

2 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

3 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

4

5 **CAUSE NO. G467 OF 2012**



7 **IN THE MATTER OF THE IMMIGRATION LAW (2011 REVISION)**

8 **AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION**

9 **AND IN THE MATTER OF THE CAYMAN ISLANDS CONSTITUTION**

10 **ORDER 2009**

11

12 **AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

13

14 **BETWEEN MANAOLA DE LA PENA VALLO 1ST PLAINTIFF**

15 **AND PAUL ANDREW RAMOON 2ND PLAINTIFF**

16 **AND THE CHIEF IMMIGRATION OFFICER RESPONDENT**

17

18 *Appearances:*

19 *Mr. Dennis Brady appearing on behalf of the Plaintiffs*

20 *Ms. Dawn Lewis instructed by the Attorney General's Chambers appearing*

21 *for the Respondent.*

JUDGMENT

3 At the commencement of proceedings, the Honourable Attorney General;
4 who had previously been named Second Respondent in this cause; was
5 with the consent of all parties, removed as a party to proceedings.

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Background

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9 The following facts are not in dispute.

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11 1. The First Plaintiff had previously worked in the Cayman Islands for
12 over one year, arriving in March 2005 and departing in July 2006.

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14 2. A work permit was approved on June 12, 2012 for the First Plaintiff
15 to work for the Second Plaintiff.

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17 3. The work permit was subject to several conditions including "*the*
18 *employee is required to have satisfactory working knowledge of the*
19 *English Language. Failure to do so will result in the work permit*
20 *approval being cancelled.*"

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22 4. The First Plaintiff, a native of the Philippines arrived in the Cayman
23 Islands on September 11, 2012. Upon arrival he proceeded to take



1 the English language test administered by the Immigration
2 Department.

3 5. The First Plaintiff failed the test. Both he and the Second Plaintiff
4 were subsequently advised that he would have to return to the
5 Philippines.

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7 6. On September 17, 2012 the Second Plaintiff sent a request by email
8 to the Chief Immigration Officer requesting that the First Plaintiff be
9 allowed to retake the test. Therein, he cited long period of travel
10 and delays as having contributed to the First Plaintiff not functioning
11 at optimum level. The Second Plaintiff stated that he would be
12 losing two employees permanently at the end of the month and
13 further that he was not in a position to purchase a return ticket for
14 the First Plaintiff.

15

16 7. The Second Plaintiff subsequently additionally argued that the First
17 Plaintiff had previously succeeded in obtaining a Cayman Islands
18 Drivers Licence as an additional basis for the Respondent to allow
19 the First Plaintiff to retake the test.

20

21 8. After communicating with several officers of government; including
22 the Deputy Governor, on November 8, 2012, the Second Plaintiff
23 received an email from the Deputy Chief Officer of the Portfolio of
24 Internal & External Affairs stating that the decision of the Chief



1 Immigration Officer denying the request that the tests be re-
2 administered to the First Plaintiff, was supported by the Portfolio.
3 The Second Plaintiff was also advised therein that *"it is the policy of*
4 *the Department to only allow resits in exceptional circumstances. Mr*
5 *Vallo signed a declaration that he was fit to take the test, and as*
6 *such this case does not fit the exceptional circumstances category"*.

8 **The Application**

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10 On December 6, 2012, the Grand Court of the Cayman Islands granted
11 ex-parte leave for an application for judicial review. Additionally the court
12 made an order restraining the Chief Immigration Officer from requiring
13 the First Plaintiff to leave the Cayman Islands or prosecuting him for
14 remaining until the determination of the application or further order of the
15 court.

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17 By their claim, the Plaintiffs seek the following relief.

- 18
19 1. An order of Mandamus under the provision contained in GCR Order
20 77A, directing the first Respondent, whether by his/her servants,
21 agents or otherwise to refrain from any and all actions pursuant to
22 the provisions of section 13(2) and 13(2)(a-c) of the Cayman
23 Islands Constitution Order 2009, unless and or until the
24 protections afforded to the First Applicant, in the provisions
25 contained within section 13(2)(d)(iii) and 13(3)(a-d) of the said



1 Constitution Order are observed, and this Judicial Review
2 application is determined.

3 2. A Declaration that the First Respondent whether by his/her
4 servant, agents or otherwise be restrained and prohibited from any
5 and all actions the objective of which is the detention of the First
6 Applicant, under any provision of the Immigration Law (2011
7 Revision) until this Judicial Review application is determined.

8

9 3. A Declaration that the First Respondent whether by his/her
10 servants, agents or otherwise be restrained and prohibited from
11 any and all actions the objective of which is the detention of the
12 Second Applicant, under any provision of the Immigration Law
13 (2011 Revision), until this Judicial Review application is
14 determined.

15

16 4. A Declaration that the First Respondent permit the First Applicant
17 to re-sit the mandatory English Test, on the basis that the
18 circumstances surrounding the request for a re-sit, does qualify as
19 satisfying the definition of "exceptional circumstances category" as
20 per the Immigration Department Policy standard in that regard,
21 and that his/her decision was therefore Wednesbury unreasonable
22 in all the circumstances.

23



1 5. A Declaration that the assertion made to the Second Applicant by
2 the First Respondent, that whether the First Applicant left the
3 Cayman Islands of his own volition or otherwise, there was no point
4 in the Second Applicant re-applying for any further grant of a work
5 permit, in respect of the First Applicant, as it will be denied,
6 because of the position taken by the Portfolio of Internal Affairs,
7 was a demonstration and an expression of bias against the First and
8 Second Applicants and in breach of natural justice.

9
10 6. Costs and such further, consequential, or other relief as this
11 Honourable Court seems just.

