

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 (2021 REVISION).

EDWIN REYNERI OCHOA SANCHEZ

Appellant

-v-

THE DIRECTOR OF
WORKFORCE OPPORTUNITIES AND RESIDENCY CAYMAN

1st Respondent

-AND-

IMMIGRATION APPEALS TRIBUNAL

2nd Respondent

-and-

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

3rd 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 Edwin Sanchez ("the Appellant") for an order in the following terms:

- i. The decision of the 1st Respondent dated 23 July 2021 was unreasonable and not in accordance with the Law or amounts to a Breach of Section 9 of the Bill of Rights. Therefore the matter would be remitted to the 2nd Respondent to be reconsidered and decided according to the Law; and
- ii. The decisions of the 2nd Respondent dated 17 June 2022 and 18 October 2022 to refuse grant the Appellant's appeal against the decision of the 1st Respondent dated 23 July 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 2nd Respondent to be reconsidered and decided according to the Law; and / or
- iii. The decisions of the 2nd Respondent dated 17 June 2022 and 18 October 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 2nd Respondent to reconsider their decision and reach a decision in accordance with the Law and Natural Justice.
- iv. A declaration that the 1st Respondent, the 2nd 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
- v. Section 37 (3) Immigration (Transition) Act 2021 ("the Act") 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 1st Respondent.

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

1. The Appellant has resided in the Cayman Islands since November 2011.
2. The Appellant is a 40 year old Honduran national. On 6 November 2020, when the Appellant was 38 years old he applied with the help of Anglin Lewis and Associates ("Anglin Lewis") for Permanent Residence ("PR") and a Residency and Employment Rights Certificate ("RERC") pursuant to Section 37 (1) of the Immigration (Transition) Act, 2018 ("the 2018 Act").
3. At the time that the Appellant applied for PR and an RERC, he had developed a private life in the Cayman Islands on the basis of the time that he had spent in the Cayman Islands, his personal connections that he developed in the Cayman Islands, his employment and the involvement with the church.
4. The Appellant had also developed a Family life in the Cayman Islands on the basis of his connections with his sister Dalia Ochoa Sanchez and her children Annique Isabella Whittaker (DOB 2/ 10/2012), Ivy Ayanna Whittaker (DOB 18/3/2015) and Julius Whittaker (11/07/2018) who live in the Cayman Islands and with whom the Appellant resides.
5. At the time that the Appellant submitted his PR application, his sister had not acquired the Right to be Caymanian. However, the Appellant's nephew and nieces were Caymanian. Despite this fact and his clear family life with them, the Immigration Regulations (2019 Revision) does not award points on the basis of having a nephew and niece who are Caymanian.
6. As part of the Appellant's application for PR, he submitted a letter dated 6 November 2020 from Cayman National Bank Ltd which stated:

Edwin Reyneri Ochoa Sanchez maintains the under-mentioned account:

- *One KYD savings account with an average credit balance for the past sixty months in the low three figure range.*
7. The Appellant also stated in the application form that he had CI\$1,650.00 in savings at question 48.

8. When the Applicant submitted his PR application the following documents were missing;
 - His Resume.
 - Up to date Medical.
9. In a letter dated the 8 June 2021, the Caymanian Status and Permanent Residency Board (“the Board”) requested that the Appellant provide an up to date resume and an updated medical form. 14 days was provided to the Appellant to do this. At no point in time did the Board request that the Appellant provide proof of his actual amount of savings. If he had been requested to provide this evidence the Appellant could have done so.
10. At the 15 June 2021, the Appellant would have CI\$1,114.17 in a bank account which would have amounted to 3.3% of the Appellant’s previous 12 months income which was CI\$33,214.67 and would have resulted in him being awarded 9 points for Factor 4a.
11. The letter of 8 June 2021, also informed the Appellant that the History and Culture Test that he was required to sit would take place on 2 July 2021.
12. On 2 July 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.
13. 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)

