



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF 2022

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 37 (1) IMMIGRATION (TRANSITION) ACT (2018 REVISION).

STEPHANIE JANE MOUCK

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 Stephanie Jane Mouck (“the Appellant”) for an order in the following terms:

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

- i. The decision of the 1<sup>st</sup> Respondent dated 22 March 2022 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 1<sup>st</sup> Respondent to be reconsidered and decided according to the Law; and / or
- ii. Or the decision of the 1<sup>st</sup> Respondent dated 22 March 2022 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 2018 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 has resided in the Cayman Islands since 2010.
2. The Appellant is a 34 year old Canadian national. On 29 October 2019, when the Appellant was 32 years old she applied for Permanent Residence of the Cayman Islands and a Residency and Employment Rights Certificate (“RERC”) pursuant to Section 37 (1) of the Immigration (Transition) Act, 2018 (“the 2018 Act”).

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3. On 6 December 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.
4. 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:
  - 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)
5. 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.
6. 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.

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7. In a decision dated 10 March 2020 the Board rejected the Appellant's application. The Appellant was notified that she had been awarded 97 points.
8. Subsequently, a Notice of Appeal was submitted against the decision on behalf of the Appellant.
9. In March 2020, the Cayman Islands entered a lock down due to the Covid Pandemic. As a result of the Covid Pandemic, the Tourism industry was heavily hit and many individuals who were working in that industry or dependant upon it were negatively effected, i.e. their salary was reduced or they were made unemployed. To date, it is not believed that the Cayman Islands Tourism industry has returned to Pre March 2020 levels.
10. On 22 September 2020, Regina Jackson, an employee of 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 Board minutes in which the Appellant's application was decided upon.
11. It is also noticeable that the Board made no reference to considering the Appellant's Constitutional Rights / Human Rights, in particular her Right to a Private Life as per Section 9 of the Bill of Rights ("BOR").
12. Grounds of Appeal were submitted and on 13 May 2021, the 1<sup>st</sup> Respondent concluded that the Board had erred in Law.
13. Subsequently, the Appellant provided further information to the 1<sup>st</sup> Respondent as to her current circumstances in the Cayman Islands.
14. In a decision dated 22 March 2022, the 1<sup>st</sup> Respondent concluded that the Appellant had not scored sufficient points to be granted PR. The 1<sup>st</sup> Respondent also concluded that it does not have the discretion nor the ability to consider matters outside of the points system.

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15. It is the Appellant's case that the decision to not award her Permanent Residence breaches her right to a private life which she has established in the Cayman Islands. It is averred that this decision is not reasonably justifiable / proportionate in the circumstances.

#### **Wrong in Law**

16. 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 she had established a private life in the Cayman Islands which was therefore protected by Section 9 of the Bill of Rights.
17. Furthermore, it is the Appellant's case that decision of the 1<sup>st</sup> Respondent dated 22 March 2022, is wrong in law / not in accordance with the Law in that:
- i. The decision of the 1<sup>st</sup> Respondent without reasonable justification breaches the Appellant's right to a private life in the Cayman Islands; and
  - ii. The 1<sup>st</sup> Respondent failed to carry out its obligation to interpret the Act in a way which is consistent with Section 9 of the BOR.
18. It is the Appellant's primary contention that both the Board and the 1<sup>st</sup> 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 whether or not to grant her 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 or unconstitutional. 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.

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19. 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.

**Unreasonable / procedurally unfair / breach of natural justice.**

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 she sat and the answers that she provided.
- ii. Failed to ensure that the appeal process was fair.
- iii. Failed to offer the Appellant the opportunity to re-sit the test.
- iv. Failed to have any policies in regards to the Covid Pandemic and the affect that this might have on individuals wages who are reliant upon the Tourism Sector for tips and gratuities.

21. It is the Appellant's position that the Board are required to:

- i. Provide to the Appellant and the 1<sup>st</sup> Respondent the questions and answers she provided as part of the History and Culture Test; and
- ii. The Minutes of the meeting in which her application was discussed, points were awarded and subsequently rejected. These minutes are required to be kept as per Section 37 (23) of the 2018 Act.

22. In the current matter, the Board provided neither of the above documents to the Appellant. While the failure to provide the minutes of the meeting did not prejudice the Appellant, the failure to provide the history and culture test questions and answers did prejudice the Appellant in the that she was unable to ensure that the questions and answers she provided were correct.

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23. In the event that the Board failed to provide the history and culture test questions and answers to the Appellant the 1<sup>st</sup> Respondent had the following options:
- i. Make an unless order.
  - ii. Award the Appellant 20 points for Factor 6.
24. Due to the failure of the 1<sup>st</sup> Respondent to ensure that the Appellant was not prejudiced by the Board's refusal to disclose the History and Culture Test questions and answers, the 1<sup>st</sup> Respondent has failed to ensure that a fair appeal has been carried out. Therefore in the circumstances, the Appeal should be remitted back to them, with guidance as to how to ensure that a fair appeal is carried out.

#### **Covid Policies**

25. While it is accepted that the Tribunal and the Board can only award points as per the Regulations and the Points system, set out in Schedule 2, it is averred that the Point system is currently irrational due to the Covid Pandemic.
26. In October 2013, the current points system was introduced. Since then, the Points system has remained essentially the same, save for the fact that there have been minor changes. However, the current points system was created at a time when there was no Covid-19 and there was no discretion permitted to decision makers to take into account factors which, whilst are relevant, fall outside of the points system.
27. It is therefore contended that the failure of the points system to evolve to take into account Covid and the failure of the Board and the Tribunal to consider the effect of the Covid Pandemic on individuals means that the point system is not fair and not compliant with Section 9 of the Bill of Rights. It is therefore averred that the decision was therefore unreasonable, irrational and the appeal system is unfair.

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**Conclusion**

28. 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: 20 April 2022

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.

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