

IN THE GRAND COURT OF THE CAYMAN ISLAND
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: GO 248 OF 2014

In the matter of the Immigration Law (2009 Revision), (the “Law”), section 17 (2).
And in the matter of the dismissal of an Application for Permanent Residency of Lena McGowan pursuant to the Law, section 29, by at decision of the Immigration Appeals Tribunal made by letter dated 21 October 2014.

BETWEEN:

LENA MCGOWAN

AND



1. THE ATTORNEY GENERAL
2. THE IMMIGRATION APPEALS TRIBUNAL



NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on 2014 at or as soon thereafter as counsel can be heard, by counsel on behalf of Lena McGowan for the following relief, namely

1. That until such time as the substantive matter is heard and determined by the Court the Applicant shall be permitted to stay and work in the Cayman Islands.
2. Leave of this Honourable Court to exercise its discretion to permit an extension of time pursuant to GCR Ord 3 r. 5 for the applicant to lodge a Notice of Motion if the Court considers that the time for lodging the application has expired.
3. Alternatively, that this Application stand as a Notice of Motion for an application that the decision to refuse to grant Lena McGowan permanent residency is unreasonable, erroneous and at variance with the Regulations.
4. The factual background is as follows:
 - (i) The Appellants application to the Caymanian Status and Permanent Residency Board (“the Board”) was made on the 15 July 2008 and was heard and refused on the 22 February 2010 on the grounds that the Appellant received a total score under the points system of 83 (and thus did not receive the 100 points necessary under section 30(4) of the Immigration Law 2009 (revision) (“the Law”) as per the Boards letter of refusal dated 22 February 2010.
 - (ii) Under paragraph 8 of the second Schedule of the Immigration Regulations (2009) Revision (the “Regulations”) the Appellant was entitled to 20 points for her connection to a Caymanian which person was her sister, Mona Lisa Morgan-Berry Kudritzki (“sister), who has had Caymanian Status since 15 July 2003.

- (iii) The Appellant has since received the Confidential Caymanian Status and Permanent Residency Board (the "Board") Appeal Statement which was submitted to the Immigration Appeals Tribunal ("IAT") on 12 May 2010 wherein it will be noted at paragraph 8 it states: "***Close CAYMANIAN CONNECTIONS: The appellant declared that she has a Caymanian conception (sic) namely her sister Monalisa Morganberry Kudritzki. However, the Appellant failed to provide evidence of the familial connection or legal documentation of adoption. Therefore, she was not eligible for points under this category***".
- (iv) The Board deferred its decision on 12 October 2009. It required further information concerning the ownership of property and so communicated its request to the Applicant to submit a "stamped copy of the land transfer duly filed with the Registrar of Lands" for the property 132D 331h27. However, and with explanation or logic, it failed unreasonably or erroneously, contrary to the principles of natural justice or in breach of the Regulations to request documentation concerning the Applicant's sister and thus Caymanian connection. As a result of its failure to request all of the requisite information, it having discovered that the evidence was missing, was clearly material and vitally necessary and that the applicant was not aware that it was lacking it thus did not award her the 20 points that she was clearly entitled to receive in such circumstances.
- (v) It is patently obvious from the document dated 10 May 2010 and submitted to the IAT on 12 May 2010 that it or the Board knew or would have known that the Applicant had a sibling who had Caymanian Status but for whom papers to prove the same had not been submitted. The Applicant was never made aware that the Board or the IAT required confirmation of that fact by way of supporting documents of the familial connection. The applicant discovered these facts when she received documentation on 22 October 2013 after a Freedom of information ("FOI") request made on or about 28 July 2013. That was the first time that the Applicant became aware that such documentation was needed. If the Board or IAT had notified her that they did not have that information then she would have provided them with it immediately.
- (vi) The applicant was not permitted under the Immigration Law (2009R) at section 16(9) the right, in short, to attend the hearing with or without a representative. If she were permitted what is not only a statutory right but a fundamental right to be heard and thus a fair hearing she could have addressed the issue of the absence of the supporting documents. This fact that she had a Caymanian sibling is not made less by the fact that there was no evidence before the IAT to support it. The evidence was required merely to prove the fact. The IAT therefore fell into error when it failed to request the evidence to support the fact after it had received documents from the Board pointing out the fact that there was a Caymanian sibling. The error could have been corrected under the "slip rule". Such a correction and thus review who not

prejudice any other party and would have been the right thing to do in the circumstances thus avoiding wasting any further time and here court time and costs.

