GRAND COURT OF THE CAYMAN ISLANDS
IVISION

CAUSE NO: OF 2023

IN THE MATTER OF SECTION 23(2) OF THE IMMIGRATION (TRANSITION) ACT (2022 REVISION)

AND

IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES

AND

IN THE MATTER OF SECTION 23 OF THE CAYMAN ISLANDS CONSTITUTION ORDER 2009

AND

IN THE MATTER OF AN APPLICATION FOR A RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE PURSUANT TO SECTION 37 (1) IMMIGRATION (TRANSITION) ACT (2022 REVISION).

BETWEEN	**AMOY SUBBRINA YANKANA**	**APPELLANT**
AND	**IMMIGRATION APPEALS TRIBUNAL**	**1ST RESPONDENT**
AND	**CAYMANIAN STATUS & PERMANENT RESIDENCY BOARD**	**2ND RESPONDENT**

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Grand Court at the Law Courts, George Town, Grand Cayman will be moved on 2024 at am/pm or as soon thereafter as counsel can be heard, by counsel on behalf of Amoy Subrina Yankana (the "**Appellant**") for an order in the following terms:

THIS NOTICE OF ORIGINATING MOTION was **FILED** by HARVEL GRANT of P.O. Box 23 Bodden Town, KY1-1601 Grand Cayman, Cayman Islands, Attorney-at-law for the Applicant whose address for service is that of her said Attorney-at-law.

1. The Decision of the 1st Respondent dated 14 March 2024 was unreasonable and not in accordance with the Law. Therefore the matter should be remitted to the 1st Respondent to be reconsidered and decided according to the Law; and/or

2. The Decision of the 1st Respondent dated 14 March 2024 amounts to a breach of the Appellant's Section 9 rights as protected by the Bill of Rights.

3. The judgment of the 1st Respondent that no grounds had been made out, thus the Decision of the 2nd Respondent was not unreasonable or erroneous is an error of Law.

4. The erred Judgment by the 1st and the 2nd Respondent implying that because the Appellant had not declared her daughter Gabrel Behanka Reynolds (the "**Child**") on her original application that she could not now apply to add the Child as a dependant on her Residency Certificate ("**RERC**").

5. 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:

6. The Appellant is a Jamaican national whose date of birth is 6 May 1989.

7. The Appellant has been resident in the Cayman Islands since 2009.

8. The Appellant has been employed as a domestic helper for over 13 years and has been employed by Marion Ricketts for the past 13 years.

9. The Appellant has very strong Caymanian connections, as her mother has been residing in the Cayman Islands for over 20 years and is a Caymanian. In addition, the Appellant has siblings who are Caymanian living in the Cayman Islands.

10. The Appellant was granted a RERC pursuant to s. 30 of the Immigration Act (2015 Revision) on 21 December 2020.

11. On 22 September 2021, the Appellant submitted an application for the variation of her RERC to add the Child to her RERC (the "**Variation Application**").

12. By letter dated 17 March 2022, the 2nd Respondent deferred the Variation Application as it sought additional information in the form of bank records from the Appellant's mother, who wrote in support of the Variation Application.

13. On 5 April 2022, the Appellant's Attorneys wrote to the 2nd Respondent enclosing a copy of the requested financial information.

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14. On 15 September 2022, the 2nd Respondent wrote to the Appellant indicating that the Variation Application had been refused on the basis that the Appellant had failed and/or neglected to disclose that the Appellant had a dependant pursuant to s. 37(8) of the Act.

15. s. 37(8) of the Act states as follows:

> *"When applying under this section for the right to reside permanently in the Islands the applicant shall provide full particulars of that person's spouse or civil partner and all dependants whether or not it is intended that they would accompany the applicant if the applicant's application is successful; and the failure to provide such particulars in the application is an offence."*

16. The Decision further stated that the Variation Application was refused as a result of the failure by the Appellant to disclose a dependant on the Appellant's RERC application.

17. In a letter dated 19 October 2023, the 1st Respondent refused the Appellant's appeal agreeing with the Decision of the 2nd Respondent.

Erroneous in law

18. We submit that the Decision of the 1st Respondent and 2nd Respondent to refuse the Appellant's Variation Application under s. 37(8) was erroneous in law.

19. Section 37(8) clearly provides that, "*the failure to disclose such particulars in the application is an offence*", but this Section doesn't provide for an automatic refusal of a future application to add a dependant.