12
13 The following are the grounds of the application:



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15 1. **WEDNESBURY UNREASONABLENESS:** The decision of the First
16 Respondent to refuse the request of the First Applicant and to re-
17 sit the mandatory English Test, was a fettering and an improper
18 exercise of his/her discretion, by applying a policy and failing to
19 adequately or at all consider the peculiar circumstances of the First
20 Applicant, is Wednesbury Unreasonable and should be set aside,
21 for the reasons that he/she concluded that the circumstances of
22 the First Applicant did not fall to be considered as "exceptional
23 circumstances:", and which reasons failed to take into account:-

24

1 (i) That the First Applicant had been travelling for four days prior
2 to his arrival in the Cayman Islands and the First Applicant
3 denies the assertion by the First Respondent, of having been
4 offered the option by the processing Immigration Officer, upon
5 arrival in the Cayman Islands, to do the test some other time,
6 and that despite this, he obtained a score of 14.5 questions
7 correct out of 21 questions, to achieve a score of 65% when
8 the pass score is set at 80%, was in any event unreasonable
9 conduct on the part of the First Respondent, his/her servant
10 or agent.

11

12 (ii) That the First Applicant had worked previously in the Cayman
13 Islands, for two different employers, over the period of a year
14 and three months, and was also the holder of a Cayman
15 Islands Group 3 Licence, which licence permitted him to drive
16 passenger type vehicles, to include trucks and buses,
17 conveying up to twenty five (25) passengers, was a fact that
18 was not adequately considered or at all by the First
Respondent in the exercise of his/her discretion to refuse to
permit the First Applicant the opportunity to re-sit the
mandatory English Test.



23 (iii) That the First Applicant had to have been, by virtue of the
24 history of his travel, which was at all material times known to

2 the First Respondent, appear in the professional opinion of the
3 agent of the First Respondent and by extension the First
4 Respondent, despite any appearance to the contrary, mentally
5 and physically less capable, in the circumstances of, and
6 under which he was asked to take this English test, and
7 therefore the First Applicant, should have been told in the first
8 instance, of the option to sit this Test at some future time, by
9 the attending Immigration Officer, who was at all material
10 times the agent of the First Respondent, and who processed
11 the First Applicant upon his arrival in the Cayman Islands.

12 (iv) That the First Applicant, at the time of his request to re-sit the
13 said English Test, posed no threat to the interests of the
14 state's defences, public safety, public order, public morality or
15 public health, to provide grounds for derogation from the
16 provisions of the protections offered by section 13(2)(d) and
17 (3) of the Cayman Islands Constitution Order 2009, nor had
18 he been fairly and properly examined in accordance with
19 section 44(3) of the Immigration Law (2011 Revision), and
20 that the main objective for which the mandatory English Test
21 was designed, was not by any means in jeopardy of
22 compromise, so that the refusal of the First Respondent in the
23 circumstances, was a disproportionate response to the request
24 for a re-sit of the said test, and that the said decision of the



1 First Respondent was not : objectively and reasonably
2 justifiable in a democratic society ... between the means
3 employed and the purpose sought to be realized"; as provided
4 for in section 16(4)(d) of the Cayman Islands Constitution
5 Order 2009.

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7 2. PREJUDICIAL DISCRIMINATORY AND BIASED STATEMENT

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9 (i) The declaration made by the First Respondent to the Second
10 Applicant, that whether the First Applicant departed the
11 jurisdiction voluntarily or was forced to depart then, based
12 upon the position taken by the Portfolio of Internal and
13 External Affairs, on the appeal made to them by the Second
14 Applicant, on behalf of the First Applicant regarding the
15 English Test re-sit request, meant there was no point in the
16 Second Applicant applying for any other work permit in
17 respect of the First Applicant, as same will be denied; was for
18 all intents and purposes a prejudicial, disproportionate, biased
19 and discriminatory declaration/decision taken against the First
20 and Second Applicant, and one not "objectively and
21 reasonably justifiable in a democratic society ... between the
22 means employed and the purpose sought to be realized:, as is
23 provided for in section 16(4)(d) of the Cayman Islands
24 Constitution Order 2009.



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(ii) The Second Applicant had, in an effort to resolve the matter, following upon the refusal of the request to re-sit the English test suggests that the Second Applicant make a new application for a work permit, in respect of the First Applicant and in those circumstances, he would make every effort to have the First Applicant depart, to facilitate the new application, as by Immigration Law, the First Applicant's current status was that of "visitor" the effect of which prohibited any application being made, whilst this status applied to the First Applicant, and that it was more practicable to have the First Applicant travel to Jamaica, instead of all the way back to the Philippines, being met by the statement attributed to the First Respondent in this regard, was a statement made with prejudice, discrimination and bias towards the Second Applicant, and to the First Applicant, who had committed no breach of any law whether locally or internationally, nor did he have any previous conviction, to disqualify him from holding or being granted a work permit within the Cayman Islands, and therefore such a statement demonstrated a policy position, which was in breach of natural justice, disproportionate, and a violation of the Second Applicant's rights as a Caymanian insofar as those rights entitles the Second Applicant to earn a living from ... "the



1 employment, engaging in any business or profession,
2 movement or residence within the Cayman Islands of persons
3 who are not Caymanian..." as provided for in section 16(4)(b)
4 of the Cayman Islands Constitution Order 2009.

5

6 **Legislation**

7

8 It was submitted on behalf of the Respondent that the Chief Immigration
9 Officer is required to take certain matters into consideration, specific to a
10 prospective employer and specific to a prospective employee; when
11 considering an application for a work permit. The applicable provision on
12 September 11, 2012 was found in Sections 44 of the existing Immigration
13 Law (2011 Revision) which provided as follows.

