

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF 2023

IN THE MATTER OF SECTION 37 (4) OF THE IMMIGRATION (TRANSITION) ACT (2022 REVISION)

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 (2022 REVISION).

TODD SHIPSTER

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

1<sup>st</sup> Respondent

AND

DIRECTOR OF WORK

2<sup>nd</sup> Respondent

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NOTICE OF  
ORIGINATING MOTION

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TAKE NOTICE that the Grand Court at the Law Courts, George Town, Grand Cayman will be moved on the \_\_\_\_\_ day of \_\_\_\_\_ 2023 at \_\_\_\_\_ a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of the Appellant for an order in the following terms:

- i. The decision of the 1<sup>st</sup> Respondent dated 30 November 2023 was unreasonable and not in accordance with the Law. Therefore, the matter should be remitted to the 1<sup>st</sup> Respondent to be reconsidered and decided according to the Law; and / or
- ii. A declaration by the 1<sup>st</sup> Respondent that it has the power to consider the matter having considered section 52 (a) and (b) of the Immigration (Transition) Act (2022 Revision) ("Act").

And for an order that the costs, of and incidental, to this Application be paid by the Respondents.

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

1. The Appellant has resided in the Cayman Islands since 6 June 2013. Between 6 June 2013 and 6 June 2022, work permits were applied for and granted in regards to the Appellant.
2. In none of the work permits granted to the Appellant between 6 June 2013 and 6 March 2016, was the Appellant notified that he was not permitted to leave the Cayman Islands for more than 6 months or that a 6 months absence from the Cayman Islands would amount to a break in residence.
3. Between the 6 March 2016 and 4 November 2016, the Appellant and his, then, wife were absent from the Cayman Islands. The reason for this absence was due to being gifted a paid vacation for their wedding and the fact that the Appellant had to return to South Africa to renew his passport.
4. Despite being absent for six months, the following was and is contended as correct:
  - The Appellant intended on returning to the Islands at the end of his holiday, shown by the fact that he maintained his rented apartment within the Islands.
  - The Appellant maintained contact with his employers about his job and returning to the Islands at the end of his trip.
  - The Appellant never intended to break from his residence.

- It was always the Appellants intention to return to the Islands and continue residing here.
5. On the 10 December 2021, the Appellant applied for Permanent Residence and a Residency and Employment Rights Certificate (“RERC”) following which updates were provided for to the 2<sup>nd</sup> Respondent.
  6. On 22 March 2023, the Appellant was asked, to explain, by an administrator from the Department of WORC, his absence from the Cayman Islands between 6 March 2016 and 4 November 2016.
  7. On the 5 April 2023, HSM Chambers on behalf of the Appellant, informed WORC that:
    - i. The Appellant had been gifted a wedding gift of an extended paid vacation from his family;
    - ii. His family had organized a celebration for him and his wife upon their visit to South Africa; and
    - iii. The Appellant had informed the Canadian Authorities in March 2016, that he had intended to visit Canada for 3 months before returning to his place of residence in the Islands.
  8. On 18 April 2023, the 2<sup>nd</sup> Respondent refused the Appellant’s application for an RERC, stating that, under section 37(1) of the Act, he had no jurisdiction as the Appellant did not meet the residence requirement of at least 8 years. The 2<sup>nd</sup> Respondent stated that;

*The Director has no jurisdiction to consider the application as it was noted that the applicant does not meet the legal and ordinary residence requirement of at least 8 years as there was a break in stay during the period 6 March 2016 to 4 November 2016. Explanation for break in stay noted from applicant's representative. Upon review, the period identified is a break in his residence and does not fall in the categories identified within the definition as being reasons why one's break would not be considered.*

9. On 26 April 2023, the Appellant appealed the decision to reject his application to the 1<sup>st</sup> Respondent.
10. In an Appeal Statement dated 5 May 2023, the rationale for the 2<sup>nd</sup> Respondent's decision was stated as being:

*"Upon review, the Director considered that according to the definition of legal and ordinary residence, the period of vacation spent abroad (just under 8 months) did not count as residence but rather raised the presumption that there was a break in residence".*

The Appellant appealed the above decision on the basis that;

- i. The Director had misdirected himself and interpreted Section 2 of the Act incorrectly.
- ii. The Director's decision was unreasonable.
- iv. The Director's decision amounted to a breach of natural justice.

