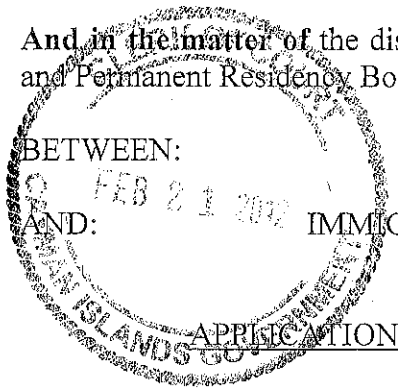
Application for Leave to Apply for Judicial Review (O.53, r.3)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 582 OF 2012

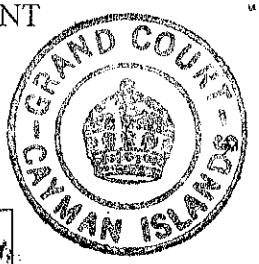
In the matter of an application by V. Smithson to apply for Judicial Review of a decision made pursuant to the Immigration Law (2010 Revision)

And in the matter of the dismissal of an appeal against the decision of the Caymanian and Permanent Residency Board by the Immigration Appeals Tribunal.



BETWEEN: VINTON SMITHSON PLAINTIFF

AND: IMMIGRATION APPEALS TRIBUNAL DEFENDANT



APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law courts, George Town, Grand Cayman.	
Name, address and description of applicant.	Vinton Smithson, Smith Road Villas P.O. Box 10187 APO, Cayman Islands.
Judgment, order, decision or other proceeding in respect of which relief is sought	Decision of the Immigration Appeals Tribunal on 10 November 2011 received on 21 December 2011 to dismiss application for Permanent Residency.
Relief Sought Leave to apply to the Grand Court for the issue of a Declaratory Order against the Immigration Appeal Tribunal the decision to dismiss the applicant's application for Permanent Residency as being null and void, an Order of certiorari to quash the decision and mandamus to hear the applicant and for any consequential damages.	
Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Clyde H. Allen CHAMBERS Attorney-At-Law PO Box 31076 SMB, Grand Cayman, Cayman Islands
Signed	Dated 21.2.2012

GROUNDS ON WHICH RELIEF IS SOUGHT

1. This matter was determined according to the Immigration Law (2010 Revision ((hereafter referred to as the "2010 Law") notwithstanding that the application was lodged at the time when the Immigration Law (2006 Revision) (hereafter referred to as the "2006 Law") was in place. This law was amended by the Immigration (Amendment (No.2) Law 2006. Since then the Immigration Law (2007 Revision) (hereafter referred to as the "2007 Law") was enacted and was in place when the applicant lodged his appeal against the refusal decision of the Caymanian and Permanent Residency Board. Since then the Immigration Law (2007 Revision) has been enacted.

2. Sections 15 and 16 of the 2007 and 2010 Law provides, *inter alia*, as follows:

15. (1) Save as otherwise provided in this Law, any person aggrieved by, or dissatisfied with, any decision of a Board other than a decision under section 14 may, within-

(a) twenty-eight days of the communication of the decision to him; or
(b) such longer period as the Chairman of the Immigration Appeals Tribunal may, for good reason shown, allow,

appeal there from by way of rehearing to the Immigration Appeals Tribunal, and matters referred to the Tribunal may not be remitted to that Board.

(2) An appeal under subsection (1) may be lodged on the ground that it is-

(a) erroneous in law;
(b) unreasonable;
(c) contrary to the principles of natural justice; or
(d) at variance with the Regulations.

(3) Where the Immigration Appeals Tribunal sends notice of its decision to the appellant by post, such notice shall be deemed to have been communicated to the appellant at the time at which it should have been received by him in the ordinary course of post.

3. The manner in which the appeal is to be conducted is set out under section 16 of the Law as follows:

16. (1) Appeals under sections 14 and 15 shall be by notice in writing addressed to the Secretary of the Board or of the Immigration Appeals Tribunal, as the case may be, and such notice-

(a) shall set forth-
(i) the decision against which the appeal is made;
(ii) whether or not the appellant wishes to be heard personally or by a representative; and
(b) shall be accompanied by a copy of the original application and in the case of an appeal to the Immigration Appeals Tribunal, by the prescribed non-refundable processing fee.

(2) On receipt of the notice of appeal the Appellate Tribunal shall, within fourteen days, notify the Chief Immigration Officer or the Board, as the case may be, of the decision against which the appeal is made.

(3) Within twenty-eight days of receipt of the notice referred to in subsection (2), the Chief Immigration Officer or the Board, as the case may be, shall deliver to the Board or the Immigration Appeals Tribunal, as the case may be, and the appellant the reasons for his or its decision.

