

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

IN THE MATTER OF AN APPLICATION FOR A RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE
UNDER SECTION 37 (1) IMMIGRATION (TRANSITION) ACT (2021 REVISION).

SHERYL ANGELA ROBINSON-SMITH

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 Patsy Knight (“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 decisions of the 1st Respondent dated 16 November 2021 and 22 February 2022 to refuse grant the Appellant's appeal against the decision of the Director of WORC dated 9 June 2021 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 the matter should be remitted to the 1st Respondent to be reconsidered and decided according to the Law; and / or
- ii. The decisions of the 1st Respondent dated 16 November 2021 and 22 February 2022 to refuse to Grant the Appellant's appeal 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 or not to 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 has resided in the Cayman Islands since 31 December 2011.
2. The Appellant is a 53 year old Jamaican national. On 11 November 2020, when the Appellant was 51 years old she applied for Permanent Residence ("PR") and a Residency and Employment Rights Certificate ("RERC") pursuant to Section 37 (1) of the Immigration (Transition) Act, 2021 ("the 2021 Act").

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3. At the time that the Appellant applied for PR and a RERC she had developed a Private Life in the Cayman Islands. The Appellant's private life consists being a property owner, having a wide circle of friends and acquaintances in the Cayman Islands and being a long standing member of the Power of Faith Deliverance Ministry.
4. On 29 January 2021, 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 they 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.

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7. It is not currently known whether or not WORC maintains a similar policy due to the fact that the Caymanian Status and Permanent Residency Board Policies and Procedures 2012 are understood to no longer to be relied upon and have not been replaced.
8. It is the Appellant's position that potentially the questions that she was asked, and which formed part of the test that she sat, were either factually wrong, impossible to get right, were marked incorrectly or were unreasonable.
9. In a decision dated 9 June 2021, the Director of WORC rejected the Appellant's PR/ RERC application. The Appellant was notified that she had been awarded 107.5 points. The Appellant was therefore 2.5 points short of obtaining PR/ RERC.
10. Subsequently, on 1 July 2021, a Notice of Appeal was submitted to the 1st Respondent against the decision on behalf of the Appellant.
11. Once an appeal has been filed with the 1st Respondent, the 1st Respondent 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 5 August 2021 and it contained a number of documents. However, noticeably it was missing the Appellant's History and Cultures Test Questions and Answers.
12. It is also noticeable that the Director of WORC made no reference to considering the Appellant's Constitutional Rights / Human Rights, in particular her Right to a Private and family Life as per Section 9 of the BOR.
13. On 3 September 2021, Anglin Lewis and Associates ("Anglin Lewis") on behalf of the Appellant submitted grounds of appeal. In this document that set out that:

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- i. The decision of the Director of WORC was unreasonable and contrary to natural justice.
 - ii. The Appellant was awarded the wrong points under Factor 5.
14. Reference was also made to the Appellants length of residence in the Cayman Islands, her investment in the Islands and other factors which could be considered as a part of a Section 9 Bill of Rights ("BOR") claim.
 15. Upon considering the Appellant's application, the Grounds of Appeal and the Appeal Statement, the 1st Respondent in a letter dated 16 November 2021, denied the appeal.
 16. On 13 December 2020, Anglin Lewis asked for the Tribunal to reconsider the matter. The weight of their argument was in regards to the points awarded for Factor 5.
 17. In a decision dated 22 February 2022, the 1st Respondent rejected the Appellant's request to reconsider their decision.
 18. It is the Appellant's case that the decision to not award her Permanent Residence breaches her right to a private life and family which she had established in the Cayman Islands. It is averred that this decision is not reasonably justifiable / proportionate in the circumstances.

Wrong in Law

19. It is the Appellant's case that prior to the decision of the Director of WORC and the decision of the 1st Respondent she had established a private life in the Cayman Islands which was therefore protected by Section 9 of the BOR.
20. Furthermore, it is the Appellant's case that the decisions of the 1st Respondent dated 16 November 2021 and 22 February 2022, are wrong in law / not in accordance with the Law in that:

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- 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.

21. It is the Appellant's primary contention that both the Director of WORC and the 1st Appellant are required to consider her right to a private in the Cayman Islands pursuant to Section 9 of the 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 test would render the decisions unlawful or unconstitutional. The Appellant avers that the Director of WORC 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 Director of WORC 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.

22. It is the Appellant's position that the decision to reject her PR application breaches her Section 9 BOR rights due to the fact that she will be required to leave the Cayman Islands, leaving behind, her house, her employment, the Church that she attends and a wide circle of friends as she has no other permission to remain and work and support herself in the Cayman Islands.

23. In the event that Section 37 (3) of the Act or any of the earlier iterations prevent the Director of WORC or the 1st Respondent from carrying out a proportionality / reasonably justifiable assessment it is averred that those laws, and in particular Section 37 (3) of the 2021 Act, 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.

24. Further and in the alternative, it is the Appellant's case that the decision is unreasonable / amounts to a breach of natural justice in that the 1st Respondent:

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- i. Failed to require the 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.

25. It is the Appellant's position that Director of WORC is required to:
 - i. Provide to the Appellant and the 1st Respondent the questions and answers she provided as part of the History and Culture Test;

26. In the current matter, the Director of WORC did not provide the History and Culture Test Questions and answers she sat. The failure to provide the history and culture test questions and answers to the Appellant did prejudice her in that she was unable to ensure that the questions and answers she provided were correct and the questions were factually correct.

27. In the event that the Director of WORC 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.

28. Due to the failure of the 1st Respondent to ensure that the Appellant was not prejudiced by the Director'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.

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Conclusion

29. 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 the law.

DATED: 2 August 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.

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