IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G16 OF 2014

BETWEEN:

ANDRE AMANDO MALCOLM

Proposed Appellant

AND

IMMIGRATION APPEALS TRIBUNAL

-and–

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Proposed Respondents

Appearances:	**Ms. Martha Rankine for the Proposed Appellant** **Ms. Jennifer Catran of AG's Chambers for the Proposed Respondents**
Before:	**Hon. Justice Richard Williams**
Hearing:	**11th November 2014**
Ex Tempore Judgment:	**11th November 2014**
Transcript of Judgment provided:	**11th November 2014**

JUDGMENT

1. I am giving this ex tempore judgment so that the parties have the reasons for my decision today. I will direct that a transcript of this judgment be made available to the parties. As this is an ex tempore ruling, it is not intended to read as a formal written ruling.

Background

2. The proposed appellant is Andre Amando Malcolm, a Jamaican national. The application arises, as described by the affidavit of Mr Malcolm sworn on 8 August 2014. Mr. Malcolm has resided in the Cayman Islands since 2003. He had been employed as a carer for an elderly relative who died in 2012.

3. On 16th July 2012 Mr. Malcolm applied to the Caymanian Status and Permanent Residency Board for the grant of permanent residence under s.30 Immigration Law (2011 Revision) ("the Law"). Prior to the application he had been on his final work permit, having reached his term limit pursuant to s.52(1) of the Law. On 20th July 2012, at the end of his final work permit, he was granted a renewable 30 days Visitor's Visa. On 10th January 2013 he was notified by letter of the same date from the Board that his application had been refused. On 23rd January 2013 Mr. Malcolm filed his Notice of Appeal against the Board's decision pursuant to s.15(1)(a). In the interim he unsuccessfully applied for final extension of his Visitor's Visa. On 12th February 2013, he filed an appeal against the refusal of the extension pursuant to s.14(2) (b) of the Law. That appeal is apparently still to be determined.

4. On 3rd May 2013 Mr. Malcolm filed his grounds of appeal against the Board's decision pursuant to s.15 of the Law. The Immigration Appeals Tribunal considered the appeal on 15th August 2013. It is that dated decision that the Proposed Appellant now seeks to challenge. The Tribunal communicated its decision to Mr. Malcolm's attorney in a letter dated 7th October 2014. Mr. Malcolm states at paragraph 14 of his affidavit sworn on 3rd

February 2014 that the letter was received on or about 14th October 2013. Importantly, as required under s.18(3) of the Law, the letter correctly informed Mr. Malcolm of his right to appeal under s.15 when it stated:

> *"Should further appeal be desired, the appellant may appeal to the Grand Court pursuant to section 17 of the Immigration Law (2012 from a decision of the Tribunal on point of law only, within twenty eight (28) calendar days after receipt of the decision against which the appeal is brought*[1]*."*

Therefore, Mr Malcolm and his attorney have been aware of the requirement to file and serve any appeal promptly since 14th October 2013

5. On 5th February 2014 Mr. Malcolm filed an Application for Leave to Apply for Judicial Review. That was supported by an affidavit sworn by Mr. Malcolm on 3rd February 2014.

6. The Application for Leave came on notice before Quin J. on 18th June 2014. Quin J.'s detailed and helpful Minute of Order notes the following as a preamble to his Order:

> *"a. The application for leave to apply for JR was filed on the 5th February 2014, and therefore, comes 30 days/1 month outside of the three months [pursuant to GCR O.53 r.4(1)] allowed for filing from the time of the decision of the Immigration Appeals Tribunal (on 7th October 2013) (re the decision of the Caymanian Status and Permanent Residency Board) and for the application to be made;*
>
> *b. Grounds 1, 3, 6, and 8 listed by the Applicant as grounds for the application of points of law, however, grounds 2 and 4 had to do with "reasonableness": the respondent conceded that the application was not*

[1] My emphasis by underlining.

strongly opposed on this basis but noted that, pursuant to s.17(2) of the law, grounds for appeal are to be on points of law only"

7. Quin J.'s Minute also importantly reflects as a preamble to the Order:

> *"Upon Counsel for the Applicant advising the Court that the delay beyond the 90 days allowable deadline is "all [her] fault" as she had been off on vacation for some of the period following the decision of the Immigration Appeals Tribunal."*
>
> .....
>
> *"Upon the Court advising counsel for the Applicant that:*
>
> - *the grounds for leave to apply for JR should be on points of law only (pursuant to s. 17(2) of the Immigration Law;*
> - *when one is out of time with a the[2] Leave to apply for JR application, the first course should be to file application for Leave to file for an Extension of Time in which to file the application for Leave to apply for JR at time. This extension of time application should be supported by an affidavit giving good reason(s) for the delay;*
> - *Judicial Review is considered to be "a significant remedy" and the Applicant must have exhausted all remedies under the Immigration Law before making an application for leave to apply for JR;"*

8. His Minute of Order sets out Quin J.'s decision to dismiss the Application for Leave on the basis that the application was out of time, as it was not made within three months after the decision of the Immigration Appeals Tribunal. Quin J.'s Minute contains his finding that the Applicant had not exhausted his remedies under the Immigration Law. Importantly Quin J. also noted that Mr. Malcolm failed to file an affidavit providing the

[2] This is how it appears in the Minute.