(4) The appellant shall, within twenty-eight days of receipt of the reasons referred to in subsection (3), file his grounds of appeal with the Board or the Immigration Appeals Tribunal, as the case may be, and serve a copy thereof on the Chief Immigration Officer or the Board.

(5) The Chief Immigration Officer or the Board may, within twenty-eight days of the receipt of the grounds of appeal referred to in subsection (4), provide a written defence which shall be filed with the Board or the Immigration Appeals Tribunal, as the case may be, and served on the appellant.

(6) Where the appellant has applied to be heard personally or by a representative, the Appellate Tribunal shall fix a time and a date for such hearing and notify the appellant and, as the case may be, the Chief Immigration Officer or the Board thereof.

(7) Appeals to the Immigration Appeals Tribunal shall be by way of rehearing.

(8) The Immigration Appeals Tribunal, when hearing an appeal, may take into account fresh evidence and any change in circumstances that may have arisen in relation to the parties.

(9) At every hearing of an appeal where the appellant or his representative is present, the appellant or his representative shall be given an opportunity to address the Appellate Tribunal, and the Chief Immigration Officer or his representative or the representative of the Board, as the case may be, shall be heard in answer, but the Appellate Tribunal may, in its absolute discretion, call upon either party further to address it.

(10) Representatives appearing on behalf of either party need not be persons having legal qualifications.

(11) The decision of the Appellate Tribunal shall be notified to the appellant with the least possible delay.

4. The applicant's original application was lodged on 26 September 2006 under section 29(1) of the Immigration Law (2006 Revision). The applicant had been living within the Cayman Islands since 1998 and working at Hurley's Supermarket since 1998 and thus qualified to submit his application. The Caymanian and Permanent Residency Board refused his application on 1 December 2008 which resulted in this appeal. He lodged an appeal against that decision on 8 December 2008. When writing it appears that no grounds were submitted by his then representative as they appeared to be waiting for a copy of the Appeal Statement. By letter dated 28 April 2009 the applicant was sent the Appeal Statement and was invited to provide detailed grounds of appeal. It is not clear when the applicant's representative received the letter but it is clear that the applicant's representative submitted detailed grounds of appeal on 26 May 2009 which was received by the IAT on 29 May 2009. The ground of appeal was that the decision of the Caymanian and Permanent Residency Board was unreasonable.

5. On 29 September 2008 the Caymanian and Permanent Residency Board requested further information concerning a certified copy of the Land Register of the applicant's property. They did not write at that time to find out who was to attend the hearing – the applicant or his representative. Unfortunately, the applicant's representative submitted a valuation report for the property which showed it with a value as at 2003 of CI$133,000.00. That report did not reflect the correct value as a valuation report as at 4 May 2009 valued the property at or about CI$220,000.00.

6. On 21 November 2011 the applicant received a letter dated 10 November 2011 from the Immigration Appeals Tribunal ("IAT") dismissing his appeal from the decision of the Caymanian and Permanent Residency Board by way of Notice of Appeal dated 8 December 2008.

7. The IAT letters states that the basis for refusing his appeal is that he failed to establish that the Caymanian and Permanent Residency Board erred in Law and the appeal was dismissed. As mentioned above it is clear that the facts relied on by the Caymanian and Permanent Residency Board was erroneous and therefore the decision must be erroneous.

8. Until recently the applicant was represented by Cayman Immigration Consultants Services who lodged the Notice of Appeal on 10 December 2008. They did lodge grounds of appeal on 29 May 2009. The ground of appeal was that the decision was unreasonable. The ground of appeal was acknowledged on 1 June 2009. The tribunal reviewed the matter and on 15 January 2010 notified the applicant that the appeal had been dismissed as it did not establish any grounds. By letter dated 19 February 2010 from the applicant's attorney the IAT was invited, in short, to review the letter dated 29 May 2010 as it set out the grounds of the applicant. The IAT agreed to review the ground and the same was confirmed by letter dated 30 March 2010 as it had made "...an error in.....the decision letter dated 15 January 2010.".

9. On 10 November 2011 the appeal was dismissed and notice of the dismissal was received on 21 November 2011 again on the basis that the appeal established no grounds under section 15(2) and 16(4) of the Immigration Law (2010 Revision). The applicant through his attorney wrote to the IAT inviting it to review the matter again as it did not, *inter alia*, take account of the applicant's changed circumstances such as the value of property, the change in status at his job and the commensurate higher salary, the fact that he is now married and his wife is in full time employment.

10. It is of significance that the applicant was not permitted to attend the hearing and by that it is meant that before the tribunal dismissed his application because it considered that "...no grounds of appeal had been established..." it did not avail him or his representative an opportunity to attend and if they had attended to consider the matter de novo by way of a rehearing to include perfecting the grounds and further there was no basis under the statute to support the position by the IAT that a person must first establish grounds of appeal and only if such grounds were established the matter could be heard de novo which it is understood to be the practice. Section 16(1)(a)(ii) and 16(6) of the 2010 Law envisages that either the applicant or his representative should be in attendance so that they can be afforded an opportunity to make representation before the tribunal and it is to be noted that section 16 (7) states that the hearing "shall be by way of a rehearing". There is clearly no two stage basis for considering the application as set out under the Law and if there was such a basis then the

applicant should be afforded an opportunity to respond to such a procedural change on the part of the IAT as the same is not set out in 2007 or 2010 Law.

11. It is not clear as to the basis in law for the finding that the applicant did not establish any grounds of appeal as the IAT has not put its reasons for such a finding in writing. What is submitted in writing by the IAT does not in law support the view that the reasons have not been set out in writing.

12. The applicant will seek to rely on the authority of ***Barret –v- Southwark London Borough Council [2008] AllER (D) 57 (JUL)*** to support the ground that he had no knowledge of the failure, if such failure occurred, of the Cayman Immigration Consultants Services to act in accordance with Section 16(1)(a)(ii) of the 2010 Law thus prejudicing the consideration of his application for permanent residency. In the latter case the court relied on the proposition set out in ***R (Tofik) –v- Immigration Appeal Tribunal [2003] EWCA Civil 113 at paragraph 46*** that :

> ***"There is no general principle of law which fixes a party with the procedural errors of his or her representatives."***

13. I submit the above in support of the proposition that it is not the applicant's fault that his representative failed in accordance with the mandatory requirement set out at section 16(1)(a)(ii) "whether or not the appellant wishes to be heard personally or by a representative;"

14. In that regard, I am instructed that my client provided Cayman Immigration Consultants Services with all of the necessary information to lodge the appeal on his behalf. However, and unbeknownst to him, it would appear that they did not notify the tribunal whether he was to attend a hearing on his own or with a representative.

15. However, it is submitted that the Tribunal could not fix a date for the matter to be heard without first notifying the applicant in accordance with section 16 (6) of the 2010 Law. If it had considered this matter properly then, given the passage of time, the Tribunal could have taken into account "...fresh evidence and any change in circumstances that may have arisen in relation to the parties." pursuant to section 16(8) of the 2010 Law. The applicant will submit that the decision is *ultra vires* the 2010 Law as it was made in breach of the *audi alteram partem* principle which is one of the two fundamental pillars of natural justice.

16. On 1 February 2012 and in an effort to resolve matters amicably and without a hearing the following e-mail was sent to the IAT:

> Dear Natasha,
>
> It was a pleasure discussing this matter with you today. Please excuse this long letter but if I can dispose of this matter without placing it before the court then that may address the underlying concerns.

Please can you inform me if you are the correct person to respond to this e-mail. I note that you are in charge of matters, amongst others, relating to freedom of information and so I write to you in part on a matter concerning FOI. This e-mail follows out (sic) brief discussion today.

Mr. Smithson's application for leave to appeal the decision of the Immigration Board to grant him Permanent Residency was heard in December 2011 and refused. I wish to appeal that decision to the Grand Court but had invited a review which was refused. I was not his legal representative who submitted his appeal and sadly only just got sight of documents submitted on his behalf to the IAT. I note for instance that a request was made by the Secretary of the Caymanian Status and Permanent Residency Board for documentation to prove that he owned land by letter dated 29 September 2008 and that his then agent wrote back on 1 October 2008 attaching a report dated 2003. The value of the property – CI$133,000.00 in that report attached to her letter was substantially out of date. I have attached a 2009 DDL report in which the property was valued at about CI$220.000.00. That is clearly a marked difference and would affect the points allocated to him at least under part 4 of the points system. Under the points system his salary at point 5 would also have been considered differently as it was comparatively higher. There clearly was an error that needed to be corrected at point 4 with regards to his investment in the property at the time the application was considered. He has since remarried and thus his joint income is also comparatively higher.

I have looked at the Immigration Law and nowhere in it am I able to find any provision that states that the applicant must first establish a ground and only then will the matter be heard *de novo*. That is not to say that I recognise that grounds must be set out. In my client's case Sabrina Fennell did file the application and later grounds of appeal. In particular, she submitted that the finding was unreasonable as per section 15 (2)(b) and the basis for that claim. I note that when she first wrote to the tribunal she did not include the grounds of appeal which were sent to the tribunal on 26 May 2009. However, it appears that they were overlooked in January 2010 when a decision was rendered by the tribunal. The tribunal reviewed my letter dated 19 February 2010 and kindly agreed to review the matter.

I have last week been provided with all papers in this file as they were not provided to my client until then and I note that the application is silent as to whether the applicant wished to attend and be heard at the hearings. One of the principles of JR is natural justice, which includes the "*audi alterem partem*" rule – to hear the other side. It appears that no such request was made but more importantly no such opportunity was offered especially where a substantial and quite frankly unreasonable passage of time has occurred.

I would be grateful if you can inform me and provide to me a copy of whatever relevant document is being relied upon by the IAT when making its decisions. In this case I understand that there is a memorandum or legal opinion which address (sic) that point. In this case grounds were sent albeit late. I do not consider that there is a statutory mechanism for the IAT to decide the merits of an appeal after grounds have been lodged before the actual hearing. I consider that this is simply *ultra vires* as no opportunity is provided to the applicant to set out his case even if the tribunal finds that the grounds have not been properly set out.

As mentioned today I feel that the IAT are trying to set up a mechanism similar to that applied before a JR application when one has to show a *prima facie* case.

That is simply not applicable here. The Court of Appeal if it is not content with Grounds of Appeal as lodged will provide an opportunity to perfect those grounds as that must be the right thing to do thus providing the applicant with what ultimately can be described as a fair hearing. I am concerned that on the facts of this case that simply has not taken place. As with the Court of Appeal, a hearing should be held and it should be made clear that the grounds should be perfected. I am particularly concerned as to what has taken place here and the fact that notice of no grounds being provided is given but only at a time where it appears it is simply too late.

For those of us who have appeared before the Court of Appeal and knowing how far they strive to be fair I cannot see the President not permitting an applicant to be heard just because his grounds may in some way be defective. It is for this reason that I consider that I must be provided with whatever document is being relied on by the IAT that has set up what I can only best describe as a two tier system which in my humble opinion is fettering the discretion of the tribunal. I also consider that they should have permitted my client a hearing especially since he was not legally represented and is addressing a matter applied for in 2006 but finally being heard on appeal in 2011.

When our Parliament passed the statute which governs the conduct of the tribunal it, and the tribunal members, have in mind being as fair as possible. The decision of this tribunal will have a major impact on my client and thus is a very serious matter which should be treated as such. It simply is not clear how the tribunal have determined that there are no grounds established when clearly there is correspondence before it setting them out.

May I refer you to the case of ***R v Manchester Metropolitan University, ex parte Nolan (15 July 1993.*** In short, a court will quash a decision made in disregard of representations. I would be grateful if, notwithstanding the letter dated 10 November 2011 where it is being suggested that "....no grounds had been made out..." I can be provided with an explanation of that statement as the same letter states that it received "...detailed grounds dated 26 May 2009...". When the IAT ignores grounds and purport to dismiss an appeal without a hearing they are disregarding the representations.

I wait to hear from you as a matter of some urgency whether this matter can be reviewed or the document(s) can be provided to me.

Please do not hesitate to contact me if you consider it may be helpful to clarify any point raised above.

Best regards,

17. The FOI department under the FOI request have stated that they are not prepared to release the legal document relied on as it is privileged. The difficulty therefore experienced is that one has absolutely no idea how the IAT are considering the extant Law as the applicant is not privy to the legal opinion of counsel. The applicant fully understands the importance of privilege as it applies to such legal advice but it does not know how it is impacting the decisions of the IAT as its reason for refusal is simply insufficient. If that opinion is wrong and no reasons are provided then the applicant has no way of knowing how the IAT has exercised its discretion.

18. The applicant seeks the assistance of this court to determine whether this matter should have been dealt with in the manner described by the IAT and it is the contention of the applicant that it is wrong for illegality, it is clearly irrational and there has been a procedural impropriety. It is clear on the facts that the IAT have dismissed this matter in a manner not permitted by law and it is for that reason that it is considered that their decision is *ultra vires* and thus null and void.

19. The decision to dismiss the applicant's appeal was contrary to natural justice as the applicant was never permitted an opportunity to make representations before the tribunal either in person or by a representative or when the matter was dismissed. The fact is that the application was silent as to whether the applicant wished to attend the hearing and make representations or to do so by a representative but it is the applicant's contention that it is clear on the face of the Law that either one or the other would or should attend the hearing. The IAT did not comply with the law. The applicant seeks a Declaration that the decision to dismiss his appeal was therefore null and void as his representative or the applicant was not permitted to attend the hearing or was an inquiry made to find out if either he or his representative intended to attend the hearing, that the decision be brought up and quashed and the matter be heard but this time with either the applicant and/or his representatives in attendance at the hearing so that the fresh evidence can be heard especially given the passage of time. The applicant is a blood donor and no points have been allocated for such a charitable act.

20. This issue raised here is of some considerable importance as the IAT are applying this method of dismissal for all applications that now come before it when the Law clearly makes no provision for a two stage procedure for dismissing such applications of establishing grounds and only then the substantive application is heard *de novo*.

Chambers
21 February 2012