14

15 "44. (1) *The Work Permit Board, the Business Staffing Plan*
16 *Board or the Chief Immigration Officer, as the case may be, in*
17 *considering an application under section 42 –*

18 (a) *shall, in respect of an application for a grant; or*

19 (b) *may, in respect of an application for a renewal,*

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22 *subject to any general directions which the Governor may, from time to*
23 *time, give in respect of the consideration of such application, take into*
24 *account the matters listed in subsections (2) to (4).*



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(2) In relation to the prospective employer, that –
(a) *he has demonstrated his genuine need to engage the services of the prospective worker;*

(b) *he has, unless he has been exempted by the Governor or by the Board, sought, by advertising in at least two issues for two consecutive weeks in a local newspaper, to ascertain the availability of any one or more of the following in the order in which they are listed-*

- (i) a Caymanian;*
- (ii) the spouse of a Caymanian;*
- (iii) the holder of a Residency and Employment Rights Certificate; and*
- (iv) a person legally and ordinarily resident in the Islands who is qualified and willing to fill the position; and*



(c) *in the case of an application in respect of a professional, managerial or skilled occupation, the Board or the Chief Immigration Officer, as the case may be, is satisfied as to the extent to which*

he has established adequate training or scholarship programmes for Caymanians.

(3) In relation to the worker-

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(a) his character, reputation and health, and where relevant, the character, reputation and health of his dependants;

(b) his professional and technical qualifications and his experience and competence to undertake the position applied for;

(c) the economic and social benefits which he may bring to the Islands;

(d) the sufficiency of the resources or the proposed salary of the worker and, where his spouse is employed within the Islands, those of his spouse, and his or their ability to adequately maintain his or their dependants;

(e) his facility in the use of the English language; and



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(f) the location, type and suitability of the accommodation available for the worker and his dependants, if any, throughout the term of the work permit.

(4) Generally-

(a) the protection of local interests and in particular of Caymanians, including without limitation and where applicable, the provisions set out in section 44(2)(c);

(b) the availability of the services of a suitable person already legally and ordinarily in the Islands; an

(c) the requirements of the community as a whole, the demographics referred to in section 24(j) and such other matters that may arise from the application.

(5) General directions given under this section shall be published in the Gazette.



The following provisions of Section 48 (10) of the said law deals with the power to revoke a work permit based on certain grounds.

"48. "(10) An application for the grant or renewal of a work permit may be refused and a work permit may be revoked on any of the following grounds-

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(a) that there is refusal or inability on the part of the applicant and his spouse, if relevant, to properly support his dependants;

(b) that there are reasonable grounds for suspecting that the applicant uses or is involved in illegal drugs;

(c) that the applicant has a background of subversive political activity, racism or any illegal activity;

(d) that the applicant has committed an act of insolvency or bankruptcy or been as a shareholder or director of any company or other entity that has been the subject of liquidation especially where the creditors have been adversely affected;

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(e) that the applicant has been convicted of an offence or has been fined by an immigration officer of the rank of Assistant Chief Immigration Officer or above;

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(f) that the work permit holder has been promoted or re-designated by his employer without the prior approval of the Board;

(g) that the applicant is in the Islands as a tourist visitor;

(h) that the Board or the Chief Immigration Officer considers that the applicant has not fully met any of the requirements of section 44;

(i) for any of the matters referred to in section 44(2) to (4) that the Board or the Chief Immigration Officer in its discretion considers appropriate;



(j) that, in respect of an application for a temporary work permit, the Chief Immigration Officer is of the opinion that the number or frequency of temporary work permits previously obtained or continuing to be sought in respect of a worker suggests more than temporary employment and constitutes a deliberate attempt to circumvent the operations of the provisions of section 52(1) and (20); or

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(k) that the applicant failed to give the written undertaking referred to in section 42(4)(b)."

The decision whether or not to revoke a work permit required that the procedure set out in Section 48 (11) of the said law be followed.

"48. (11) Prior to the revocation of, or refusal to renew, a work permit-

(a) all objections shall be considered;

(b) the applicant shall be given notice of all objections and allegations relating to him and he shall be afforded an opportunity to make written representation to the Board in respect thereof or, at the discretion of the Board, to appear before the Board to address such objections and allegations;

(c) an inquiry shall be made into the applicant; and

(d) all allegations that are taken into account in considering the application shall so far as reasonably practicable be corroborated and a full



investigation of such allegations shall so far as
reasonably practicable, be carried out."

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4 It was noted that Section 48 (10) was amended in 2011 by Section 4(c)
5 of the Immigration (Amendment) No.3) Law 2011. The amendment
6 provided:

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"4. The principal Law is amended in section 48 as follows-

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(d) in subsection (10)

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(i) in paragraph (h) by inserting before the
word "requirements" the word
"applicable"; and

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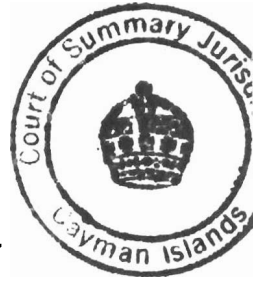
Evidence

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There is a dispute on the evidence concerning the mechanics of the test
which was administered to the First Plaintiff.

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20 In her affidavit, Senior Immigration Officer Josefina McLean-Shaqaqi
21 stated that it was she who administered the test to the First Plaintiff. She
22 stated in her affidavit that on the date in question, she advised the First
23 Plaintiff that he had the option of sitting the test at once or the next day.



1 She also stated that she told him that she would authorise that he rest on
2 11th September 2012, if he opted to sit the test the next day.

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4 According to Officer McLean-Shaqaqi, the First Plaintiff indicated to her
5 that he would sit the test that day and not take it on the following day.