Court with good reasons for his delay in making the Application for Leave to Apply for Judicial Review and for the Court to grant an extension of time to file the Application for Leave to Apply for Judicial Review.

9. Quin J.'s decision brought Cause No. 16 of 2014 to an end. The file should have been closed. However, there then follows a catalogue of procedural errors made by Mr. Malcolm and his attorneys. On 8th August 2014 Mr. Malcolm filed a Notice of Originating Motion in support of a purported appeal. It was served on the 1st Respondent on 20th August 2014. It is unclear why the 2nd Respondent has been made a party as there is no action brought against the Crown. For reasons best known to his attorney, this proposed appeal was also brought in the already concluded Cause No. 16 of 2014. Of course, it should have been brought with a new Cause No. and a new file. This in itself may be a reason for me not to proceed to hearing the matter today. If this was not enough of a procedural irregularity, there are more concerns, which are listed as follows:

(i) The Notice of Motion is defective. It does not comply with GCR O.55, rule 3(2) which requires *"(2) Every notice of the motion by which such an appeal is brought must state the grounds of appeal and, if the appeal is against part only of any order, determination, award or other decision, must state whether the appeal is against the whole or part of that order, termination, award of other decision and, if against a part only, must specify the part."* Even if the appeal was in a position to go ahead and raised arguable points, I find it hard to fathom why Mr. Malcolm's attorneys felt that the appeal required an only 30 to 45 minute time estimate.

(ii) Paragraph (iii) of the Notice of Motion flies in the face of s.17(2) of the Law which makes clear that an appeal from the Immigration Appeals

Tribunal is on the point of law only. The said paragraph raises a point of fact only. Orders of certiorari, mandamus and declaration, which are not available on appeal have been sought in the Notice. Parts of the Notice of Motion are more akin to those seen in judicial review proceedings.

(iii) The Notice of Appeal, should have been filed and served within 28 days of the communication of the Tribunal's decision to Mr. Malcolm on 14th October 2013, namely by or on 11th November 2013. The Immigration Law does not set a statutory time limit for the appeal and therefore one applies GCR O.55, r.4(2) which provides *"in the absence of any other statutory time limit, the notice must be served, and the appeal entered, within 28 days after the date of the order, determination, award of other decision against which the appeal is brought. "* Even if the Notice was accepted as being properly drafted and issued, it was filed a rather startling 211 days after the prescribed date and served 223 days after the due date. Just as concerning is that it was filed 51 days after the hearing before Quin J., and his Minute of Order reflects his then clearly expressed concerns about delay before refusing leave. The serving of the Notice of Motion is considerably out of time. As a consequence, the Notice of Motion filed in this case does not commence the proceedings. An application for an extension of time to appeal must be made by summons or notice. This must be supported by an affidavit, in which Mr. Malcolm must set out concisely the reasons why the appeal was not filed and served within the prescribed time. This is particularly so where there has been an inordinate delay, as in the matter before me. This has not been done, and is yet a further example of a procedural error. It is particularly troublesome, as Quin J.'s Minute of Order reflects that the parties were made aware of the need to file an affidavit giving good reasons for delay in applying for leave to apply for judicial review out of time, wise guidance which would obviously also similarly apply to any application for leave to appeal out of time. I am not willing, due to the nature and number of procedural errors and the state of the pleadings, to consider an application for leave to

extend time today. However, if the Court ever needs to do so, the affidavit to be provided by Mr. Malcolm in support of the application would have to contain very persuasive material in light of the considerable and, on the face of it, inexcusable delay.

10. I respectfully suggest that if Mr. Malcolm wishes to proceed with an appeal then he should bring it properly. For me to allow the matter to proceed today with this cocktail of errors would send out the wrong message to those who make applications before this Court, namely that the Grand Court countenances shoddy and procedurally irregular applications. Mr. Malcolm and his attorney should:

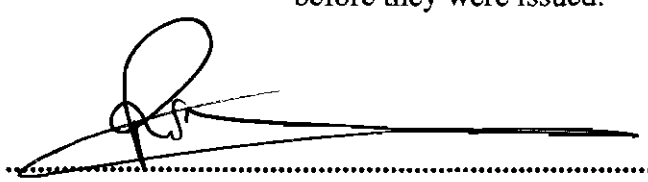
    (i) think long and hard about the merits of an appeal seeking the orders set out in the current Notice of Motion;

    (ii) think long and hard about how to draft a Notice so that it conforms with the requirements set out in GCR O.55 r.3(2);

    (iii) prepare a formal application supported with an affidavit for leave to extend the time for filing and serving the notice of appeal;

    (iv) think long and hard about the contents of the affidavit, as they will have to explain concisely and in some detail the reasons for the significant delay;

    (v) file any pleadings in a new Cause. It was not appropriate for Mr. Malcolm and his attorney to have submitted the pleadings currently before me using the same Cause No. used for the already concluded judicial review proceedings. An attorney had an obligation to draw to the attention of the busy members of staff at the Registry that the judicial review proceedings were over and request a new cause number to be entered on the pleadings before they were issued.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT