

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

Cause No: 0355/2010

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6 **IN THE MATTER OF GRAND COURT RULE, O.55 r.1 AND s.17(2) OF THE**
7 **IMMIGRATION LAW (2009 REVISION)**

8
9 **AND IN THE MATTER OF THE APPEAL OF RADFORD HOYBIA GABATO UNDER**
10 **THE IMMIGRATION LAW (2009 REVISION)**

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12 **BETWEEN:**

13 **RADFORD HOYBIA GABATO**

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15 **APPLICANT**

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17 **AND:**

18 **THE IMMIGRATION APPEALS**
19 **TRIBUNAL**

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21 **RESPONDENT**

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24 **Appearances:**

25 **Mr. James Kennedy of Samson & McGrath**
26 **for the Applicant**

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28 **Ms. Dawn Lewis of the Solicitor General's**
29 **Chambers for the Respondent**

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31 **Before:**

The Hon. Mr. Justice Charles Quin

32 **Heard:**

11th March 2011

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34 **JUDGMENT**

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37 1. On the 23rd December 2010 the Applicant's attorneys filed an application to be
38 granted an extension of time pursuant to GCR O.3 r.5 in which to file an appeal
39 pursuant to GCR O.55 r.4(2), against a decision of the Respondent Tribunal
40 dismissing the Applicant's appeal for a grant of Permanent Residence ("PR") with

1 the right to work. The application was grounded by the affidavit of Mr. Radford
2 Gabato (“the Applicant”)

3 **History of Relevant Facts**

4 2. In addition to swearing and filing an affidavit on the 9th December 2010, the
5 Applicant gave evidence and was subject to cross examination by the Respondent’s
6 counsel.

7 3. The Applicant came to the Cayman Islands to live and work on the 24th August
8 1997.

9 4. On the 17th February 2006 the Applicant applied to the Caymanian Status and
10 Permanent Residency Board for a grant of PR with the right to work. The Applicant
11 was assisted with his application by Messrs. Anglin Lewis & Associates (“Messrs.
12 Anglin Lewis”).

13 5. On the 13th March 2008, the Caymanian Status and Permanent Residency Board
14 rejected the Applicant’s application for PR with the right to work, and informed
15 him that he had the right to apply to the Work Permit Board for a final non-
16 renewable one year Work Permit.

17 6. In a letter dated the 13th March 2008 the Secretary of the Caymanian Status and
18 Permanent Residency Board stated: *“It is my duty to advise you that if you are
19 dissatisfied with this decision under s.15 of the Immigration Law (2007 Revision)
20 you have the right of appeal to the Immigration Appeals Tribunal [“the Tribunal”]
21 within 28 days hereof.”*

- 1 7. On the 8th April 2008 the Applicant filed an appeal to the Respondent Tribunal
2 against the decision of the Caymanian Status and Permanent Residency Board.
- 3 8. Over two years elapsed and then on the 29th July 2010 the Respondent Tribunal
4 wrote to Messrs. Anglin Lewis informing them that the Applicant's appeal to the
5 Tribunal had been dismissed. Unlike the Secretary of the Caymanian Status and
6 Permanent Residency Board, the Respondent Tribunal, in its letter dated the 29th
7 July 2010 did not disclose that pursuant to s.17(2) of the Immigration Law the
8 Applicant had the right of appeal to the Grand Court from the decision of the
9 Tribunal on a point of law only, and further, did not disclose that pursuant to GCR
10 O.55 r.4(2), the Applicant must serve any notice of appeal and have the appeal
11 entered within twenty-eight (28) days after the date of the of the Respondent
12 Tribunal's determination.
- 13 9. On or about the 4th August 2010 the Applicant collected the Respondent Tribunal's
14 letter dated the 29th July 2010 from Messrs. Anglin Lewis. Messrs. Anglin Lewis
15 told the Applicant of his right of appeal but did not indicate any deadline in which
16 to file an appeal. Messrs. Anglin Lewis recommended that the Applicant visit a firm
17 of attorneys.
- 18 10. Following on from this advice, on or about the 6th August 2010 the Applicant went
19 to the office of the recommended firm of attorneys and was given an appointment
20 to meet an attorney on the 11th August 2010.
- 21 11. On the 11th August 2010 the Applicant met with an attorney and paid a fee of five
22 hundred dollars (CI\$500) for this consultation. The Applicant's evidence is that on
23 the 11th August 2010 he explained his circumstances to the attorney and left his

1 relevant documents with her. The attorney said that she would get back to the
2 Applicant.

3 12. Some days later the attorney phoned the Applicant and asked him to visit the office
4 to meet with her. The Applicant met with the attorney approximately one or two
5 weeks after the 11th August 2010, and the attorney told the Applicant that her firm
6 could not assist him, and further recommended that he seek the services of another
7 firm of attorneys. The Applicant's evidence is that the attorney did not advise him
8 of any time deadline for the appeal.

9 13. The Applicant said that he was at a complete loss about what to do next.