6 There is a declaration which is the preamble to the test and which stated
7 that the person about to do the test was prepared and comfortable to sit
8 the test at that time. According to Officer McLean-Shaqaqi, this was read
9 to the First Plaintiff and he was asked if he understood it and that he had
10 to attain a test score of 75% or more. The First Plaintiff allegedly
11 indicated that he understood by nodding and then signing the document.

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13 Officer McLean-Shaqaqi further stated that when he was advised that he
14 had failed the English test, the First Plaintiff did not ask her for a re-sit. In
15 any event she stated, she is not the person who determines whether or
16 not any person gets the opportunity to re-sit failed language tests.

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18 In contrast to this evidence, in his second affidavit, which was filed in
19 response to the affidavit filed by the Acting Chief immigration Officer, the
20 First Plaintiff asserted that while he was given a form to sign, it had not
21 been explained or read to him. As such he stated that although he signed
22 a form stating that he was comfortable and able to do the test, essentially
23 all he did was to follow the instructions to sign the form. He also stated
24 that it was not the officer who administered the test who had advised him

1 that he was able to take the test either then or the next day. This was
2 told to him he stated, by the first Officer that he spoke to when he
3 arrived. The First Plaintiff asserted that the Immigration Officer who
4 administered the test did not observe the stated policy because there was
5 a failure by that Officer to tell him that he could have done the test
6 another day.

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8 The First Plaintiff did state that he agreed to take the test at the time of
9 his arrival in the Cayman Islands because he believed that he would have
10 passed it; having worked in the Cayman islands before. He also stated
11 that he knew that he would not have transportation to return to the
12 airport the next day.

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14 In his First Affidavit, the First Plaintiff had asserted that prior to his arrival
15 in the Cayman Islands on September 11, 2012; he had been travelling for
16 four days and he that was mentally tired upon arrival. He also stated that
17 when asked by the Immigration Officer if he wished to take the exam
18 upon arrival, he replied in the affirmative "because I didn't want to have
19 to return to do it, plus I had worked in Cayman before, and I knew I could
20 speak and write English". He also stated in this Affidavit that while
21 previously living in the Cayman Islands, he had been issued with a Group
22 3 Drivers Licence (on May 19, 2005) and that the test for same included a
23 written test.

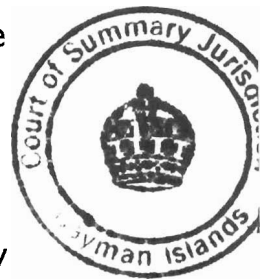
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1 In his affidavit, the Second Plaintiff asserted that in his request to the
2 Chief Immigration Officer that a re-sit be allowed, he had mentioned his
3 own economic hardships as an employer. He pointed out his lack of staff,
4 his contractual obligations and the extent to which he was relying on the
5 First Plaintiff. The Second Plaintiff also asserted that he was not in a
6 financial position to pay for a return ticket to the Philippines for the First
7 Plaintiff.
8

9 It was submitted on behalf of both Plaintiffs that the forgoing assertions
10 constituted reasons which fell into the category "exceptional
11 circumstances" and justified the First Plaintiff being allowed to re-sit the
12 test and to decide otherwise was considered unreasonable.
13

14 The Second Plaintiff in his affidavit also asserted that he had been told by
15 a senior Immigration Officer that once the First Plaintiff left the Cayman
16 Islands; the Second Plaintiff having secured his passage, there would be
17 no point in the submission of an application for a new work permit for the
18 First Plaintiff because it would be denied based on the position taken by
19 the Portfolio on the matter. It was further allegedly stated that if the
20 Immigration Department had to undertake the departure of the First
21 Plaintiff, he would not be able to apply for another work permit in the
22 Cayman Islands without going through the Governor. It was submitted
23 that these statements were a demonstration and an expression of bias
24 against both Plaintiff's and in breach of natural justice.



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2 Submissions were made on behalf of the Respondent with respect to this
3 allegation of bias and the remedy sought. In any event however, it was
4 argued that proper procedure required that the public official be named
5 and full particulars given of the circumstances of the conduct of that
6 official.

7

8 **The English Language Policy**

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10 The Respondent emphasized the obligation to consider the worker's
11 facility in the use of the English Language as required under Section
12 44(3)(e) of the said Law. The policy of requiring persons whose native
13 language is not English to take the English language test is seen as a part
14 of the duty of the Respondent to comply with this provision of the said
15 law.

16

17 Affidavit evidence was adduced stating that it had been necessary to
18 adopt this policy because of past incidences of some workers being unable
19 to function properly because of their poor grasp of the English language.
20 It was submitted that the test was meant to be an objective means of
21 assessment.

22

23 According to the policy, persons who failed the test would not be
24 permitted to take up their employment. It was submitted on behalf of the



1 respondent that according to policy, the test takes approximately 20
2 minutes and is conducted in a quiet, comfortable, non-intimidating area
3 and further that the questions are short and simple.

4

5 It was submitted on behalf of the Respondent that no evidence had been
6 adduced that the test had not been conducted under these conditions.

7 It was additionally submitted that the evidence established that both
8 Plaintiffs had been aware of this policy prior to the First Plaintiff travelling
9 to the Cayman Islands.

10

11 According to the policy, in assessing the results the presiding officer is
12 required to take into account any factors which might have adversely
13 affected the person's performance when taking the test. It was submitted
14 that the policy was substantively followed because the Immigration
15 Officer addressed the concern reflected in the policy by ascertaining
16 beforehand whether the First Plaintiff was comfortable doing the test.

17 It was also submitted that it was the evidence of the First Plaintiff that he
18 indicated that he wished to take the test at that time because he knew
19 that he could write and speak English and he didn't want to have to return
20 to do the test. The evidence also established that the Immigration Officer
21 had been prepared to allow the First Plaintiff to take the test on a
22 different day.

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1 It was submitted that it was not improper for the Immigration Officer to
2 apply the policy in this way because the policy merely provided guidance
3 and was in no way binding. It was submitted that the Immigration
4 Officer's decision could not be regarded as irrational as it was a measure
5 taken to address the concerns in the policy.



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8 **Unreasonableness**

9 Counsel for the Plaintiffs also referred to the English language testing
10 policy.

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12 It was submitted that if "exceptional circumstances" had been made a
13 condition for retesting, then an insistence on immediate departure without
14 regard for the circumstances of the First Plaintiff's work history in the
15 Cayman Islands was a decision which fell squarely into the realm of
16 irrationality as defined in the case of **Associated Provincial Picture**
17 **Houses Ltd. V Wednesbury Corporation [1948] K.B. 223** and was
18 unreasonable.

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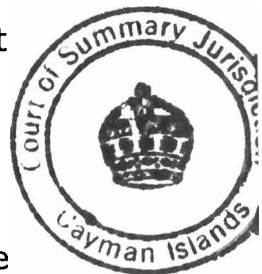
20 Citing the Internet Home Page of the Respondent which related to the
21 English Language testing policy, Counsel for the Plaintiffs commented on
22 the words "*in assessing the results of the test the Senior Immigration*
23 *Officer will take into account any factors that might have adversely*

1 *affected the person's performance when taking the test. This might be*
2 *where the person has arrived late at night or after a long journey".*

3
4 Counsel submitted that this applied to the First Plaintiff's peculiar
5 circumstances upon arrival in the Cayman Islands. He argued that the
6 long period of travel including detention in Bangkok while his documents
7 were authenticated formed the core of the First Plaintiff's request for
8 retesting. Counsel argued that the First Plaintiff's mental capacity was
9 severely challenged at the time despite the fact that he had agreed to do
10 the test immediately. It was submitted that the First Plaintiff's greatest
11 desire was to be out of the airport and relocated to a calm place after
12 enduring four days of travel and fatigue.

13
14 Counsel submitted that the authorities required a court to investigate and
15 determine if matters have been taken into account which ought not to
16 have been or conversely if there had been a refusal to take into account
17 or neglect to take into account matters which should have been.

18
19 Counsel argued that based on the facts which were known to the
20 Respondent about the First Plaintiff's circumstances, the decision not to
21 permit retesting was irrational. It was submitted that the English
22 language testing policy having been instituted to ensure that persons
23 could properly assimilate themselves into the community, perform work
24 duties effectively and administer themselves appropriately. It was argued



1 that during his previous employment in the Cayman Islands, the First
2 Plaintiff had satisfied all of these requirements. He had driven a truck on
3 the roads of the Cayman Islands and worked for two different employers.

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5 Counsel submitted that the First Plaintiff's statement to the Immigration
6 Officer that he was comfortable to sit the test was of little consequence to
7 the request for a re-sit.

8

9 Counsel argued that the First Plaintiff's decision to sit the test
10 immediately; was motivated by his desire to get all formalities out of the
11 way because he needed to start working and repay the cost of his ticket
12 to the person who had loaned him the money to acquire it. It was argued
13 that the officials were advised that the First Plaintiff's ticket was one way
14 and that he did not have plans to return home prior to completion of his
15 work. It was submitted by Counsel that there was a humanitarian basis as
16 well as implications of economic costs for the First Plaintiff, even if the
17 government of the Cayman Islands paid his return fare and that this
18 should have been a factor which influenced the Respondent's decision. It
19 was conceded that if the First Plaintiff failed upon retesting, he could have
20 no argument in relation to the requirement that he depart. It was
21 submitted that it was in no way inconvenient to the Respondent to allow
22 retesting.

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Counsel for the Plaintiffs argued that they both shared an economic interest in the modification of the decision which was made and both would benefit if the First Plaintiff was allowed to re-sit the test.

4

5 Counsel for the Plaintiffs concluded on this point that the Court should
6 issue an order reversing the decision of the Respondent and direct that
7 the First Plaintiff be allowed to re-sit the English test since the decision
8 made was *Wednesbury* unreasonable, disproportionate, irrational in all
9 the circumstances and should be set aside.

10

11 Conversely, it was submitted on behalf of the Respondent that the
12 decision not to allow the First Plaintiff to re-sit the test was not
13 unreasonable as asserted by the Plaintiffs.

14

15 It was the Respondent's position that since the First Plaintiff had signed a
16 declaration stating that he was prepared and comfortable to sit the test
17 when he did and since the test had been administered fairly, there were
18 no circumstances warranting allowing the First Plaintiff to retake the test.

19 It was conceded that the Immigration Officer may not have carried out
20 the policy to the letter. However it was argued that the Immigration
21 Officer had substantively followed the policy by addressing the concern
22 reflected in the policy by ascertaining beforehand whether the First
23 Plaintiff was comfortable doing the test. It was submitted that it was not





1 improper for the Immigration Officer to apply the test in this way because
2 the policy merely provided guidance and was not in any way binding.