#### **Error of Law by the 2<sup>nd</sup> Respondent**

11. When assessing whether or not an individual has broken residence it is averred that the following is a correct interpretation of the Act and in particular Section 2.
  - i. Has the applicant been outside of the Cayman Islands for more than 6 months?
  - ii. If yes, has the explanation which the applicant provided rebutted the presumption that they had not broken residence?
12. It is the Appellant's case that it is not clear whether the 2<sup>nd</sup> Respondent followed a two-stage test, furthermore it appears that the 2<sup>nd</sup> Respondent fettered his discretion by limiting his consideration to only the first limb as set out above. It is therefore contended that both acts would amount to an error of Law and the decision should therefore be quashed and a *de novo* hearing carried out.

13. As quoted above in the Appeal Statement, the rationale for the rejection of the Appellant's application states:

*"Upon review, the Director considered that according to the definition of legal and ordinary residence, the period of vacation spent abroad (just under 8 months) did not count as residence but rather raised the presumption that there was a break in residence".*

14. If the above was the only consideration, it is averred that the 2<sup>nd</sup> Respondent erred in Law because he is required to carry out the second stage consideration as set out above in paragraph 11. It appears that, while the 2<sup>nd</sup> Respondent recognized that there was a presumption of a break in residence, he did not recognize that this presumption could be rebutted and therefore he failed to move onto the second stage to consider whether or not the presumption had been rebutted. It is therefore contended that the 2<sup>nd</sup> Respondent erred in law.

15. Furthermore, it is respectfully averred that the rationale in the Appeal Statement needed also to be seen in light of the decision of 18 April 2023 which stated:

*"Upon review, the period identified is a break in his residence and does not fall in the categories identified within the definition as being reasons why one's break would not be considered".*

16. When the rationale is seen in light of the above quote, it appears that the 2<sup>nd</sup> Respondent had erred in the following way:

- i. Proceeded on the basis that there were a limited number of categories of explanation which were able to rebut the presumption of a breach in residence.
- ii. As a result, failed to consider the explanation provided.

17. The relevant part of Section 2 of the Act states:

*"legal and ordinary residence" means a person's uninterrupted voluntary physical presence in the Islands for a period of time without legal impediment (other than a tourist visitor or transit*

*passenger) during which period the Islands are regarded as that person's normal place of abode for the time being, except that —*

*(a) absences abroad of six consecutive months' duration or less for, inter alia, purposes of education, health, vacation or business during such period shall count as residence in the Islands;*

*(b) absences abroad of more than six consecutive months but less than one year shall raise the presumption that there has been a break in residence; and*

18. It is not clear what categories the 2<sup>nd</sup> Respondent was referencing in the decision letter because (b) is silent to a limited number of categories.
19. The 2<sup>nd</sup> Respondent's position is concerning for a variety of reasons:
  - i. The 2<sup>nd</sup> Respondent seems to be under the misapprehension that there are categories of absences which would be "valid absences" if they extended over 6 months. This is not the case. Each absence is fact specific and there are no categories of "approved absences".
  - ii. The Department has in the past accepted using unwritten or undisclosed policies.
20. In the event that the 2<sup>nd</sup> Respondent were relying upon an unwritten or undisclosed policy it is contended that the decision is unreasonable and amounts to an error of law.
21. If it is the case that the 2<sup>nd</sup> Respondent was not relying on any policies whether unwritten, disclosed or not and gone on to consider the 2<sup>nd</sup> limb as set out in paragraph 11, it is contended that this would mean the 2<sup>nd</sup> Respondent was applying a wholly subjective consideration to whether or not the Appellant has rebutted the presumption contained within Section 2 of the Act. It is therefore contended that this would mean that the decision of the 2<sup>nd</sup> Respondent was unreasonable.
22. Finally, due to the truncated and limited nature of the decision it is averred that:
  - i. The decision does not meet the minimum standards guaranteed by the Bill of Rights.