20. Section 37 (8) provides for no penalty for the offence under this Section, and therefore Section 80 of the Act applies. Section 80 sets out as follows:

> *"A person who commits an offence for which no penalty is liable-*
> *a) on summary conviction, in respect of a first offence, to a fine of five thousand dollars and to imprisonment for one year; or,*
> *b) on summary conviction, in respect of a second or subsequent offence, to a fine of ten thousand dollars and to imprisonment for two years,*
>
> *and where any such offence is a continuing offence, the person guilty of the offence shall, in addition to any punishment provided by this section, be liable to a fine of five hundred dollars in respect of each day during which the offence continues."*

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21. Section 80 only provides for fine and imprisonment and there is no automatic right to refuse or any penalty to refuse a subsequent application.

22. If it was the intention of the Act for such failure to act as an automatic refusal of any future application to add such dependant, then the Act would have made this clear.

23. We note that Section 37(12) of the Act clearly provides the consequences of a failure (albeit in this case a declaration). Here the Act clearly states:

> "*The holder's failure to provide such declaration is both an offence and a ground for revocation of the Certificate*".

Also, we note from Section 37(7) of the Act, a failure to report (albeit is change in job circumstances), such "*failure to do so is an offence and shall render both the holder and the holder's employer, both previous and current liable*".

24. Similarly in Section 37(19) a failure to report a death of an RERC holder "*is an offence for which the holder and the holder's spouse or civil partner shall be liable*".

25. We note from the above that the Act is clear on the consequences of a failure and there is nothing in Section 37(8) that stipulates that a failure to mention or include a dependant in the original Permanent Residency application will result in an automatic refusal to add the dependant after the grant of an RERC.

26. The Appellant accepts that the failure to include a dependant will restrict the dependant on reaching the age of 18 to apply independently for an RERC pursuant to Section 39 of the Act which states:

> *"A dependant of a Residency and Employment Rights Certificate holder, having attained the age of eighteen years, may apply to the Board or the Director of WORC for a Residency and Employment Rights Certificate and shall, be granted the right to permanently reside in the Islands if —*
> *(a)* ***the dependant was declared in the original application for the Certificate*** (emphasis added);
> *(b) the dependant is found to be of good character and conduct;*
> *(c) the dependant has been legally and ordinarily resident in the Islands for at least seven years immediately prior to the application; and*
> *(d) the holder of the Residency and Employment Rights Certificate continues to possess it or has become a Caymanian."*

27. In the Appellant's Variation Application, s. 39(1) is not applicable, being that the application is not being made by the dependant.

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28. We note from the checklist provided with the Variation of Permanent Residence and Residency & Employment Rights Certificate to add/remove dependants (RV37a) (the "**Variation Form**") that the requirements to add a dependant under the age of 18 are as follows:

28.1. Certified copy of birth certificate.

28.2. Employment Letter from both parents including hours worked per week, monthly income and other benefits received.

29. Question 17 of the Variation Form requests information as to whether the child(ren) being added at this time was declared on the original RERC application form.

30. Question 17 provides the option to answer yes or no, and if the answer is no, an explanation is required. The Appellant correctly answered question 17 'no' and provided an explanation why.

31. The Variation Form also included a Monthly Income and Expense Report which the Appellant completed and which showed that the Appellant has the financial means to care for the Child.

32. The Appellant fully complied and correctly answered all the questions on the Variation Form.

The unreasonableness of the Decision

33. In asserting the unreasonableness of the 1st and 2nd Respondent's determination to refuse to grant the Variation Application, the Appellant relies on the case of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* which provides that an administrative decision may be *Wednesbury* unreasonable if members of the administrative body:

> *"{1} ...have taken into account matters which they ought not to take into account, or {2}, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. {3} Once that question is answered in favour of [the administrative body], it may still be possible to say that, although [the members of the administrative body] have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it..."*

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34. The sequence of events as set out in the 2nd Respondent's Appeal Statement, while accurate, does not highlight the fact that in its deferral letter dated 22 March 2022 (the "**Deferral Letter**"), the 2nd Respondent did not indicate that the issue of the non-disclosure of a dependant was an issue. As such, it was reasonable for the Appellant to assume that the Variation Application would have been approved or the non-disclosure of the Child was not a factor under consideration. The 2nd Respondent by the Deferral Letter implied that the only outstanding issue was how the Child would be financially supported with the assistance of the Appellant's mother.

