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 (2021 REVISION).

WAYNE MILTON DAVID BROWN

Appellant

-v-

THE DIRECTOR OF
WORKFORCE OPPORTUNTIES 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 Wayne Brown ("the Appellant") for an order in the following terms:

i. The decision of the 1st Respondent dated 14 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 3 December 2021 and 21 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 3 December 2021 and 21 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 October 2005.

2. The Appellant is a 51 year old Jamaican national. On 22 December 2020, when the Appellant was 49 years old he applied 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 length of 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 World Christian Fellowship and other organisations.

4. On 21 April 2021, the Honourable Mr. Wayne Panton become Premier of the Cayman Islands and his Cabinet were sworn in.

5. On 23 April 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. The test was prepared at a time when the Cayman Islands Government was the PPM and before the Honourable Mr. Wayne Panton became premier.

6. 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)

7. 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.

8. 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.

9. 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.

10. It appears that was at least one question which pertained to either the 2021 Election or the previous Government / Premier. It also appears that the Appellant did not select the "correct" answer and therefore was not awarded any points for his answer.

11. In a decision dated 14 July 2021, the 1st Respondent rejected the Appellant's PR/ RERC application. The Appellant was notified that he had been awarded 107.5 points. The Appellant was therefore 2.5 points short of obtaining PR/ RERC.

12. 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 Life as per Section 9 of the BOR.

13. Subsequently, on 13 August 2021, a Notice of Appeal was submitted to the 2nd Respondent against the decision of the 1st Respondent on behalf of the Appellant. As part of this request, the Appellant requested that the History and Culture Test results be disclosed.

14. 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.

15. 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.

16. 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 when 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*".

17. 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.

18. On 27 September 2021, HSM Chambers, on behalf of the Appellant submitted grounds of appeal.

19. The Grounds of Appeal included submissions in regards to the disclosure of the History and Culture test and the email of Susan Dixon.

20. On 3 December 2021, the 2nd Respondent confirmed the decision of the 1st Respondent. In the decision they made no reference to the submissions made in regards to the History and Culture Test. On the same day, a reconsideration request was made. Submitted with the request was an Affidavit of Nicholas Joseph, relating to a different appeal but in regards to the History and Culture Test.

21. 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.

22. In a decision dated 21 October 2022, the 2nd Respondent rejected the Appellant's request to reconsider their initial decision. In the decision of 21 October 2022, the 2nd Respondent state:

"However, the Tribunal is of the view that given that the H&C test was prepared prior to the General Elections, this would not affect the Appellant's test outcome"

and

"The Tribunal reviewed the results of the test and is satisfied on the review of the questions relating to the 2021 Election Result, the correct answers were provided for the four potential answers, there was a correct answer contained therein the test itself, however the Appellant did not select the correct answer therefore, the test results stand."

23. It would appear that on 16 August 2022, that the 2nd Respondent obtained from the 1st Respondent some, if not all, of the Appellant's History and Culture Test questions and answers yet did not disclose them to the Appellant.

24. 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 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.

Unreasonable Test

25. In the reconsideration decision, the 2nd Respondent's determination is confusing. It would appear to say that:

i. They reviewed the History Test questions and answer the Appellant sat/provided.
ii. The correct answers were provided for four of the potential answers. It is presumed that this should read, "The correct answers were provided for the four questions".
iii. In at least one of the questions "the Appellant did not select the correct answer and therefore the test result stand".

26. The fact that the Respondent failed to disclosure the Appellant's History and Culture Test to him, only compounds what is a confusing decision.

27. It appears that the 2nd Respondent has proceeded on the basis that due to the fact that the Test was drafted at a time when the answers were correct, then the test is correct. This is strongly

disputed. The questions have to be correct as the date they were posed or the test has to make it clear that the questions relate to pre 21 April 2022 facts. If it is the case that the questions could not be answered correctly or it was not made clear they related to pre 21 April 2022, it is averred that the Appellant should not be prejudiced and the 1st Respondent's decision should have been overturned due to the fact that the test was unreasonable.

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

28. 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.

29. In the current matter, it is contended that the Appellant provide a prima facie case to the 2nd Respondent that one of statuary grounds had been made out on the basis that in the original grounds of appeal and the reconsideration email of 3 December 2021, provided proof that the History and Culture test was flawed and that the 1st Respondent had failed to disclose the test and answers the Appellant sat. It is averred that a prima facie case of a breach of natural justice was provided and as such, the appeal should be a granted and a *de novo* hearing ordered.

30. Furthermore, it appears that in the decision of 21 October 2022 the 2nd Respondent, the placed the standard of proof too high when they stated "no proof of a breach of natural justice was put forward". It appears that the 2nd Respondent are requiring Appellants to prove on a balance of probabilities that an statutory grounds has been made out, whereas the test is much lower. It is contended that the Appellant only had to establish a prim facie proof and as such, the 2nd Respondent erred in law by not granting a *de novo* hearing.

31. 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

Unreasonable / Breach of Natural Justice.

Disclosure of the History and Culture Test.

32. As of 7 September 2021, the 1st Respondent was aware that there were issues with the History and Culture Test sat after 21 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.

33. In the current matter, the Appellant was only aware of the issues in regards to the History and Culture Test due to a Freedom of Information request made by HSM Chambers. Despite, the fact that it was known to the 1st Respondent that there was an issue with the tests between April 2021-September 2021, the 1st Respondent kept that information secret from the wider pubic and the appellants in general.

34. While the 2nd Respondent should have congratulated by reviewing the History and Culture Test of the Appellant is not clear whether:

i. They reviewed the whole test;
ii. They only reviewed the questions the Appellant got wrong.

35. The Appellant has still be denied the ability to made submissions in regards to the reasonableness of the questions and whether they were marked correctly. It is therefore still contended that there has been a breach of natural justice, because the Appellant has not been able to advance

the fullest case possible. In particular, he cannot makes submissions in respects to the "reasonableness" of the questions he sat.

36. 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 2ndRespondent should have granted the appeal or disclosed the History and Culture test to the Appellant. It is contended that the procedure which has been followed is unfair and as such the appeal should be granted and remitted back to the 2dn Respondent for a de novo hearing.

Section 9 of the Bill of Rights.

37. 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 a private life in the Cayman Islands which was therefore protected by Section 9 of the BOR.

38. Furthermore, it is the Appellant's case that the decisions of the 1st Respondent dated 14 July 2021 and the decision of the 2nd Respondent dated 3 December 2021 and 21 October 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.

39. 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.

40. 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 employment, his Church and a wide circle of friends as he has no other permission to remain and work and support himself in the Cayman Islands.

41. 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.

42. 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

43. Further to the above, it is averred that the 1st Respondent and 2nd Respondent acted unreasonably, erroneously and unlawfully and in breach of natural justice. Accordingly, the decision of the 1st and 2nd Respondents should be set aside so that the Applicant's application can be reheard in accordance with the law.

DATED: 18 November 2022

HSM Chambers

HSM CHAMBERS
Attorneys for the Applicant

TO: The Clerk of the Court

AND TO: The Director of WORC

AND TO: The Chairman
Immigration Appeals Tribunal
Government Administration Building
Elgin Ave,
George Town
Grand Cayman

AND TO: Attorney General of the Cayman Islands.