immigration (Transition) Act (2021 Revision) ("the 2021 Act) and previous iterations of the Immigration law, including the 2015 Act.

5. The Director of WORC or their designate sits as a member of the Board. Furthermore, the following members of the Board are employees of WORC (previously known as the Department of Immigration):

- The Head of Work Permits, Cayman Status and Permanent Residence or the Director's Designate.
- The Secretary of the Board.
- The Assistant Secretary.

6. On 1 December 2017, the Appellant sat the History and Culture Test and scored 15 out of 40. She was therefore awarded 7.5 points out of 20 for Factor 6.

7. On 3 May 2018, the Appellant's application for PR/ RERC was rejected by the CIO. It is believed that one of the CIO's administrator's made the decision, rather than the CIO in person. The Immigration Law in the Cayman Islands on 3 May 2018, was the the 2015 Act. In a letter dated 3 May 2018, the CIO set out:

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 98 points.

8. The CIO awarded the following points to the Appellant:

Factor 1a	**15**
Factor 1b	**0**
Factor 2a	**10**

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Factor 2b	**0**
Factor 3	**0**
Factor 4a	**9**
Factor 4b	**0**
Factor 5	**10.5**
Factor 6	**7.5**
Factor 7	**40**
Factor 8	**0**
Factor 9	**6**

9. In a letter dated 22 May 2018, the Appellant appealed against the decision of the CIO and on 1 June 2018, the Chairman of the Immigration Appeals Tribunal ordered the CIO to carry out the following:

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

10. In a document received on 14 December 2018, Grounds of Appeal were submitted on behalf of the Appellant. In these grounds the Appellant set out that the CIO had failed to properly consider Factor 5 appropriately. In particular the Appellant's involvement with Bodden Town Football Club.

11. As part of her application the Appellant submitted three letters from the Bodden Town Football Club. Those letters were the letters of:

- 11 April 2016;
- 30 November 2017; and
- 15 January 2018.

12. The letter of 11 April 2016 stated:

Ms. Murphy has been volunteering with the Bodden Town Football Club for over 7+ years she has also volunteer with our FC football camps held every summer in each district, she has put a lot of spare time and effort to make our summer camps a success.

She has been an integral part of our volunteer team and I am more than happy to recommend Ms. Murphy for The Caymanian Residency.

13. The letter of 30 November 2017 stated:

Ms. Floira Murphy has been volunteering her services to the Bodden Town Football Club for many years. She has been extraordinarily dedicated volunteer, unselfishly donating her time all year round to our club and even more during the summer time when we host our annual Football Summer Camps, which are held in our eastern districts Bodden Town, East End, North Side as well as George Town and from time to time at the Lighthouse School & Cayman Brac.

Ms. Murphy is an exceptionally efficient at what she does, she is in charge of cooking all meals every year at our Bodden Town Summer Camp that is held for 5 days. Ms. Floria also is in charge of making sure all of the children at all of our camps are taken cared of as well as maintaining the water stations and that all of the children including the coaches has a snack to eat during their break time, she also makes sure that all of the children are accompanied to the rest rooms as well as assisting other coaches with the children after camp has ended until their parents or guardian has picked them up. Ms. Floria also assist the Bodden Town Football camp with all of their fundraising events to help us raise funds for our club, she assists with our Fish Fry's, and also our bake sales.

14. The letter of 15 January 2018 states:

Mrs. Floria Murphy works a total of 200 Hours a year at our Football Summer Camps we have every year during school summer break, she also assists with our fundraising events and contributes over 150 hours per year to our fundraising events.

Mrs. Floria has been a great assist to our club for many years, she has been a part of this club and have contributed to our Bodden Town youth as well as past youth who have now grown into young men who she has helped mentor and kept them on a good path.

15. An applicant is awarded 1.5 points for every year of participating and assistance provided to a sports programme, provided they have participated and assisted for more than 35 hours per year. Therefore, if an applicant had participated and assisted for more than 35 hours per annum for 7 years they would be awarded 10.5 points under the points system. If they had participated and assisted for more than 8 years they would be awarded the maximum of 12 points.