- ii. The decision does not enable the Appellant to understand why the matter was decided and how any issues of law or fact were resolved.
  - iii. The decision gives rise to a substantial doubt as to whether the 2<sup>nd</sup> Respondent has misunderstood the law, or failed to reach a rational decision.
23. On the basis of the above it is contended that the 2<sup>nd</sup> Respondent's decision amounts to an error of law.

#### **Error of Law by the 1<sup>st</sup> Respondent**

24. On the 27 April 2023, the Appellant submitted Grounds of Appeal to the 1<sup>st</sup> Respondent in similar terms to those set out in paragraphs 11-23 above.
25. On the 30 November 2023, the 1<sup>st</sup> Respondent, having reviewed the Applicant's appeal of the 2<sup>nd</sup> Respondent's decision, upheld the original decision. In the decision, the 1<sup>st</sup> Respondent stated:
- i. The 2<sup>nd</sup> Respondent did not have the power to engage in consideration of Section 9 of the Bill of Rights.
  - ii. The Director of WORC did not err in its decision or was not unreasonable, erroneous or that the decision was not contrary to the principles of natural justice or at variance with the Regulations.
  - iii. The Tribunal did not have the power to consider the appeal after considering Section 52 of the Act.
26. It is respectfully contended that the 1<sup>st</sup> Respondent erred in Law in that they should have recognized the errors in the 2<sup>nd</sup> Respondent's decision as set out in the Grounds of Appeal and therefore granted the appeal and held that the Appellant had not broken residence in the Cayman Islands due to his absence as set out in paragraph 3 above.
27. It is further contended that the 1<sup>st</sup> Respondent erred in the following ways:

- i. Misapplying Section 9 of the Bill of Rights. It is not accepted that Section 9 of the Bill of Rights plays no consideration in the Appellant's application for PR. Because of the fact that the Appellant's right to a private light is affected by the failure to grant him PR, there should enhanced scrutiny applied by the 1<sup>st</sup> Respondent to decisions of the 2<sup>nd</sup> Respondent. By failing to apply that enhanced scrutiny standard, the 1<sup>st</sup> Respondent has erred in law and acted unreasonably.
- ii. The 2<sup>nd</sup> Respondent have seemingly misunderstood Section 52 of the Act. In particular the 2<sup>nd</sup> Respondent has failed to consider Section 52(b) of the Act.

28. Section 52(b) states:

*nothing in this subsection shall have effect so as to preclude any person from appealing to the Immigration Appeals Tribunal under section 21 on the grounds that the Board or the Director of WORC came to the wrong decision on the question of whether during any material period that person was or was not legally and ordinarily resident in the Islands.*

29. It appears that the 2<sup>nd</sup> Respondent did not accept that they even had jurisdiction to hear the appeal as they stated:

*"The Tribunal unanimously determined that it has no power to consider this matter."*

30. The paragraph preceding the above quote referenced Section 52 of the Act and therefore the decision has all the appearances of the 1<sup>st</sup> Respondent misapplying Section 52 of the Act.

31. Lastly, the 1<sup>st</sup> Respondent has erred in the same way as the 2<sup>nd</sup> Respondent did in that the truncated decision does not address many of the grounds of appeal, but also:

- i. The decision does not enable the Appellant to understand why the matter was decided and how any issues of law or fact were resolved.
- ii. The decision gives rise to a substantial doubt as to whether the 2<sup>nd</sup> Respondent has misunderstood the law, or failed to reach a rational decision.

32. It is therefore averred that failure to provide an adequate decision also amounts to an error of Law and as such should the decision should be quashed.

**Conclusion**

33. It is therefore contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent erred in Law and acted unreasonably. Accordingly, the decision of both Respondents should be set aside and the orders be made so that the Appellant's application can be reheard in accordance with the Law.

DATED: 12 December 2023

HSM CHAMBERS

**HSM CHAMBERS**

- 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.