



COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF 2024

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

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 OF THE IMMIGRATION (TRANSITION) ACT (2022 REVISION).

NORNA ZANOLA JOHNSON HURLSTON

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

1st Respondent

AND

THE DIRECTOR OF WORC

2nd 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 _____ 2024 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 1st Respondent dated 24 May 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
- ii. The decision of the 1st Respondent dated 24 May 2024 to refuse to grant the Appellant’s appeal from the decision of the 2nd Respondent is unreasonable amounts to a breach of natural justice

and therefore the matter be remitted to the 1st respondent to reconsider their decision and reach a decision in accordance with the Law and Natural Justice; or

- iii. A declaration that the 1st Respondent and any decision maker, when considering the application for Permanent Residence must consider an applicant's right to family life and private life pursuant to Section 9 of the Bill Of rights when considering whether not to grant or reject an application for Permanent Residence.

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 2013. The Appellant currently lives with her Caymanian son, aged 12. They live together in George Town, Grand Cayman.
2. The Appellant's Caymanian son is currently a student at John Gray High School. The Appellant is the primary carer of her son and if she was to leave the Cayman Islands, her son would have to accompany her.
3. The Appellant is a 53 year old Honduran national, who, when she applied for Permanent Residence and a Residency and Employment Rights Certificate ("RERC") pursuant to Section 37(1) of the Immigration (Transition) Act (2022 Revision) ("the Act"), was 51 years old. The Appellant's application was submitted in June 2022.
4. On 30 March 2023, prior to the decision of the Director to reject the Appellant's application for an RERC, the Court of Appeal ("COA") of the Cayman Islands declared Section 37(3) of the Act incompatible with Section 9 of the BOR. The decision was subsequently appealed to the Judicial Committee of the Privy Council.
5. In his decision dated 18 September 2023, the Director rejected the Appellant's application for an RERC. This is despite the decision of the COA and pending appeal. In the rejection letter, the Appellant was notified that:

- In considering an application for permanent residence under subsection (1), the Director of WORC upon applying the criteria set out in the points system shall grant permanent residence to all applicants attaining one hundred and ten points or more. In this particular case, the total score attained is 103.00 points.
6. Subsequently a notice of appeal was submitted against the decision on behalf of the Appellant.
 7. On the 9 November 2023, WORC provided the Appellant an Appeal Bundle. This Bundle contained the Appellant's original application and a number of documents.
 8. It was noticeable that the Director made no reference of considering the Appellant's Constitutional Rights / Human Rights or even the implications of the declaration of incompatibility made by the COA, nor was there any reference or seemingly any consideration made to "staying" the appeal pending the decision of the Privy Council.
 9. Grounds of Appeal were submitted on the 1 February 2024. The Appellant sought to overturn the decision of the Director on the basis that the decision was:
 - Unreasonable.
 - Erroneous in Law.
 10. On 24 May 2024 the 1st Respondent concluded that –

The Tribunal determined that it must apply the points system as prescribed in the primary legislations (Immigration (Transition) Act and Schedule 2 of the Immigration Regulations) and that it does not have the discretion or the ability to consider Section 9 of the Cayman Islands Constitution Order to weigh various factors separately.

The Tribunal noted that arguments regarding the incompatibility of the points system and the Bill of Rights cannot be determined by the Tribunal.

Therefore, the Tribunal determined, having considered the legislations, that it does not have the power to engage consideration of Section 9 of the Bill of Rights in this matter.

The Tribunal determined that no grounds had been made, in assessing the information that was before the Director of WORC the decision to refuse the grant of permanent residence was not unreasonable, erroneous, contrary to the principles of natural justice or at variance with the regulations.

11. It is the Appellant's case that the decision not to grant the Appeal not only breaches her right to a family life, which she has established in the Cayman Islands with her Caymanian child, but also her right to a private life. It is averred that this decision is not reasonably justifiable proportionate in the circumstances.