10 14. The Applicant received ninety-two (92) points on his appeal, and therefore was
11 only eight (8) points short of making the required score for receiving a grant of PR
12 with the right to work. As a result of being told by the first firm of attorneys that
13 they could not act for him, the Applicant stated, both in his affidavit and on oath,
14 that he did not know what to do and therefore, it was some time later before he
15 contacted another set of attorneys.

16 15. On the 21st September the Applicant made an appointment with the firm of
17 attorneys Messrs. Samson & McGrath, and retained them to file an appeal.

18 16. As a result of the Applicant's instructions Samson & McGrath filed the Notice of
19 Originating Motion on the 23rd September 2010 and in this Notice asked for an
20 extension of time, pursuant to GCR O.3 r.5, for the filing of this appeal.

21 17. Samson & McGrath entered into correspondence with the Solicitor General's
22 Department and ultimately, on the 23rd December 2010, filed the Summons which

1 is now before the Court asking for an extension of time in which to file an
2 application to appeal on behalf of the Applicant.

3 18. Counsel for both parties have agreed that the Applicant's Notice of Originating
4 Motion was filed twenty-one (21) days after the deadline in which to file his appeal
5 against the Respondent's decision.

6 **The Applicant's Position**

7 19. The Applicant's counsel submits that the Applicant, upon receiving notice of the
8 Respondent Tribunal's rejection of his appeal, took immediate steps to seek legal
9 advice and file an Appeal. The Applicant's counsel contends that the delay was not
10 entirely caused by the Applicant. Further, the Applicant's counsel submits that, in
11 any event, the delay of 21 days is not substantial.

12 20. The Applicant's counsel submits that the Applicant has, in his affidavit and in *viva*
13 *voce* evidence before the Court, provided an acceptable explanation for the delay
14 and further submits that, should this Court grant the request for the extension of
15 time, there would be no significant prejudice to the Respondent.

16 **The Respondent's Position**

17 21. The Respondent's counsel submits that there is no proper appeal before the Grand
18 Court and, as a result, the Notice of Originating Motion dated the 23rd September
19 2010 should be struck out.

20 22. The Respondent's counsel further submits that no reasonable explanation has been
21 put forward for the delay in filing an appeal, and therefore an extension of time
22 should not be granted.

1 23. The Respondent’s counsel relies on O.3 r.5/3 of the Rules of the Supreme Court
2 which refers to the English Court of Appeal decision in *Regalbourne Ltd. v. East*
3 *Lindsey District Council* [1994] 158 LGRV 81 (1993) The Times March 16 where
4 Kennedy L.J. stated:

5 *“In the absence of agreement, before the court would consider exercising its*
6 *discretion to extend time under O.3 r.5 it would normally need to be satisfied*
7 *that there was an acceptable explanation for the delay. If there was none the*
8 *question of prejudice was unlikely to arise. If there was an acceptable*
9 *explanation, the court might still refuse to extend time if the delay was*
10 *substantial or if to do so would cause significant prejudice to the Respondent.”*

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12 24. The Respondent’s counsel submits that the interests of good administration require
13 that the challenges to decisions of Tribunals be made within the prescribed limited
14 time frames and argues that Courts have repeated their reluctance to extend time in
15 such situations.

16 25. The Respondent’s contention is that the right to appeal exists only for twenty-eight
17 (28) days. The Applicant’s right to appeal expires on the expiration of that period.
18 The Applicant failed to file his appeal and, in this case, the Respondent’s counsel
19 submits that the Notice of Originating Motion should be struck out and the
20 application refused.

21 **Analysis and Conclusion**

22 26. I have been assisted by the written submissions of both counsel and the affidavit
23 and sworn *viva voce* evidence of the Applicant.

24 27. It is clear from the Applicant’s conduct, and from what he has stated in evidence,
25 that he always wished to exercise his right to appeal against the decision of the
26 Respondent Tribunal. I note that the Respondent Tribunal’s written decision did not

1 refer to s.17(2) of the Immigration Law, which provides for the right of appeal, nor
2 did it refer to the time period for such appeal, stipulated by GCR O.55 r.4(2), when
3 it was delivered to the Applicant's advisers, Messrs Anglin Lewis.

4 28. In this regard I refer to the decision of Latham J. in *C and Another v. The Special*
5 *Education Needs Tribunal* CO/1668/95 dated the 7th November 1995 in which the
6 learned Judge stated:

7 *"I also take into account the fact that, unlike decisions from other Tribunals, no*
8 *note was attached to the decision setting out clearly both the form of an*
9 *appropriate appeal, and the relevant time limits. That seems to me to be a*
10 *deficiency which needs to be remedied urgently. I am therefore prepared to*
11 *approach the delay in this case benevolently."*

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13 29. Had the Respondent Tribunal's written decision, dated the 29th July 2010, contained
14 a note setting out the provisions of s.17(2), as read with GCR O.55 r.4(2), then the
15 Applicant could have no valid excuse or acceptable explanation for his delay in
16 filing his Notice of Appeal.

