



COURT OF THE CAYMAN ISLANDS

CAUSE: G OF 2022

OF: Section 23(2) of the Immigration (Transition) Law 2018

AND: IN THE MATTER OF: Section 24 of the Cayman Islands Constitution Order 2009

AND: IN THE MATTER OF SECTION 21 OF THE IMMIGRATION (TRANSITION) ACT (2022 REVISION)

AND: IN THE MATTER OF ORDER 55 RULE 4(2) OF THE GRAND COURT RULES 1995 (REVISED)

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| BETWEEN: | WAYNE ANTHONY MCKARKLE | APPELLANT |
| AND: | DIRECTOR OF WORC | FIRST RESPONDENT |
| AND: | IMMIGRATION APPEALS TRIBUNAL | SECOND RESPONDENT |

NOTICE OF MOTION

TAKE NOTICE THAT the Court at the Law Courts, George Town, Grand Cayman will be moved on at _____ or as soon thereafter as counsel can be heard, by counsel for **THE APPELLANT** for the following relief namely :-

1. An Order setting aside the Decisions of the Director of WORC (**First Respondent**) and the Immigration Appeals Tribunal (**Second Respondent**) as relates to the refusal, of the grant of Permission to Continue Work made by the Appellant; on the ground that the several decisions are erroneous, unlawful, in breach of natural justice and at variance with the regulations, and in clear contravention of Sections **21(8)** and **66** of the **Immigration (Transition) law 2022**.
2. A Declaration that the Respondent whether by his/ her servant, agents or otherwise be restrained and prohibited from any and all actions the objective of which is the detention of the Applicant, and or removal from the Cayman Islands, under any provision of the Border Control Law or the Immigration (Transition) Law (2022 Revision) until an Appeal is determined.

BACKGROUND

1. The Appellant made application to the Director of WORC ("**the First Respondent**") to which this Appeal refers, for Permission to Continue Work, pending the processing of his appeal against the refusal of his application for Permanent Residency, which application was made on October 19 2020; through Cayman Immigration Consultants Services.

2. **THAT** by a letter dated August 31 2021 from the Director of WORC, advised that I had only scored sixty four point five points (64.5) out of the requisite number, therefore the application had been refused. Thereafter, by a letter dated September 20 2021, the Appellant tendered a Notice of Appeal, requesting ...**"a statement showing how the Director of WORC arrived at the respective tabulations under each heading... as well as a full explanation in writing justifying the deduction of two points...made under the heading of Character and Health"...** A copy of this letter is produced as **Exhibit "WM1"**. By a receipt dated September 25 2021, this Notice of Appeal was received by the Second Respondent. A copy of this receipt is produced as **Exhibit "WM2"**.
3. **THAT** the Appellant filed detailed grounds of appeal on January 17 2022, during which period of processing by the Second Respondent, the Appellant's employers applied for and he was granted Permission to Continue Work authorisations; with the most recent issue at the time being due to expire on July 15 2022.
4. **THAT** by a letter dated July 14 2022, the Appellant was advised that ...**"the Tribunal has determined that no grounds had been established...Accordingly, the appeal is unanimously dismissed"...**
5. **THAT** prior to receiving this letter and the expiry of the Appellant's then current PCW, his employers had submitted an application for a further **"six months PCW"**. By a letter dated 1st August 2022, the First Respondent Director of WORC advised that...**"your application for Permission to continue Working...has been refused under the provisions contained in Section66(4) of the Immigration (Transition) Act (2022 Revision)...Please note that the submission and acceptance of an appeal no longer confers the entitlement ...to continue work"...**
6. **THAT** as a consequence of this letter, by a letter dated August 2 2022, the Appellant instructed his lawyers to file a Notice of Appeal of this decision, to the Second Respondent (IAT), challenging the lawfulness of this decision by the First Respondent, in light of the fact that the usual procedure observed, was that upon the exhaustion of all appeals, this event would confer a right to the grant of a **"final ninety days PCW"**; if one had less than ninety days remaining on the PCW they possess at the time of the last "appeal" being exhausted. It is therefore submitted that this blanket and sudden "refusal" was **erroneous, unlawful and at variance with the regulations.**
7. **THAT** the Appellant was subsequently advised by his attorneys, that they had received a phone call from one Ms. Trisha Cuffy of the IAT (**the Second Respondent**) stating that the IAT was not the forum for appeals against refusal of a PCW; and were requesting that the Appellant return to collect the Notice of Appeal that he had left in the drop box'; at the Government Administration Building. The Appellant's attorneys wrote to Ms. Cuffy via email, asking that she send this **instruction/information** in writing. This email sent by the Appellant's attorney, and was dated August 4 2022, and after some two or so days, and his following up on whether a response would be forthcoming, an email was sent to him, dated August 9 2022 and stating...**"Good Evening Mr. Brady, My apologies for not responding to you in a timely manner. We are trying to determine if an appeal under Section 66 (4) is appealable to the Tribunal. Once we have**

confirmation or further details on this aspect, we will provide you with further information"... A copy of this email trail as Exhibit "WM3".

8. **THAT** the Appellants employers are now facing a dilemma of uncertainty, as to how to navigate the fulfilment of a school building contract, and completion of work on the Court Building, situated in the old Scotia Bank Building, and the fact that the Appellant heads up the works in relation to those two projects, on behalf of his employers, with the Cayman Islands Government, and which projects are now nearing completion; and is therefore fraught with "breach of contract" implications for the Appellant and his employers. Copies of the relevant contracts are produced together as Exhibit "WM4"
9. **THAT** the Immigration (Transition Act (2022 Revision) makes it clear in Section 21(1) and (8) that the Immigration Appeals Tribunal is the forum to which an appeal by ..." **any person aggrieved by or dissatisfied with any decision of the Director of WORC...serve notice on the Immigration Appeals Tribunal of the person's intention to appeal such decision"....** which therefore makes the "**non- acceptance**" of the Appellant's Notice of Appeal , by the Second Respondent in the given circumstance. to fall within, the provisions of **subsection 21(8)** and therefore its decision is **erroneous in law, unreasonable, contrary to the principles of natural justice and at variance with the regulations"**...