Wrong in Law

12. It is the Appellant's case that, prior to the decision of the Director and the decision of the 1st Respondent, she had established a family and private life in the Cayman Islands.
13. Furthermore, it is the Appellant's case that the decision of the 1st Respondent dated 24 May 2024 is wrong in Law / not in accordance with the Law, in that:
 - i. The decision of the 1st Respondent failed to conclude that the decision of the Director was contrary to Section 9 of the BOR and therefore amounted to an error of Law.
 - ii. The decision of the 1st Respondent in failing to conclude that the failure of the Director to stay the decision in the Appellant's case, pending the decision of the Privy Council, was unreasonable.
14. It is the Appellant's contention that both the Director and 1st Respondent are required to consider the Appellant's right to a family and private life in the Cayman Islands pursuant to Section 9 of the BOR. The failure to consider such rights and / or defer or stay the application would amount to a breach of Section 9.
15. While it is accepted that an RERC cannot be granted "outside" of Section 37 (3) of the Act, an applicant's Section 9 BOR rights are a fundamental consideration when considering to conclude the application, especially in light of the COA's declaration of incompatibility. In effect, following the declaration of incompatibility, the Director should have proceeded as follows:
 - i. Reviewed the Appellant's application pursuant to the points system.

- ii. Upon concluding that the Appellant did not achieve 110 points, consider whether or not the Appellant had a Section 9 BOR right.
 - iii. If the Director concluded that the Appellant had not established a Section 9 BOR right, reject the application.
 - iv. If the Director concluded that the Appellant established a Section 9 BOR right, then he should have notified the Appellant that her application was deferred pending the decision of the Privy Council.
16. It is the Appellant's contention that because the Director failed to carry out a process similar to the above, he acted unreasonably / erred in Law. Furthermore, because the 1st Respondent did not accept the submission as set out in the Grounds of Appeal, they have also erred in Law.
17. Further it is averred that the 1st Respondent erred in law when it concluded that:

"The Tribunal determined that it must apply the points system as prescribed in the primary legislations (Immigration (Transition) Act and Schedule 2 of the Immigration Regulations) and that it does not have discretion or the ability to consider Section 9 of the Cayman Islands Constitution Order to weigh various factor separately.

The Tribunal noted the arguments regarding the incompatibility of the points system and the Bill of Rights cannot be determined by the Tribunal.

Therefore, the Tribunal determine, having considered the legislations, that it does not have the power to engage consideration of Section 9 of the Bill of Rights in this matter".

18. The Appellant would contend that when the 1st Respondent reviews the decision of the Director and applies the test of anxious scrutiny, especially when considering the procedure followed by the Director, any Section 9 BOR rights of the applicant are relevant and need to be considered. By failing to consider these Rights and other rights, i.e. what is in the best interest of the Appellant's child, the 1st Respondent erred in Law.

Unreasonable

19. Further and in the alternative, it is the Appellant's case that the decision of the Director was unreasonable / amounts to a breach of natural justice in that the Director
- i. Failed to ensure that the process of applying for and obtaining an RERC post the decision of the COA was a fair process for those individuals who had Section 9 BOR Right.
 - ii. Failed to create policies for when to defer an RERC application when it was clear the individual had an established Section 9 BOR right.
20. By the 1st Respondent failing to seemingly identify or deal with the above issues the decision of the First Respondent is unreasonable. It should have been abundantly clear to the 1st Respondent and the Director, following the decision in the case of *Buray & D'Souza*, that no individual's PR application should be rejected when they had an arguable Section 9 Right. The Court of Appeal of the Cayman Islands ruled that Section 37(3) of the Act was incompatible with Section 9 of the BOR and therefore, subject to the decision of the Privy Council, the Act would have to be amended to potentially incorporate a BOR consideration. Therefore, on this basis, a policy should have been devised so that in circumstances where an applicant for PR had established a prima facie Section 9 BOR right, but had not obtained 110 points, the application could have been deferred pending the decision in *Buray & D'Souza* and any change in the Law.
21. As such, it is contended that the 1st Respondent and the Director should have considered the Appellant's human rights and the COA decision and stayed the application to await the decision of the Privy Council and the potential amendments to the law. Having failed to stay its decision and thus rejecting the appeal, the 1st Respondent has acted unreasonably, thus rendering its decision unlawful.

Breach of Natural Justice

22. Lastly, it is averred that the decisions of the 1st Respondent and the Director are a breach of natural justice due to the brevity of the decision. It appears that the 1st Respondent has failed to identify the issues raised in the Grounds of Appeal and certainly have not addressed them in their decision. It is contended that the brevity of the decision falls foul of the guidance in the case of

National Roads Authority v Bodden et Ors [2014] 2 CILR 47 as there is a substantial doubt as to whether they have understood the issues.

Conclusion

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

DATED: 13 June 2024

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.