14. 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.
15. It is not currently known whether or not the 1st Respondent 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.
16. 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.
17. On 30 June 2021, the Appellant's sister (Dalia) was notified that her application for the Right to be Caymanian was successful and that she had thirty days to make the payment of CI\$1,000. On 26 July 2021, Dalia made the payment of CI\$1,000.
18. In a decision dated 23 July 2021, the 1st Respondent rejected the Appellant's PR/ RERC application. The Appellant was notified that he had been awarded 80.5 points. The Appellant was awarded 3 points for Factor 4a (Financial Stability) and zero points for Factor 7 (Possessing

Close Cayman connections). The Appellant was therefore 29.5 points short of obtaining PR/RERC.

19. If the Appellant had been awarded 20 points for having a Caymanian sister and 3 further points for his savings the Appellant would have achieved 103.5 points.
20. It is also noticeable that the 1st Respondent 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 BOR.
21. Subsequently, on 17 August 2021, a Notice of Appeal was submitted to the 1st Respondent against the decision on behalf of the Appellant. As part of this request, the Appellant requested that the History and Culture Test results be disclosed.
22. On 10 September 2021, as a result of information HSM Chambers received in regards to concerns in respect to the History and Culture a freedom of information request was submitted to the Department of WORC. On 14 September 2021, the Department provided to HSM Chambers an email from Susan Dixon, an employee of the Department of WORC and the Manager – Permits, Residency and Status, to an unnamed person dated 13 September 2021.
23. In the email of 13 September 2021, Susan Dixon, stated in response to a query in relation to the History and Culture Test:

I apologize for the delay in a response and advise that we are currently in the process of having the tests revised and take into account the change in government. We understand the concern as to how it could affect applicants' scores and the issue will be corrected as soon as possible.

24. Susan Dixon's email was in response to an anonymous individual who emailed here and another employee of the 1st Respondent who stated that they were aware that "the Permanent Residency test questions have not been updated following the change in government earlier this year". The individual went on to state that they were aware of people focusing on the new

government officials not the old officials and that this difference could affect applicants who are "on the fringe of scoring enough points" and therefore could be a "significant issue".

25. Post 14 September 2021, HSM Chambers Grounds of Appeal to the 2nd Respondent in respects to PR denials included the above email. The first Grounds of Appeal which brought the above email to the attention of the 2nd Respondent was the Grounds of Appeal in regards to PR/054/2021 which was submitted on 14 September 2021. On 19 November 2021, the 2nd Respondent granted PR/054/2021 a *de novo* hearing, although the basis of the grant was not due to PR/054/2021 establishing a Ground of Appeal of appeal pursuant to Factor 6. It should be noted that the 1st Respondent is provided with a copy of the Grounds of Appeal and therefore would have been aware of the submissions made in regards to PR/054/2021. The 1st Respondent had 28 days to respond to those submissions and chose not to do so.
26. Once an appeal has been filed with the 2nd Respondent, the 2nd Respondent notifies 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 the 1st Respondent. This Appeal Statement provides disclosure to the appellant and the 2nd Respondent. The Appeal Statement that the Appellant was provided with was dated 20 September 2021 and it contained a number of documents. However, noticeably it was missing the Appellant's History and Cultures Test Questions and Answers. This is despite the fact that Susan Dixon had acknowledged the fact that there were potential issues in the History and Culture test as of 13 September 2021. Furthermore, at no point has the 1st Respondent nor the Board notified the general public nor those individuals who applied for PR between 14 April 2021 and sometime in September 2021 that there were potential issues with the History and Culture Test that applicants sat.
27. On 18 October 2021, Anglin Lewis, on behalf of the Appellant submitted grounds of appeal.
28. On 17 December 2021, HSM Chambers on behalf of PR/061/2021 and PR/067/2021 requested that the 2nd Respondent reconsider the rejections of their denials to grant a *de novo* hearings to those individuals. In submissions made on 17 December 2021, the 2nd Respondent was provided

with the email of 13 September 2021, from Susan Dixon. On 5 April 2022, the 2nd Respondent agreed to rehear the Appeals of PR/61/2021 and PR/67/2021.