16. Despite the Appellant's submission in a decision letter dated 9 March 2020, the 1st Respondent rejected the appeal. The 1st Respondent did not consider (or seemingly did not consider) the Appellant's submissions in regards to Factor 5.

17. In a letter dated 27 April 2021, the Appellant asked the 1st Respondent to reconsider their decision. In particular it was contended that the 1st Respondent had erred by:

- Failing to award the appropriate points for Factor 5.
- Failing to consider the Appellant's Section 9 Bill of Rights ("BOR") Rights.

18. In a decision received on 6 June 2021, the 1st Respondent stated:

i. The factors put forward by HSM Chambers were not factors put forward by the Appellant's initial advocates.
ii. The 1st Respondent was prevented from considering Section 9 of the BOR.

Wrong in Law

19. It is respectfully contended that when one combines the letters of 11 April 2016, 30 November 2017 and 15 January 2018, a reasonable decision maker would have reached the conclusion that the Appellant had been participating and assisting with the Bodden Town Football club for over 8 years and therefore was entitled to no less than **12 points** for Factor 5 as opposed to the 10.5 points she was awarded. Therefore by failing to award the Appellant sufficient points for Factor 5, the CIO erred in Law.

20. It is respectfully contended that these issues were raised by the Appellant's original advocate and also in the reconsideration request of 27 April 2021. It is averred that the decision of the CIO was erroneous in law and contrary to the Regulations and as such the 1st Respondent should have quashed the original decision of the CIO and ordered by a *de novo* hearing. By failing to grant the Appeal, it is averred that the 1st Respondent has erred in Law.

21. Section 22 (4) of the Immigration (Transition) Act, 2018[1] required the 1st Respondent to carry out a *de novo* hearing when one of the Grounds of Appeal has been made out. By the 1st Respondent failing to conclude that the CIO had erred in Law, they have further erred in failing to carry out a *de novo* hearing and permitting the Appellant provide fresh evidence about her position in the Cayman Islands.

Section 9 of the Bill of Rights

22. When the CIO reached their decision in regards to the Appellant, Section 30 (4) of the 2015 Act stated:

> (4) 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.

23. It is respectfully averred that Section 30 (4) of the 2015 Act is sufficient ambiguous so as to ensure the law is considered in a manner which is compatible with Section 9 of the Bill of Rights. In particular, the CIO was required to consider a two stage test, i.e. firstly considering the Act / points system and then once reaching a decision in regards to the appropriate level of points, if the applicant has not received 110 points, the CIO and the 1st Respondent were required to consider the Appellant's BOR rights.

24. In circumstances where the public official is prevented from / required not to consider Section 9 of the BOR by the Act, the Court must make a declaration of incompatibility. It would appear that the 1st Respondent's position is that they are prevented from considering Section 9 of the BOR by the Section 38 (3) of the 2021 Act. However, the correct Law at the time that the CIO reached the decision, and therefore the Act which should have bene considered, was the 2015 Act which is different to the current law.

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[1] The Law in force when the 1st Respondent reached the decision on the Appellant's Grounds of Appeal. The same section in the 2015 Act was section 16 (4) of the 2015 Act.

25. It is the Appellant's position that Section 25 of the BOR requires the 1st Respondent to interpret Section 30 (4) of the 2015 Act so far as it is possible to do so to give effect to Section 9, and therefore apply a two stage test. As the CIO failed to do this, the 1st Respondent should have quashed the original decision of the CIO and ordered a de novo hearing.

26. In the event that Section 30 (4) of the 2015 Act prevents a public official from consider whether or not to grant Permanent Residence to an individual outside of the points system it is averred that Section 37 (3) should be declared incompatible.

Unreasonable / Procedurally Unfair/ Breach of Natural Justice.

27. For the 1st Respondent to overturn a decision of the Board or the Chief Immigration Officer ("CIO") / Director of WORC, they have to be satisfied that the decision is:

- Erroneous in Law.
- Unreasonable.
- Contrary to the Principles of Natural Justice.
- At variance with the Regulations.