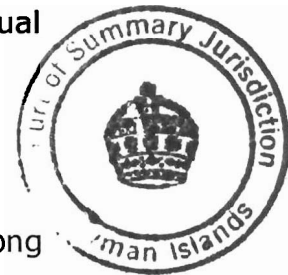
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4 It was submitted on behalf of the Respondent that pursuant to the
5 principles stated in *Wednesbury*, the decision sought to be challenged
6 had to be so unreasonable that no reasonable authority could have come
7 to it. Reference was made to the statement by Lord Greene M.R. at pages
8 233-234 of the case:

9

10 *"The court is entitled to investigate the action of the local authority with a*
11 *view to seeing whether they have taken into account matters which they*
12 *ought not to take into account, or, conversely, have refused to take into*
13 *account or neglected to take into account matters which they ought to*
14 *take into account. Once that question is answered in favour of the local*
15 *authority, it may be still possible to say that, although the local authority*
16 *have kept within the four corners of the matters which they ought to*
17 *consider, they have nevertheless come to a conclusion so unreasonable*
18 *that no reasonable authority could ever have come to it. In such a case,*
19 *again, I think the court can interfere. The power of the court to interfere*
20 *in each case is not as an appellate authority to override a decision of the*
21 *local authority, but as a judicial authority which is concerned, and*
22 *concerned only, to see whether the local authority have contravened the*
23 *law by acting in excess of the powers which Parliament has confided in*
24 *them."*

2 It was submitted that the evidence established that the Respondent gave
3 consideration to the grounds presented by the Second Plaintiff for giving
4 the First Plaintiff a chance to take the test a second time. It was further
5 submitted that the Respondent on the evidence, did not take any
6 extraneous factor into consideration and further, it did not treat its
7 discretion as being fettered by policy; in that it willingly gave individual
8 consideration to the First Plaintiff's case.



9
10 It was submitted that the fact that the First Plaintiff had travelled a long
11 distance in order to come to the Cayman Islands could not be seen as
12 exceptional because many workers in the Cayman Islands arrive having
13 travelled from very distant locations. It was argued that if this fact was
14 treated as an exceptional circumstance in the First Plaintiff's case; it
15 would warrant its extension to the case of all the workers who arrive from
16 far off countries.

17
18 It was also submitted that since all workers are notified beforehand that
19 they can have only one opportunity to take the test, it is reasonable to
20 expect that they would each give themselves the very best opportunity to
21 pass the test including agreeing to rest before they take it. It was noted
22 that the First Plaintiff was clearly quite confident that he could
23 successfully take the test on the day that he arrived.

24

1 It was submitted that the First Plaintiff having previously worked in the
2 Cayman Islands and having obtained a driver's license did not advance
3 this case. Further it was argued that traffic signs are fairly universal
4 throughout the world and not much language is required to understand
5 their meaning.

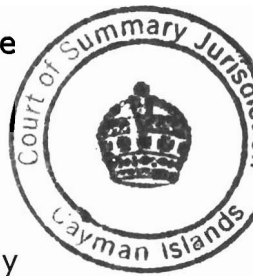
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7 It was submitted that the fact that he failed the test after volunteering to
8 do it on the date of his arrival was proof that his English-language skills
9 were not up to par. The implementation of the policy of the English
10 language test was meant to deal with the issue of persons being allowed
11 to work in the Cayman Islands without the requisite level of skill in the
12 English language. The First Plaintiff had not taken an English language
13 test when he had previously come to work in Cayman Islands and it was
14 submitted that he may very well have failed it. As such, his previous
15 employment in the Cayman Islands could not be considered to be
16 exceptional because his inability to pass the test demonstrated the
17 deficiency in the previous practice of not administering a test.

18

19 It was further submitted that to allow persons to retake the test merely
20 on the basis of having travelled from far away or having previously
21 worked in the Cayman Islands would serve to undermine the purpose of
22 section 44 (3) (e) which is to ensure that only persons with a sufficient
23 grasp of the English language are allowed to work in the Cayman Islands.

24 It was further submitted that this would open the floodgates to persons



1 who fell into either group to claims that they should retake the test,
2 notwithstanding having signed the declaration.

3

4 It was also submitted that the business concerns of the Second Plaintiff
5 could not be regarded as an exceptional circumstance. That party's
6 business was not relevant to the worker's proficiency in the English
7 language.

8

9 It was submitted that following *Wednesbury*, it was not the task of the
10 courts to retry the original matter nor substitute its view for that of the
11 decision maker. The court could not act as an appellate authority and it
12 was submitted that it was inappropriate for the Plaintiffs to invite the
13 court to canvass the merits of the decision. The Respondent cited the
14 case of **The Queen on the Application of Assisted Reproduction and**
15 **Gynaecology Centre, "H" v The Human Fertilisation and**
16 **Embryology Authority [2002] EWCA Civ 20**. Mr. Justice Wall was
17 quoted as follows:

18

19 *"Like any public authority, it is open to challenge by way of judicial*
20 *review, if it exceeds or abuses the powers and responsibilities given to it*
21 *by parliament; but where, as is manifest here from an examination of the*
22 *facts, it considers requests for advice carefully and thoroughly, and*
23 *produces opinions which are plainly rational, the court, in our judgment,*
24 *has no part to play in the debate, and certainly no power to intervene to*



1 *strike down any such decision. The fact that the appellants may disagree*
2 *with the Authority's advice is neither here nor there."*

3

4 It was submitted that it was clear that the decision was taken after the
5 Plaintiff's request was carefully considered. It followed therefore it was
6 submitted, that once the court was satisfied that careful consideration is
7 given, it would not be proper to intervene.

8

9

10 **Prejudicial and Biased Statement**

11 Counsel for the Plaintiffs referred to the assertion made by the Second
12 Plaintiff that he had been told by an agent of the Respondent that
13 whether the First Plaintiff left the jurisdiction voluntarily or was deported,
14 there was no point in making a further application for a work permit for
15 him because same would be denied. This was allegedly told to the Second
16 Plaintiff when he offered to send the First Plaintiff to Jamaica rather than
17 back to the Philippines while he submitted a new work permit application
18 for him.

19

20 Counsel submitted that the statement must be viewed as biased,
21 prejudicial and against the rules of natural justice.