29. Upon considering the Appellant's application, the Grounds of Appeal and the Appeal Statement, the 2nd Respondent in a letter dated 17 June 2022, denied the Appellant's appeal. In their decision, the 2nd Respondent rejected the Appellant's submissions in respect to Factor 5. In respects to the History and Culture Test they stated:

The Tribunal noted if the Appellant were awarded the additional seven point five [7.5] points for this factor, the Appellant would still not attain the necessary points to be granted permanent residency. Therefore to provide copies of the Appellant's History and Culture Test is unwarranted.

30. On 6 July 2022, Anglin Lewis asked for the 2nd Respondent to reconsider the matter. The Appellant's reconsideration request was based upon:
- i. The Appellant's sister was granted the Right to be Caymanian and therefore the Appellant was entitled to 20 points for Factor 7.
 - ii. The 1st Respondent was unreasonable in not deferring the consideration of the application and permitting the Appellant to provide proof that his level of savings were more consistent with declared amount rather than the back letter provided.
31. In a decision dated 18 October 2022, the 2nd Respondent rejected the Appellant's request to reconsider their initial decision.
32. It is the Appellant's case that the decision to not grant his appeal and permit him to provide up to date information is wrong in Law and also breaches his right to a Family and Private life in the Cayman Islands. It is further averred that this decision is not reasonable nor it is it reasonably justifiable / proportionate in the circumstances.

Wrong in Law

Standard of Proof for proceeding to a *de novo* hearing.

33. When Grounds of Appeal are submitted, the 2nd Respondent carries out a *de novo* hearing only if grounds of appeal had been made out. The Court of Appeal in the case of *Chowtee v Immigration Appeals Tribunal* held that “made out” should be interpreted in the following manner:

In other words, there had to be a realistic prima facie case on appeal grounded in at least one of the statutory grounds.

34. In the current matter, it is contended that the Appellant provide a prima facie case to the 2nd Respondent that one of statutory grounds had been made out on the basis that the original 1st Respondent erred in respects to:

- i. Factor 4.
- ii. Factor 5.
- iii. Factor 7.

35. In respects to Factor 4, the Appellant stated that he had a greater savings in his bank account which was apparent from his bank letter. Therefore, like in circumstances, where the Appellant had not provided a resume, the 1st Respondent should have deferred the matter to allow him to produce evidence of his savings.

36. It is respectfully averred that because in the reconsideration request this submission was made, there was a clear difference between the Appellant’s purported savings and the letter, the Appellant had established a prima facie case that the 1st Respondent’s decision was unreasonable (by not requesting the information). Therefore, the 2nd Respondent should have proceeded to a *de novo* hearing in which they could have granted the Appellant PR as he could have satisfied them that he had achieved 110 points.

37. In regards to Factor 5, it is averred that the 1st Respondent was aware of issues in regards to the History and Culture test as late as early as 7 September 2021. The Tribunal were aware of these

issues as early as 14 September 2021 and as late as 17 December 2021. It is averred that a prima facie case had been established by the Appellant when he requested his History and Culture Test questions and answers and these were not provided to him. Therefore the 2nd Respondent erred by not granting a *de novo* hearing.

38. Lastly is contended that the Appellant provided sufficient evidence on a prima facie basis in the reconsideration request of 6 July 2022 which showed that the 1st Respondent's original decision was wrong in Law due to the fact that he had a Caymanian sister and therefore should have been awarded 20 points for Factor 7. By failing to grant the *de novo* hearing the 2nd Respondent erred in Law and the appeal should be granted and a *de novo* hearing ordered.

Unreasonable / Breach of Natural Justice.

Disclosure of the History and Culture Test.