28. It is therefore averred that the 1st Respondent are responsible for ensuring that the Board, the Director of WORC or the CIO not only award the correct marks under the points system but that the points system is interpreted fairly and that the Board/ the CIO and the Director of WORC carry out a fair procedure not only when considering applications but when they are responding to appeals.

29. It is respectfully averred that the 1st Respondent have failed in ensuring that a fair procedure is carried out by the Board, the CIO and the Director of WORC not only when considering applications but also when responding to appeals.

Lack of policies.

30. It is submitted that the Board / the Director of WORC and the CIO have failed to ensure that there are policies and procedures in place that ensure that the point system is operated in a way which is not arbitrary nor opaque.

31. In the current situation, the lack of policies and guidance in regards to the points system means that it cannot be regarded as a transparent system. In particular numerous issues exist in the consideration of every Factor which mean that the operation of the points system is arbitrary and opaque.

32. In the current appeal the Appellant has been prejudiced by the arbitrariness and opacity of the points system in the following manner:

    i. The Appellant has not been awarded the correct points for Factor 5, i.e. there is no guidance as to whether or not a global consideration of letters has to be given or the CIO / the Board individually have to be considered on the letter on their merits.
    ii. The CIO failed to provide the 1st Respondent with the questions she sat and the answers she gave as part of the History and culture test.
    iii. The CIO failed to provide minutes of the meeting in which the Appellant's application was considered.

33. It is respectfully averred that by failing to recognise that a fair system for the consideration, grant, rejection and refusal of PR / RERC applications does not exist and to ensure that the CIO / Board act fairly and transparently at all time, the 1st Respondent has failed to act rationally, proportionally and ensure procedural fairness. It is therefore contended that they have acted unreasonably in the circumstances.

34. It is therefore contended that the matter should be remitted to the 1st Respondent so that they can reconsider the matter in accordance with the Act and the Bill of Rights.

History and Culture Test.

35. It is the Appellant's position that when an issue in the case is whether or not a decision is reasonable or not the CIO are under a duty to disclose all documents with relate to the factors considered. In particular, the Appellant would submitted that the CIO and Board are required to disclose the questions that that the Appellant sat and the answers she gave as part of the disclosure in the Appeal Statement / Bundle.

36. By the CIO failing to disclose this information it is averred that the Appellant has been denied an opportunity to:

    i. Confirm that she was awarded the correct points.
    ii. Challenge the veracity of the questions asked.

37. Issues have been raised with the 1st Respondent for a number of years in respects to potential issues in regards to History and Culture Test, yet the 1st Respondent has failed to require the CIO / the Board or the Director of WORC to disclose the relevant material as part of the appeal disclosure. As such the 1st Respondent has failed to ensure that fair procedure has been carried out in respect to appeals.

38. Despite the fact that the 1st Respondent has the power to order disclosure or require individuals attend hearings, the 1st Respondent has failed to carry out its functions and therefore as such acted procedurally unfairly.

39. It is therefore the Appellant's case that the decision of the 1st Respondent is unreasonable / irrational / procedurally unfair and as such should be remitted so that the matter can be considered *de novo*.

Minutes

40. Neither the CIO, the Board nor the 1st Respondent keep a minute of their decisions contrary to Section 37 (23) of the Act (certainly in the case of the CIO and the Board). On occasion the Board provide an Agenda however that is merely a record of the decision rather than minutes of the meeting.

41. It is the Appellant's position that the CIO, the Board and the 1st Respondent are required to act in a transparent manner and provide minutes of meetings. In the absence of abiding by a statutory obligation it is averred that neither the CIO, the Director of WORC, the Board nor even the 1st Respondent can be seen to be acting in a procedurally fair manner. As such the matter should be remitted to the 1st Respondent so that they can consider the matter fairly.

Conclusion

42. Further to the above, it is averred that the 1st 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: 1 July 2021

HSM CHAMBERS

HSM CHAMBERS

TO: The Clerk of the Court

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

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