

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

R OF SECTION 23 OF THE BILL OF RIGHTS

MATTER OF AN APPLICATION FOR A RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE
SECTION 37 (1) IMMIGRATION (TRANSITION) ACT (2018 REVISION).



CESAR OSMIN RAMIREZ FAJARDO

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

1st Respondent

-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 _____ 2022 at _____ a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of Cesar Osmín Ramirez Fajardo (“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 1st 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 or amounts to a Breach of Section 9 of the Bill of Rights ("BOR"), and that matter should be remitted to the 1st Respondent to be reconsidered and decided according to the Law; and / or
- ii. The decision of the 1st Respondent dated 22 March 2022 to refuse to Grant the Appellant PR / an RERC is unreasonable, irrational or amounts to a Breach of Natural Justice and therefore the matter is 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 BOR 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 July 2010.
2. The Appellant is a 41 year old Honduran national. On 15 July 2019, when the Appellant was 38 years old he 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").

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

3. The Appellant has been raised by a Caymanian namely Nelia Suyapa Zelaya (“Nelia”). Nelia raised the Appellant from the age of 4 months old however, no formal adoption process was undertaken and therefore Nelia never formally became the Appellant’s mother.
4. On 13 September 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.
5. Prior to sitting the History and Culture test, applicants are usually 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 applicants 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)
6. 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.

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

7. It is not currently known whether or not WORC maintain a similar policy 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.
8. It is understood that the 1st Respondent accepts that some of the questions which formed part of the History and Culture Test between April 2021 and September 2021 were incorrect. It is the Appellant's position that potentially the questions that he was asked and which formed part of the test that he sat were either factually wrong, impossible to get right, were marked incorrectly or were unreasonable.
9. In a decision dated 26 September 2020 the Board rejected the Appellant's application. The Appellant was notified that he had been awarded 94 points.
10. Subsequently, a Notice of Appeal was submitted against the decision on behalf of the Appellant.
11. Once an appeal has been filed with the 1st Respondent, they notify the Department of WORC that the appellant is appealing the relevant decision and request disclosure of information. Upon receipt of that notice, in due course, an Appeal Statement is prepared, normally, by Regina Jackson, an employee of WORC. This Appeal Statement provides disclosure to the appellant and the 1st Respondent. The Appeal Statement that the Appellant was provided was dated 15 December 2020 and it contained 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.
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 and family Life as per Section 9 of the Bill of Rights ("BOR").

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

13. Upon considering the Appellant's application and the decision of the Board, the 1st Respondent in a letter dated 16 July 2021, confirmed that the Board had erred and provided an opportunity to the Appellant to provide fresh evidence for them to consider when they reviewed his application *de novo*.
14. Subsequently, the Appellant provided further information to the 1st Respondent as to his current circumstances in the Cayman Islands. Furthermore, the Appellant confirmed his relationship with Nelia.
15. In a decision dated 22 March 2022, the 1st Respondent concluded that the Appellant had not scored sufficient points to be granted PR. The 1st Respondent also concluded that it does not have the discretion nor the ability to consider matters outside of the points system.
16. It is the Appellant's case that the decision to not award him Permanent Residence breaches his right to a private life and family which he had established in the Cayman Islands. It is averred that this decision is not reasonably justifiable / proportionate in the circumstances.

Wrong in Law

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

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

19. It is the Appellant's primary contention that both the Board and the 1st Appellant are required to consider the his right to a private and family life in the Cayman Islands pursuant to Section 9 of the Bill of Rights ("BOR") when considering whether or not to grant him PR. Any failure to consider Section 9 of the BOR (and Article 8 of the ECHR) and apply a reasonably justifiable test / proportionality test would render the decisions unlawful or unconstitutional. The Appellant avers that the Board and the 1st Respondent are required to first consider Factors One to Nine of the points system and award points based upon the evidence submitted. In the event that the Appellant does not satisfy the required score, the Board and the 1st 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.
20. It is the Appellant's position that the decision to reject his PR application breaches his Section 9 BOR rights due to the fact that he will be required to leave the Cayman Islands as he has no other permission to remain and work and support himself in the Cayman Islands.
21. In the event that Section 37 (3) of the Act or any of the earlier iterations prevent the Board or the 1st Respondent from carrying out a proportionality / reasonably justifiable assessment it is averred that those laws and in particular 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.

22. 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 1st 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 offer the Appellant the opportunity to re-sit the test.

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

23. It is the Appellant's position that the Board are required to:
- i. Provide to the Appellant and the 1st Respondent the questions and answers he provided as part of the History and Culture Test; and
 - ii. The Minutes of the meeting in which his 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.
24. 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 that he was unable to ensure that the questions and answers he provided were correct.
25. In the event that the Board failed to provide the history and culture test questions and answers to the Appellant the 1st Respondent had the following options:
- i. Make an unless order.
 - ii. Award the Appellant 20 points for Factor 6.
26. Due to the failure of the 1st 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 1st 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.

Conclusion

27. 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.

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

DATED: 26 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