



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

Cause No. OF 2021

IN THE MATTER OF SECTION 30(1) OF THE IMMIGRATION ACT (2015 REVISION)

AND IN THE MATTER OF THE REFUSAL OF AN APPLICATION FOR PERMANENT RESIDENCY OF WAYNE O'BRIAN SENIOR PURSUANT TO SECTION 23(2) OF THE IMMIGRATION (TRANSITION) ACT, 2018 BY THE DECISION OF THE IMMIGRATION APPEALS TRIBUNAL

BETWEEN:

WAYNE O'BRIAN SENIOR

-AND-

Appellant

THE IMMIGRATION APPEALS TRIBUNAL

Respondent

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on
2022 at am / pm or so soon thereafter as Counsel can be
heard, by Counsel on behalf of Wayne O'Brian Senior for the following relief, namely:

1. That until such time as the substantive matter is heard and determined by the Hon. Court the Appellant shall be permitted to stay and work in the Cayman Islands.
2. That the decision of the Immigration Appeals Tribunal of 3rd December 2021 be set aside and remitted for reconsideration *de novo* with guidance by this Hon. Court on the correct or proper manner of the exercise of the IAT's discretion and or the weight to be attached to the Appellants' evidence and or the points to be awarded under the Immigration Regulations (2019 Revision) Schedule 2.

And for an Order that the costs for indemnity of this appeal may be paid by the Respondent.

3. The factual background is as follows:
 - i. An application to the Chief Immigration Officer / Caymanian Status and Permanent Residency Board ('the Board') was made on or about 16th June 2020 by the Appellant with supporting evidence. The Appellant is a specialist, skilled, well qualified, and

highly experienced “journeyman” plumber who has lived and worked in the Cayman Islands since 1992. He has worked in his chosen occupation on island at four employers with a break between 2009 and 2011 when he was subject to rollover. Two of those employments, including his current employment, have been working under Mr James Ross who supported his application – firstly at BPC Limited (2005-2009) and latterly since 2011 and to date, at Advance Fire & Plumbing.

- ii. That application was rejected by the letter of 14th July 2021 from the Board, on the points system with an award of 90.5 (below the required 110 points under section 30 (1) of the Immigration Act (2015 Revision)). No points were deducted under the stipulated categories or more generally.
- iii. The refusal was challenged by an appeal to the Immigration Appeals Tribunal made on 14th October 2021 (the IAT had by a communication on 4th October 2021 granted an extension of time to lodge the appeal). That challenge was raised by the Appellants’ previous attorneys.
- iv. The IAT reconsidered the application and refused the appeal. The notice of refusal dated 3rd December 2021 is hereby brought before the Grand Court pursuant to s23(2) of the Immigration (Transition) Act, 2018.
- v. The IAT despite hearing the matter *de novo* neither took into account or invited any further evidence or clarification from the Appellant.

AND TAKE FURTHER NOTICE that the grounds of this appeal are:

4. The IAT erred as a matter of law or procedure in failing to consider and or to correctly award points under the wording of Schedule 2 of the Immigration Regulations (2019 Revision) and or in the exercise of its limited discretion in that,

- (i) Under Factor 4 the IAT awarded 24 points out of the maximum 30 points available. Those points were broken down as a maximum of 15 points under Factor 4a (evidence of cash and savings held locally) and 9 points under Factor 4b (evidence of salary and income).

The wording of Schedule 2 and the notes thereto in relation to Factor 4b states:

(7) Gross annual income from employment includes all employment related monetary income earned annually by the applicant and includes basic salary, bonus, commission, allowances etc. to the extent that documentary evidence is produced to show income.

The Appellant had supplied evidence from his employer as at 16th June 2020 (in error dated 16th June 2010), stating his aggregate salary for the past five years at

CI\$352,036 (equating to CI\$70,407.20 per annum) as well as stating his gross monthly salary at CI\$5,070 (equating to CI\$60,840 per annum).

The Board erred in awarding 9 points on the scale at Factor 4b using the lower figure. The IAT did not correct or adjust that assessment.

It is contended the IAT erred in,

- (a) Failing to note the disparity between the two figures or if the disparity was noted failing to seek clarification from the Appellant – given the application before the IAT was a hearing de novo the IAT could or should have asked for clarification over an obvious and innocent mistake, and or
- (b) Failing to apply the correct bracket at 4b – namely (v) equating to the gross annual salary of CI\$70,000 to CI\$89,999 which stipulated an award of 11 points.

The Appellant will contend that the IAT should have used, or had a discretion to apply, the higher annual figure and award two additional points to the Appellant. For comparison, the Appellant points to the notes and guidance under Factor 3 where income is defined as,

Income means either-
90% of total documented income for the last 12 months prior to making the application, multiplied by five; or

100% of total documented income for the last five years.

The Applicant's employer had plainly provided both sets of figures – for both the aggregate earnings over the past five years and the monthly earnings;

- (ii) Under Factor 5 – Community Involvement the IAT awarded only 7.5 points where 20 points were available.

The IAT erred as matter of law by failing to note or to heed or to give proper or sufficient credit by way of an award of points or to explain the breakdown of points awarded for,

- a. The mentoring provided over four years to Kevin C Bodden (erroneously referred to by the IAT as 'Carvel Bodden') and separately the four years mentoring provided to Elvin L Rivers Jr.

The Appellant contends that he ought to have been awarded, potentially,

- i. Two or more points for each of the four years mentoring under Factor 5, I and/ or II – training and mentoring of Caymanians outside of normal work hours or related employer sponsored activities, and
 - ii. The same number of points for each Caymanian mentee – on the basis that both Kevin C Bodden and Elvin L Rivers Jr are fellow employees of the Appellant at Advance Fire & Plumbing.
 - iii. The Appellant contends the legislation does not exclude or in any way limit the award of those points to only one mentee.
Accordingly, the Appellant contends he should have been awarded 8 points under this category of points award.
 - iv. Further or in the alternative the Appellant contends the number of points awarded under this category could and should have been higher following the explanatory notes to Factor 5 under Schedule 2 – which stipulate that ‘Applicants who demonstrate an active involvement in the training and mentoring of Caymanians and the rehabilitation and mentoring of offenders will be given higher points.’
- b. The IAT has failed to explain the breakdown of points marked only as ‘1.5 + 6’ or to set out precisely how many points are awarded for community involvement under Factor 5, II. The Appellant contends that he could and should have been awarded maximum points by reason of his evidenced community involvement (an additional 12.5 points compared with what he was in actuality awarded).

By reason of the matters aforesaid the Appellant contends that the IAT erred in law and the matter should be remitted to the IAT for consideration afresh.

Dated this 29th of December 2021

Filed this day of December 2021



**McGrath Tonner
Attorneys to the Appellant**

To: The Clerk of the Court

And to: The Respondent