17 30. The Court takes note of the fact that English is not the Applicant's first language.
18 Furthermore, the Applicant made it clear in examination by the Court that when
19 people talk he sometimes cannot understand very well, but if people speak slowly
20 he can understand. Having visited one firm of attorneys who ultimately told him
21 that they could not act, it is not surprising that the Respondent was in a state of
22 confusion and despair. I find that these were unfortunate circumstances and, indeed,
23 as counsel for the Respondent properly conceded, it is difficult not to feel sympathy
24 for the position in which the Respondent found himself.

25 31. It is apparent from the evidence that the Applicant's appeal did not progress from
26 the date of the decision namely, the 29th July 2010, until late August 2010 when the

1 first firm of attorneys indicated that they could not represent him. In these
2 circumstances it would be exceedingly harsh for this Court to attach blame to the
3 Applicant for this early and potentially crucial delay.

4 32. From the evidence I find that although the Applicant may be guilty of some delay in
5 visiting the second firm of attorneys after the first firm had informed him that they
6 could not act, I do accept that, in light of the facts and circumstances, the
7 Applicant's confusion and consequential delay were somewhat understandable.

8 33. Having met with Samson & McGrath on the 21st September 2010, the Applicant
9 wasted no time in communicating his instructions, so that, whilst the firm may not
10 have followed the correct procedure, the Notice of Originating Motion made it clear
11 that the Applicant sought to overturn the decision of the Respondent Tribunal
12 refusing the Applicant PR.

13 34. The Court receives considerable guidance and assistance from the English Court of
14 Appeal decision in *Costellow v. Somerset County Council* [1993] 1 All E.R. 952 in
15 which Lord Bingham, then Master of the Rolls, stated at page 959:

16 *“As so often happens, this problem [failure to abide by time deadlines] arises at*
17 *the intersection of two principles, each in itself salutary. The first principle is*
18 *that the rules of court and the associated rules of practice, devised in the public*
19 *interest to promote the expeditious dispatch of litigation, must be observed. The*
20 *prescribed time limits are not targets to be aimed at or expressions of pious*
21 *hope, but requirements to be met. This principle is reflected in the series of*
22 *rules giving the court a discretion to dismiss on failure to comply with a time*
23 *limit: O.19 r.1, O.24 r.16(1), O.25, r.1(4) and (5), O.28 r.10(1) and O.34 r.2(2).*
24 *This principle is also reflected in the court's inherent jurisdiction to dismiss for*
25 *want of prosecution.”*

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Lord Bingham continued and stated:

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“The second principle is that a plaintiff should not in the ordinary way be denied adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by O.3, r.5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings. Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff’s default had caused prejudice to the defendant. But the court’s practice has been to treat the existence of such prejudice as a crucial, and often a decisive matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by O.3 r.5 and would indeed involve a substantial rewriting of the rule.”

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35. Lord Bingham continued:

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“The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff’s application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases it is appropriate for the court to hear both summonses together, since, in considering what justice requires the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round.”

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1 36. The first written decision of the Respondent Tribunal dated the 29th July 2010 did
2 not set out the form of an appropriate appeal, nor the relevant time limit. Therefore,
3 like Latham J. in *C and Another v. The Special Education Needs Tribunal* I am
4 prepared to approach the delay in this case benevolently.

5 37. In adopting the well reasoned guidelines of the Master of the Rolls in *Costellow v.*
6 *Somerset County Council* and Kennedy L.J. in *Regalbourne Ltd. v. East Lindsey*
7 *District Council*, I find in this case that the 21 days delay cannot properly be
8 described as a substantial delay. Furthermore, I find that the Applicant, both
9 through his affidavit evidence and his *viva voce* evidence, has provided the Court
10 with an acceptable explanation for the cause of the delay.

11 38. The Applicant's position did not improve despite his attendance on professional
12 advisers, and this early and crucial delay could not be attributed to him alone. In
13 adopting Lord Bingham's words, I consider all the facts and circumstances in the
14 round and I cannot find any significant prejudice to the Respondent Tribunal. I find
15 that in all the circumstances, and for the reasons outlined above, the Applicant
16 deserves to have his appeal heard and adjudicated upon by this Court.

17 39. Accordingly, I am prepared to grant the Applicant an extension of time in which to
18 file his appeal pursuant to GCR O.3 r.5.

19 40. For the sake of completeness I agree with the Respondent counsel's submission that
20 there is no proper appeal before this Court, and consequently the Applicant's Notice
21 of Originating Motion, dated the 23rd September 2010 is struck out.

1 41. I order that the Applicant's Appeal must be filed and served on the Respondent
2 within fourteen (14) days from this Order, and I further Order that costs are to be
3 costs in the cause.

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5 **Dated this the 18th day of March 2011**

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10 **Honourable Mr. Justice Charles Quin**
11 **Judge of the Grand Court**