39. As of 7 September 2021, the 1st Respondent was aware that there were issues with the History and Culture Test set after 14 April 2021. Despite, being aware of this fact and knowing that this could affect an applicants' ability to make submissions in regards to Factor 6, the 1st Respondent chose not to publish this information nor include it as part of the appeal statement. It is the Appellant's primary submission that all history and culture tests should be disclosed as part of an appeal statement. However, in circumstances where the 1st Respondent is aware that factually incorrect questions are being asked which could negatively affect applicant the 1st Respondent is under a heightened duty to ensure that the appropriate level of disclosure is made.
40. In the current matter, the Appellant was wholly unaware of the issues in regards to the History and Culture Test due to the failure of the 1st Respondent or the Board to publish these issues and also due to the 1st Respondent failing to disclose the History and Culture Test as part of appeal statement. The Appellant has therefore been prevented from making these submission before the 2nd Respondent.

41. Furthermore, the 2nd Respondent was aware as of, at the very latest of, 5 April 2022, that individuals were being provided tests which were faulty. On 5 April 2022, in the case of PR/061/2021 the 2nd Respondent held:

"It was determined that Grounds of Appeal had been established under Factor 6 – History and Culture Test as the Appellant was denied the opportunity to provide the correct answer and it is of the view that particular test is faulty."

42. The same language was also used in the case of PR/067/2021 (promulgated on the same day) in which the 2nd Respondent concluded that the test that this individual sat was faulty.

43. Despite the 2nd Respondent being aware of at least two individuals who sat tests which were faulty, the 2nd Respondent failed to require the disclosure of the Appellant's test nor did they obtain the tests themselves and make the necessary checks.

44. Equally, despite the 1st Respondent being made aware that the 2nd Respondent had concerns in regards to the History and Culture Test and the veracity of the test, he failed to once again bring this to the attention of applicants / appellants who sat the History and Culture Test between 14 April 2021 and an unknown date in September 2022.

45. It is therefore averred that the failure to disclose the Appellant's History and Culture Test as part of the Appeals process render the process unreasonable and the 2nd Respondent should have granted the appeal and permitted the Appellant to provide and evidence which the 2nd Respondent could have considered *de novo*. It is therefore submitted that the Appeal should be granted and remitted to the 2nd Respondent for a *de novo* hearing.

No Policies / arbitrary treatment.

46. At the current time there are no published policies on the Department of WORC's website in regards to the Permanent Residence regime. It is the Appellant's position that the failure to clearly set out its policies leads to decisions which are arbitrary, disproportionate and inconsistent. The clearest example of this is found in the letter of 8 June 2021. In the

Appellant's original application he failed to disclose a resume which set out his work history and therefore is required for Factor 2, however he did state that he had 9 years experience in that position. Therefore, the Board requested that a resume be provided. It appears that the 1st Respondent may have proceeded on the basis of the self-declaration in the application form.

47. In the same application, the Appellant stated that his level of savings were greater than the bank letter indicated. Despite the lack of evidence to support this fact and the wholly unsatisfactory back letter, no request was made for confirmation of the Appellant's level of savings and the 1st Respondent proceeded on an arbitrary assessment of what a "low three figure" sum meant. Thus preventing the Appellant from achieving extra points.
48. As of the date of submission of these Grounds of Appeal, it is not clear whether a resume was ever provided. If a resume was not provided, it is averred that the 1st Respondent acted in a further inconsistent manner, because he accepted a declaration in regards to the Appellant's experience, and potentially awarded him more points than he disclosed, whereas he did not accept a declaration in regards to his savings.
49. It is therefore averred that because the inconsistent way in which the Department operate and the failure to request the Appellant provide a bank statement which would have clarified his levels of savings means the 1st Respondent acted inconsistently and therefore unreasonably. These actions it is contended amount to unreasonably behaviour and as such are contrary to Section 21(8) of the Act. By failing to grant a de novo hearing the Tribunal erred in law.

Failure to clearly set out the burden and standard of proof.

50. Equally, it is not clear on what standard the 2nd Respondent considered and applied when reaching their decision in regards to the original decision of the 1st Respondent. The Grand Court have previous held in the case of *HS & Ors v IAT* [2019] (1) CILR 5450 that there is a requirement to state the burden and standard of proof clearly and by the 1st Respondent failing to set out the burden and standard of proof clearly in the current matter, they have erred in law and as such the matter should be remitted to the 1st Respondent for a further consideration.

The 2nd Respondent fettering their discretion.

51. It is also contended that the 2nd Respondent fettered their discretion when rejecting the Appellant's submissions in regards to Factor 5. The 2nd Respondent stated:

"the Tribunal noted if the Appellant were awarded the additional seven point five [7.5] points for this factor, the Appellant would still not attain the necessary points to be granted permanent residency. Therefore to provide copies of the Appellant's History and Culture Test is unwarranted".

52. It is averred that this amounts to a fetter of the 2nd Respondent's discretion and also amounts to an error of Law. If the 2nd Respondent concluded that the Appellant was awarded the wrong points for Factor 6 or that that the process followed was unreasonable, then they were required pursuant to Section 22 (4) of the Act to order a *de novo hearing* in which new evidence would be considered in regards to all the Factors. By stating that it was unwarranted to provide the Appellant with copies of his History and Culture test and the setting out their rationale behind this the 2nd Respondent has erred in Law and as such the Appeal should be granted and remitted to them for a *de novo* hearing.

53. Further, it appears that the 2nd Respondent believed that they were only required to disclose the Appellant's History and Culture Test questions and answers if the Appellant would be successful purely on the basis of achieving 110 points based upon Factor 6. By doing so the 2nd Respondent concluded that new evidence in regards to Factor 1-5 and 7-9 was not relevant and therefore fettered their discretion. The Appellant would contended that upon a *de novo* hearing he would achieved the extra points due to him achieving:

- 20 points for having a Caymanian sister.
- 15 points for his level of savings.
- More for Factor 5, i.e. his community involvement.

54. With the provision of "new" evidence, the Appellant would be more than likely to achieve over the 110 point threshold. Therefore the 2nd Respondent fettered their discretion by considering that the *de novo* hearing only related to Factor 6.

Section 9 of the Bill of Rights.

55. It is the Appellant's case that prior to the decision of the 1st Respondent and the decision of the 2nd Respondent he had established both a family life and a private life in the Cayman Islands which was therefore protected by Section 9 of the BOR.
56. Furthermore, it is the Appellant's case that the decisions of the 1st Respondent dated 23 July 2021 and the decision of the 2nd Respondent dated 16 November 2021 and 22 February 2022, are wrong in law / not in accordance with the Law in that:
- i. The decisions, without reasonable justification, breaches the Appellant's right to a private life and family in the Cayman Islands; and
 - ii. The decision makers failed to carry out their obligations to interpret the Act in a way which is consistent with Section 9 of the BOR.
57. It is the Appellant's primary contention that both the 1st Respondent and the 2nd Respondent are required to consider all applicants / appellants right to a family and private life in the Cayman Islands pursuant to Section 9 of the BOR when considering whether or not to grant them 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 1st Respondent and the 2nd 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 applicant / appellant does not satisfy the required score, the decision makers 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.
58. 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, leaving behind, his family, his employment, the Church that he is a minister at and a wide circle of friends as he has no other permission to remain and work and support himself in the Cayman Islands.

59. By the 1st Respondent and the 2nd Respondent failing to considering the Appellant's Section 9 Rights it is contended that the decision breaches is Section 9 Rights and as such the decision is wrong in Law.
60. In the event that Section 37 (3) of the Act or any of the earlier iterations prevent the 1st Respondent and the 2nd 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.

Conclusion

61. Further to the above, it is averred that the 1st Respondent and 2nd 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: 9 November 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.