- (vii) The Applicant has since tried to provide the IAT with the information by way of an affidavit, albeit headed "Affidavit of Lena Rose Dixon-McGowan in support of an Appeal against the Decision of the Caymanian Status and Permanent Residency Board" so that they could review and/or reconsider her application on appeal but they considered that "...there is no basis in law to grant the Appellant's motion to Reconsider, nor has the Applicant provided any authority in support of her motion." In short, it did not have to review the papers. For the record, the document headed Motion to Reconsider is dated 17 July 2014. The IAT was referred to the letter dated 12 October 2013 from the applicant, the letter dated 22 October 2013 from Bodden & Bodden and to the affidavit dated 15 January 2014 deposed to by Lena McGowan as well as the Motion to Reconsider. All of these documents attempted to address the earlier error or oversight on the part of the Board or the IAT, which error it is submitted could easily have been rectified under the "slip rule" or any such provision.
- (viii) The Appellants application was lodged on 15 July 2008 at which time she was married as acknowledged in the appeal statement dated 10 May 2010 and thus would have been entitled to an award of 40 points under paragraph 8 of the Immigration regulation (2009) if she were still married. She would have received an award of a minimum of 123 points. However, at the time of the hearing of the application on 28th January 2010, the Applicant's marriage had been dissolved. The requirement to consider her Caymanian sibling was therefore paramount to her.
- (ix) Given the passage of time, much has happened in the life of the Applicant. This is an application submitted in 2008 which has finally been determined in 2014. This delay in the resolution of this application has caused the Applicant prejudice but that prejudice has been compounded by the IAT knowing that there was a basis for a grant of points but insufficient evidence to support that fact, refusing to notify her that the information before them was incomplete and thus reaching a decision that a reasonable tribunal who properly considered the material before it acting reasonably and administratively would never have reached and/or failed to properly consider the matter at all within the context of the law or at all. Just as the Applicant is duty bound to make full and frank disclosure of information to support her application and thus update the tribunal of any changes in her circumstances whether they are in her interest or not the IAT is equally duty bound as a matter of fairness to ensure that the correct information is before it especially before it renders a decision where there is a clear reference to a sibling although there is no supporting evidence. What could be simpler than to have asked for the supporting information?

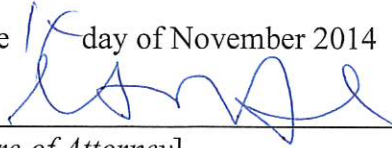
- (x) The Applicant should not be cloaked with any error or failure of her representative if it is said that there was a failure to provide the relevant evidence especially in a matter such as this where she clearly sought and had legal representation. This information should have been provided by her former attorney. The Applicant was not permitted to attend the hearing where such an error on the part of the tribunal could have been corrected in short order. The Applicant has not therefore been treated judiciously and has not had a fair hearing.

AND FURTHER TAKE NOTICE that the grounds of this appeal are:

5. In light of the above, the Grounds for the Application for the Appeal of the Decision to refuse to grant Permanent Residency or to Reconsider the decision to dismiss are pursuant to section 15(2) (a)(b)(c) and (d).
6. Alternatively, the Board having not awarded any points as seen on the Point System - Permanent Residence Assessment document signed by Mr. DaCosta on 28 January 2010 but awarding 20 points on the Appeal Statement form dated 10 May 2010 and submitted to the IAT on 12 May 2010 as evidence by the date stamp failed to properly add up the points mentioned therein which would have totaled 103 points, such correction being made under the slip rule.
7. Alternatively, the requisite statute being silent on the issue of reconsideration, failed as a matter of law to properly exercised its discretion either administratively or as a matter of common law to reconsider the application where it was clear on its face that there was an issue concerning the consideration of the applicants Caymanian sibling.
8. Alternatively, the Tribunal acted in a way that no reasonable tribunal would have acted in the circumstances.

And for an order that the costs of and incidental to this appeal may be paid by the Immigration Appeals Tribunal

Dated the 1st day of November 2014



[Signature of Attorney]

TO: The Clerk of the Court.

AND TO: The Respondent: c\o Legal Department.

This Notice of Motion was filed **CHAMBERS** on behalf of the Applicant whose address for service is P.O. Box 31076 SMB, 2nd Floor, Suite 10, Jack & Jill Building, 19 Fort Street, KYI-1205, George Town, Grand Cayman, Cayman Islands.