35. Prior to the Decision to refuse the Appellant's Variation Application, the 2nd Respondent had been notified and provided with proof that the Appellant had financial resources to care for the Child and that the issue of how the Child would be maintained, insofar as no reliance being placed on Government resources had been made out.

36. Accordingly, on the basis that the only issue that was relevant at the time that the 2nd Respondent was dealing with the Variation Application was in relation to the matter of financial arrangements, we submit that the Variation Application should have been approved as it was reasonable to assume from the Deferral Letter that the issue relating to the non-disclosure of a dependent on an RERC application was unintentional and therefore now that a Variation Application was being made, that the Appellant should now be punished for an issue that the 2nd Respondent by virtue of the Deferral Letter issued was of no concern to them at the time that the Variation Application was being considered.

37. The Appellant is concerned with the second form of unreasonableness, specifically, that the 1st and 2nd Respondent have refused to take into account or neglected to take into account matters which ought to have been taken into account thereby reaching a conclusion so unreasonable that no reasonable authority could ever have come to it. By refusing to take into account the various facts detailed above, it is submitted that the 1st and 2nd Respondent's determination is unreasonable, erroneous in law and contrary to the principles of natural justice.

Breach of Natural Justice

38. It is further averred that because of the truncated nature of the Decision above, the Decision is not sufficient and amounts to an error of law/breach of natural justice.

39. In the case of National Roads Authority v A. Bodden, Thompson and Wright [2014(2)] CILR, 47 the Court held that:

> *"The RAC had not given sufficient reasons for its decision. The requirements of the 2009 Constitution, Schedule 2, s.19—as well as the right to appeal the RAC's decision on a question of law under the Roads Law, Second Schedule, s.8(1)(b)—*

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required the RAC to meet certain standards when giving its decision. It therefore had to give the reasons for its decision in sufficient detail that any person reading them would have no substantial doubt as to whether it had made an error in law. It was not necessary, however, for the RAC to give reasons for every material consideration, provided that it referred to the main issues in dispute. As its written reasons had been limited to a summary of its evidence and conclusions, its reasons could not be regarded as sufficient and its decision would be set aside and remitted for a fresh hearing (paras. 24–27)".

40. Justice Henderson at paragraphs 25-27 of the NRA Judgment states that:

25 "The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough simply to state a result on the principle issues; the parties are entitled to know the reasoning and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this fashion by the House of Lords in South Bucks. D.C. v. Porter (No. 2) (3) ([2004] 1 W.L.R. 1953, at para. 35):

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration . . . A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

26 Regrettably, the abbreviated nature of the decision renders impossible any review by me of the implicit finding that the requisite elements of a prescriptive easement had been established. The decision presents no legal analysis at all—it simply states a conclusion. Moreover, it contains no findings of fact which would enable this court to determine that the RAC's conclusion about a prescriptive easement was within the realm of reasonableness.

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27 The failure of a tribunal to provide adequate reasons for a decision is itself a question of law. Although the NRA has not set out this ground in its notice of appeal, I am satisfied that consideration of the adequacy of the reasons on the appeal does not take the claimants by surprise. They have no doubt anticipated much of what has been said during argument and have not suggested that they are prejudiced by the attack upon the adequacy of the reasons."

41. The 2nd Respondent's reasons are wholly deficient in that they do not make clear:

41.1. Why they requested additional information in the Deferral Letter if on the face of the Variation Application S. 37(8) would have been applicable and would have automatically led to a refusal; and

41.2. Why it was then necessary to refuse the Variation Application on the basis that the Appellant was in breach of s. 37(8).

42. As the 2nd Respondent did none of the above, it is averred that the Decision is defective as there must be a substantial doubt as to whether or not the 2nd Respondent:

42.1. Directed itself correctly;

42.2. Applied the burden and standard of proof correctly; and

42.3. Correctly identified the issues.

43. The Appellant raised the above concerns in her reconsideration application to the 1st Respondent. The 1st Respondent in its Decision in the letter dated 14 March 2024 concluded that:

> *"The Tribunal found no error in law, natural justice or variance with the Regulations or any unreasonableness on its part and its decision recorded in its letter dated 19th October 2023 is upheld."*

44. The Decision of the 1st Respondent was so short and unclear as to whether it considered the additional evidence provided in the Appellant's reconsideration application, it is contended that the Appellant has been substantially prejudiced due to the limited nature of the 1st Respondent's Decision. The Appellant cannot make a submission to the burden or standards of proof, whether the 1st Respondent erred in law and whether the 1st Respondent miscarried itself.

45. It is therefore contended that the Decision should be quashed and a de novo hearing ordered.

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The Cayman Islands Constitution Order 2009 ("Constitution")

46. It is further submitted by the Appellant that the 1st and 2nd Respondent's Decision infringes upon the Appellant's rights and freedoms enshrined under the Constitution.

47. The refusal of the Appellant's Variation Application on 15 September 2022 ensured that the Appellant could no longer continue to have her Child here with her in the Cayman Islands and that her right to a private and family life was now at risk.

48. Article 9 addresses the Appellant's qualified right to a private and family life in the Cayman Islands and specifically, Article 9(1) provides that the Government shall respect every person's private and family life, his or her home and his or her correspondence.

49. Article 19 provides for the fact that all decisions and acts of public officials must be lawful, irrational, proportionate and procedurally fair and that every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.

50. The Appellant is an RERC holder, a British Overseas Territories Citizen, and with 14 years of legal and ordinary residency on Island. The Appellant's mother is Caymanian and the Appellant has 4 siblings who are also Caymanians. The Appellant's strong claim to a private and family life in the Cayman Islands is unarguable.

51. The Child has been abused while residing outside the Islands and there is no reliable person to care for the Child outside of the Cayman Islands. The Appellant is the sole parent of the Child and the Child is her only child. The Child is also enrolled in private school and is scheduled to do final external examinations in less than 3 months. Should the Child be required to leave the Cayman Islands would result in her facing hardship.

52. It is noted that the Decision fails to mention the fact that the Appellant has made her home in the Cayman Islands for a substantial length of time nor does it state whether the Appellant's rights and freedoms enshrined under Article 9 were considered prior to the Decision being made.

53. The Decision does not indicate the strong family ties that the Appellant has in the Cayman Islands.

54. It is the Appellant's case that it is incumbent upon the 1st and 2nd Respondent to consider not only whether the Appellant satisfies the relevant Act but also the Appellant's rights and freedoms enshrined under this Article. It is only if it is deemed to be reasonably justifiable to adversely interfere with the Appellant's private and/or family life, that the Appellant's Variation Application can be rejected in its entirety.

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55. In light of the notable absence of any contentions being offered by the 1st and 2nd Respondent that the Decision is proportionate to any of the legitimate aims set out in Article 9(3) or any indication that the 1st and 2nd Respondent deem the Decision to be lawful, rational, proportionate or procedurally fair in accordance with Article 19 to interfere with the Appellant's Article 9 rights, it is arguable that the Decision could amount to an unlawful interference with the Appellant's qualified right to a private and family life in the Cayman Islands and to an unlawful breach of the Appellant's enshrined rights and freedoms under the Constitution.

56. Article 26 provides that any person may apply to the Grand Court to claim that the government has breached or threatened his rights or freedoms under the Bill of Rights, Freedoms and Responsibilities ("**BOR**").

57. The Appellant is aware of the recent decision of the CICA (Civil) Appeal 17 of 2022-Joey Buray and Leon D'Souza v IAT and Attorney General where the court emphasizes that consideration of BOR is necessary where a "particularly *acute impact or hardship which might flow as a result of the refusal*" The is the position the Child faces as a result of the 1st and 2nd Respondent's refusal of the Variation Application.

58. Public officials cannot act contrary to the constitution and the BOR unless required to do so or authorised by legislation and in that case, the relevant legislation must be declared incompatible with the BOR.

European Convention on Human Rights ("ECHR")

59. In the alternative, and for the same reasons, it is submitted that the Decision is not proportionate to any of the legitimate aims set out in Article 8(2) of the ECHR and thus amounts to an unlawful breach of Article 8(1) of the ECHR.

Conclusion

60. It is therefore contended that the 1st and 2nd Respondent erred in law and acted unreasonably. Accordingly, the decision of the 1st and 2nd Respondent should be set aside and the orders be made so that the Appellant's Variation Application can be reheard in accordance with the Act.

DATED the 10th day of April 2024

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HARVEL GRANT

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ATTORNEY-AT-LAW FOR THE APPLICANT

TO: The Clerk of the Court

AND TO: The Chairman
Immigration Appeals Tribunal

AND TO: The Attorney General's Chambers

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