PROCEDURAL IRREGULARITY

1. **THAT** at all material times, it was open to the First Respondent to communicate its observations to the Appellants employers or the Appellant, but the First Respondent chose to be "silent", and the only indication came in the letter dated August 1 2022. To compound matters, the letter dated July 1 from the Second Respondent, which was never received by the Appellant nor his agent, by which interestingly, the Second Respondent handed down its decision, was just **one day** before the Appellant's then PCW was due to expire and the fact of the First Respondent arbitrarily refusing the final ninety days; followed by the agent of the Second Respondent, informing the Appellant's attorney that, the Second Respondent was not the forum to which his appeal should be directed; was in direct breach of the provisions contained in Section 21 of the Immigration (Transition) Act 2022.
2. **THAT** as in the case of *Mohanty v Medical Board*, where the issue of unreasonableness was considered; it is submitted that a similar scenario is here being played out. What is more, is that it states in **Section 24 of the Cayman Islands Constitution Order 2009**, that decisions of public officials must be "**lawful, rational, proportionate and procedurally fair**". Quite apart from the fact that this is an obligation that applies to all decisions of the First Respondent Director of WORC, it is even more concerning, that the Second Respondent would not accept the Appellant's Notice of Appeal. All authorities, and government entities in particular, including the Second Respondent, are lawfully required to be satisfied, in substance, that the Law and the Constitution are complied with; when decisions affecting persons such as the Appellant are handed down; and it is submitted that the conduct of both the First and Second Respondents were not in accordance with these principles in all the circumstances.

3. **THAT** effectively these decisions of refusal, which demonstrates conduct which is unconscionable and in breach of the rules of natural justice, are evidenced by the fact that in that it offered the Appellant no "opportunity" to make representation or further representation, as is recommended by the court in the Cayman Islands, Court of Appeal's case of **Immigration Board and Governor in Council v Streeter and K Coast Development 1999 CILR**, which case traversed the statement which was made by Lord Green in the **Wednesbury** case, at p229 and 233-234... There he stated..."It is true the discretion must be exercised reasonably...a person entrusted with a discretion must, so to speak direct himself properly...He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he is to consider. If he does not obey these rules he may truly be said, and often is said to be acting unreasonably ... The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely have refused to take into account or neglected to take into account matters which they ought to take into account...it may still be possible to say that although the local authority have kept within the four corners they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere"... Respectfully it is submitted, that the foregoing applies fully to the Appellant's current situation.
4. **THAT** furthermore, it was also said that..."Where an Act of Parliament confers an administrative power [on a statutory body] there is a presumption that it will be exercised in a manner which is fair in all the circumstances...Fairness will very often require that a person who may be adversely affected...will have an opportunity to make representation...before...or after it is taken, with a view to procuring its modification..." (see Lord Mustill in *ex-parte Doody* [1994]1 AC 531 . It is submitted that the decision of the First and Second Respondents, in these given circumstances, to refuse my applications severally, falls squarely within the realms of the foregoing statement of Lord Greene; thus rendering the decision by the First and Second Respondents, as being "unreasonable" and "irrational" in all the circumstances. The obligation to act "reasonable" is also highlighted in the case of *Mohanty v Medical Board* where it was said that the Respondent had given..."**manifestly inappropriate weight**" to a feature of their deliberations, to make it *Wednesbury* "unreasonable", as is respectfully submitted to be the circumstances of this case.
5. **THAT** the several conduct demonstrated by the First and Second Respondents without more amounts to conduct which was **unreasonable**, as defined in Section 21(8)(b) of the Immigration (Transition) Law 2022 ("**the Law**"), and also represents, a fettering of a process, such as was the case in **Streeter**, which conduct rendered the resultant decisions of the Respondents, in this case, to be contrary to the rules of natural justice, and to be in violation of Section 21(8)(c) and the Law, and which conduct placed the Appellant in an unenviable, adverse, and prohibitive position,

disregard of the provisions contained in Section 24 of the Cayman Islands Constitution Order 2009 and by extension; the rules of natural justice.

6. **THAT** in the decided local case of **Hutchinson-Green and Alisha Myriah Racz (2015)(2) CILR 75 (Grand Court)**, the Chief Justice referring to the duty of the court, opined that there would be times where the court in some cases would be more stringent in scrutinizing the decisions made by a body such as this honourable tribunal is. He said..." **It is a duty that will arise depending on the context of the case, so as to place the focus more closely upon the details of the decision making of the authority whose decision is brought into question. In such cases, which will more readily arise in the human rights context, the court should not necessarily be looking for an extreme degree of unreasonableness, capriciousness or absurdity on the part of the decision maker before intervening, something less will do"...**

AS SUCH the Appellant prays that the Decisions imposed by the First and Second Respondent, be set aside, and a Declaration made to order the grant the Appellant's Final ninety days of Permission to Continue Work .



WAYNE ANTHONY MCKARKLE

Dated the 12 day of August 2022

TO: The Clerk of the Court
AND TO: The Chief Immigration Officer
AND TO: The Attorney General

This **Notice of Appeal** was filed by Wayne Anthony Mckarkle of 82 Breezy Way, George Town, Grand Cayman KY1-1109, Cayman Islands, British West Indies.