22

23 He submitted that the statement which pointed to the pre-judging of any
24 further work permit application submitted by the Second Plaintiff for the



1 First Plaintiff was made in breach of the constitutional rights of both
2 Plaintiffs. The First Plaintiff had committed no breach of any law either
3 locally or internationally and he had no previous convictions. As such no
4 basis existed to disqualify him from holding or being granted a work
5 permit in the Cayman Islands.

6

7 As a result of the foregoing both Plaintiffs invited the court to make a
8 declaration that the assertion made to the Second Plaintiff by the
9 Respondent was a demonstration and an expression of bias,
10 discrimination and prejudice against both Plaintiffs; as well as being in
11 breach of natural justice.

12

13 Counsel for the Respondent commented on the claim by the Plaintiffs that
14 a biased, prejudicial and discriminatory statement was made to them
15 contrary to section 16 (4) (d) of the Constitution.

16

17 It was the Respondent's submission that these proceedings were not the
18 proper forum within which to raise constitutional claims. It was submitted
19 that Section 26 of the Constitution conferred the rights of individuals to
20 apply to the Grand Court when they wanted their rights and freedoms
21 under the Bill of Rights enforced. That section provides:

22 *"26 (1) Any person may apply to the Grand Court to claim that*
23 *Government has breached or threatened his or her rights and*



1 freedoms under the Bill of Rights and the Grand Court shall
2 determine such an application fairly and within a reasonable time.

3 (2) If, in any proceedings in any court established in the
4 Cayman Islands other than the Grand Court or the Court of Appeal,
5 any issue arises as to the interpretation of the Bill of Rights, the
6 court in which the question has arisen shall refer the question to the
7 Grand Court if it is in its opinion necessary for the issue to be
8 determined.

9
10 (3) An appeal shall lie as of right to the Court of Appeal
11 from any final determination of any issue by the Grand Court under
12 the Bill of Rights, and an appeal shall lie as of right from the Court
13 of appeal to Her Majesty in Council; but no appeal shall lie from a
14 determination by the Grand Court under this section dismissing an
15 application on the ground that it is frivolous or vexatious.

16
17 (4) Proceedings under subsection (1) shall be commenced
18 within one year of the decision or act that is claimed to breach the
19 Bill of Rights, or from the date on which such decision or act could
20 reasonably have been known to the complainant; but the Grand
21 Court shall extend time on application by the complainant where
22 such an extension would in the opinion of the Court be in the
23 interest of justice.

24

1 (5) *Nothing in this section adversely affects the ability of*
2 *courts to manage their own procedure to ensure that cases are*
3 *dealt with justly, fairly and expeditiously, including their ability to*
4 *dismiss applications that are vexatious or unreasonable.”*

5
6 Counsel for the Respondent thereafter referred to Order 5 (4)(A) of the
7 Grand Court Rules which provides:

8 "4A. (1) *Proceedings under section 23 or 26(1) of The Cayman*
9 *Islands Constitution Order 2009 shall be begun by petition or writ.*

10
11 (2) *Such proceedings –*

12
13 (a) *in which the sole or principal question at issue is,*
14 *or is likely to be, one of the construction of any*
15 *Law or of any deed, will, contract or other*
16 *document, or some other question of law; or*

17
18 (b) *in which there is unlikely to be any substantial*
19 *dispute of fact, are appropriate to be begun by petition unless*
20 *the applicant for any reason considers it more appropriate to*
21 *begin the proceedings by writ.”*

22
23 Respondent’s Counsel then referred to the provisions of Order 77A of the
24 Grand Court Rules, under which section the Plaintiffs sought relief.



2

3 Order 77A Rule 2 (1) & Rule (4) provide the following.

4 "2 (1) Pursuant to Rule 4A of Order 5, proceedings under
5 section 23 or 26(1) of the Constitution shall be begun by petition or
6 writ."

7

8 "4 (1) A petition, or a writ, or any pleading alleging that the
9 government has breached or threatened the applicant's rights and
10 freedoms under the Bill of Rights shall include full particulars of-



15

(a) The circumstances in which the government's liability is alleged to have arisen, and the circumstances of the conduct of any public official or officials in respect of which the applicant complains;

16

17

(b) the decision or decisions or the act or acts that is or are alleged to breach the Bill of Rights, and the date or dates of each such decision or act;

20

21

(c) to the extent that any such decision or act as referred to in rule 4(1)(b) of this Order is alleged to have taken place more than one year prior to the issuing of the writ, the presentation of the petition, or filing of the pleading,

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the date or dates on which such decision or act was alleged to be known or alleged could reasonably have been known to the applicant.

(2) The Respondent to such a petition, or the Respondent to such a writ, as the case may be, shall be the Attorney General and any relevant public official.

(3) If a claim is brought by way of counterclaim then the Respondent to such a counterclaim shall be the Attorney General and any relevant public official."



As a result of the foregoing, it was submitted on behalf of the Respondent that the Plaintiffs had neither followed the proper procedure nor invoked Section 26 of the Constitution which was the only way that a breach of the Bill of Rights could be addressed. On this basis that it was argued, this claim should be dismissed. This point was conceded by Counsel for the Plaintiffs. However he argued that the aspects of the Plaintiffs' claim were closely interwoven and that it was important for the court to consider the substance of the claim rather than the form. He invited the court to exercise its inherent jurisdiction to amend the informality of the presentation.

1 Despite the submission concerning procedure, Counsel for the Respondent
2 did proceed to comment on the merits of the claim.

3

4 It was argued that the public official should be named and full particulars
5 given of the circumstances of the conduct of that official. It was submitted
6 that in any event, the evidence before the court did not support the claim
7 of bias, prejudice or discrimination.

8

9 It was argued on behalf of the Respondent; that under section 82 (e) of
10 the Immigration Law (2011 Revision) the definition of a "*prohibited*
11 *immigrant*" included that of a person not being a Caymanian or
12 permanent resident who had been repatriated from the islands. It was
13 submitted that the Plaintiffs having complained that neither could afford
14 the passage of the First Plaintiff back to the Philippines, it was likely that
15 the Respondent would have to bear this expense. If this occurred, the
16 First Plaintiff would be considered a prohibited immigrant under the said
17 law. It was submitted that it was reasonable to infer that if anything had
18 been said in this regard, it would have been that if the Respondent had to
19 bear such an expense, the First Plaintiff would be considered a prohibited
20 immigrant. It was submitted that this was the most reasonable inference
21 to be drawn from the evidence and that it would be unreasonable to draw
22 any other inference.

23



1 Finally it was submitted on behalf of the Respondent, that if as alleged, a
2 specific person had told the Plaintiffs that a new work permit would be
3 denied even if the employer secured return passage for the First Plaintiff;
4 a remedy could not be obtained. This was because no right was created
5 under section 16(4)(d) of the Bill of Rights. Additionally it would be
6 premature to seek any relief because the evidence did not disclose that a
7 decision had been made in respect of the alleged statement that would
8 have created some right in relation to the Plaintiffs. It was argued that
9 that right could only be created if the First Plaintiff had left the jurisdiction
10 and a second application for a work permit had then been submitted. It
11 was argued that the authorities established that judicial review is not
12 desirable before a final decision is made.

13

14

15 **Criminal Charge**

16

17 The respondent raised the fact that since arrival, the First Plaintiff had
18 been charged with a criminal offence. It was submitted that under the
19 current Immigration Law, the Respondent was obligated to take into
20 account the character of a worker when considering an application for a
21 work permit. It was submitted that even if the court made a finding in
22 favour of the Plaintiffs it would not be convenient to grant the remedies
23 requested because the Respondent would be entitled to consider the



1 criminal charges even before the First Plaintiff was allowed to retake the
2 English language test.

3

4

5

6

Conclusion

7

8 The evidence established that both Plaintiffs were aware, prior to the
9 arrival of the First Plaintiff, that his work permit had been granted subject
10 to the condition that he pass an English language test.

11

12 It is not possible to make a determination on disputed facts contained in
13 competing affidavits. I refer here to the First Plaintiff's challenge to the
14 assertion by Senior Immigration Officer Josefina McLean-Shaqaqi about
15 the procedure she followed in administering the test. Based on the
16 evidence from the First Plaintiff however I am satisfied that on arrival an
17 Immigration Officer told him that he had the option to do the test either
18 immediately or on another day. I am satisfied that he was aware that he
19 was not required to do the test immediately. I am also satisfied that he
20 made his own decision to do the test upon arrival both because he
21 believed that he would pass it; and also because he did not wish to have
22 to return to the airport in order to do it.

23



1 Whilst I make no finding of fact on the matter, I do find it difficult to
2 accept the First Plaintiff's assertion that he merely signed the declaration
3 stating that he was comfortable to do the English language test because
4 he was given a form and told to sign it.

5

6 Based on the foregoing, I am satisfied that the administering of the
7 English language test was done fairly, substantively following policy. It is
8 noted however that there has been no challenge raised based on the
9 manner in which the test was administered.

10

11 The issue before the court has to do with the decision by the Respondent
12 to deny the request for the First Plaintiff to re-do the test. The policy of
13 the Respondent is to only allow a re-sit in exceptional circumstances. The
14 Respondent denied the request of the Plaintiff's because it was
15 determined that no exceptional circumstances arose.

16

17 On the issue of unreasonableness.

18

19 There is no evidence before the court that in reaching its decision, the
20 Respondent took into account matters which should not have been
21 considered. There is also no evidence that the Respondent either refused
22 or neglected to take into account matters which should have been taken
23 into account.

24



1 There is no evidence that the request for retesting was met with a bare
2 denial based on policy. The evidence established that the Respondent
3 considered the application made by the Second Plaintiff. It also
4 established that when the Second Plaintiff sought assistance from the
5 Portfolio, the matters which had been raised by the Plaintiffs were
6 reviewed. Despite this, the decision remained the same.

7

8 Left for determination is whether the decision that the issues raised by
9 the Plaintiffs did not constitute exceptional circumstances and as such
10 there should be no retesting; is a conclusion that was so unreasonable
11 that no reasonable authority could ever have come to it. I do not find that
12 this is the case. The decision arrived at by the Respondent is one which
13 was reasonable in all the circumstances.

14

15 Based on *Wednesbury*, this court cannot act as an appellate authority.
16 The decision of the Respondent to refuse the request for retesting will not
17 be overturned on the basis that it was unreasonable.

18

19 With respect to the submission that a prejudicial, discriminatory and
20 biased statement had been made to the Second Plaintiff which constituted
21 a breach of natural justice and required a remedy.

22 I agreed with the submissions made on behalf of the Respondent that this
23 issue was not properly raised in this forum.

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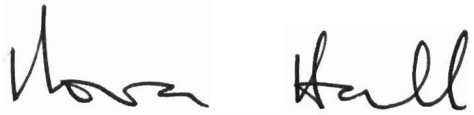


1 In any event, it is my view that a court cannot properly render a decision
2 based on the theoretical. In the absence of the identification of the
relevant agent of the Respondent, there is no opportunity to put before
the court either agreement or denial of the assertion made. However, if it
were to be accepted that such an assertion had been made, in the
absence of the refusal by the Respondent to award a work permit to the
First Plaintiff based on a new application, then no claim arises.

As a result of the foregoing, the application by the Plaintiffs is denied.

Costs are awarded to the Respondent.

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Nova Hall
Acting Judge of the Grand Court
19th December 2014



