

No. 53

Application for Leave to Apply for Judicial Review (0.53, r.3)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

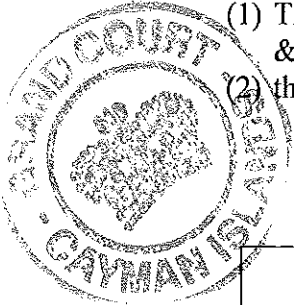
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CAUSE NO: OF 2017

BETWEEN:

Nicola Hacking


AND:

- (1) The Caymanian Status and Permanent Residency Board &
- (2) the Chief Immigration Officer of the Cayman Islands



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(s)	Nicola Hacking
Judgment, order, decision or other proceeding in respect which relief is sought	1) The failure of the Defendants to reach a decision in respect to the Applicant's application for Permanent Residence submitted on the 17 April 2014.
Relief Sought	
<p>(a) A declaration that the following the decision:</p> <p>i. The failure to reach a decision in respect to the Plaintiff's Permanent Residence application submitted on the 17 April 2014.</p> <p>is unlawful.</p>	

<p>(b) A declaration that the Defendants failure to consider the Plaintiff's PR application is unlawful, irrational, disproportionate and contrary to the principles of natural justice.</p> <p>(c) An order of Mandamus obliging either of the Defendants to consider the Plaintiff's application for Permanent Residence as of the date which is most favourable to her application due to the failure to consider the application within a reasonable period of time.</p> <p>(d) An order of Mandamus obliging either of the Defendants to consider the Plaintiff's application for PR within 2 weeks of the Order.</p>	
<p>(e) An order for the Defendants to pay the Plaintiff damages resulting from the Defendants misconduct and or inaction.</p> <p>(f) An order that costs of and incidental to this application may be paid by the Defendants.</p>	
<p>Name and address of Plaintiff's attorneys, or, if no attorneys acting, the address for service of the Plaintiff</p>	<p>Alastair David. HSM Chambers 68 Fort Street, George Town, PO Box 31726, Grand Cayman, KY1-1207 Cayman Islands</p>
<p>Signed </p>	<p>Dated 15/16/17</p>

GROUNDS ON WHICH RELIEF IS SOUGHT

(If there has been any delay, include reasons here)

Note - Grounds must be supported by an affidavit which verifies the facts relied on.

RE: APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BETWEEN NICOLA HACKING AND (1) THE CAYMANIAN STATUS AND PERMANENT RESIDENCY BOARD AND (2) CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS.

GROUND ON WHICH LEAVE IS SOUGHT

TO ACCOMPANY
FORM NO. 53 APPLICATION FOR JUDICIAL REVIEW (O.53, r3)

These grounds are accompanied by:

- The Affidavit of Nicola Hacking
- Legislative material
- Relevant Case Law

GROUND ON WHICH RELIEF IS SOUGHT

INTRODUCTION

The Application in outline

1. By this application, Nicola Hacking ("the Plaintiff") seeks leave to apply for Judicial Review with respect to the failure of the Caymanian Status and Permanent Residency Board ("the Board") and the Chief Immigration Officer of the Cayman Islands ("CIO") ("the Defendants") to reach a decision in respect to the Plaintiff's application for Permanent Residence ("PR") submitted on 17 April 2014.
2. The Plaintiff further challenges the decision of the CIO not to assume responsibility for the processing, determining and granting or refusing applications for the right to be Permanent Residents when it became clear that the Board were not carrying out their duties.
3. The Plaintiff avers that the failure of the Board and the CIO to reach a decision in a reasonable time in regards to her PR application is:
 - Unreasonable, in that the failure to reach a decision:
 - Does not satisfy the anxious scrutiny test.
 - Amounts to a breach of Article 9 of the Cayman Islands Constitution ("the Constitution") and/ or in the alternative amounts to a breach of Article 8 of the European Convention on Human Rights ("ECHR").
 - Amounts to a breach of Article 19 of the Constitution.
 - Amounts to a breach of Article 6 of the ECHR
 - Is irrational.

- And further; that by not reaching a decision in regards to the Plaintiff's PR application and the numerous other outstanding applications, the Board and the CIO can be seen to be applying a moratorium to the processing of PR applications and thus acting *ultra vires*.

Relief sought

4. Due to the failure of the Defendants to reach a decision in regards to the Plaintiff's PR application submitted on the 14 April 2014, the Plaintiff seeks
 - (a) A declaration that the contested decision:
 - i. The failure to reach a decision in respect to the Plaintiff's Permanent Residence application within a reasonable period of time is unlawful.
 - (b) An order of Mandamus obliging either of the Defendants to consider the Plaintiff's application for Permanent Residence as of the date which is most favourable to her application due to the failure of the Defendants to consider the application within a reasonable period of time.
 - (c) An order of Mandamus obliging either of the Defendants to consider the Plaintiff's application for PR within 2 weeks of the Order.
 - (d) A declaration that if the Plaintiff is to be granted Permanent Residence, she is to be granted it on the basis that she is subject to the terms and conditions of the Law as it was at the date of application.
 - (e) An order for the Defendants to pay the Plaintiff's damages resulting from their unreasonable action or inaction.
 - (f) The Defendants pay the costs arising from and incidental to this application.

The Facts

5. The Board is a creation of Statute (Section 4 (3) of the Immigration law (2015 Revision)) and its members and formation are set out in the aforementioned section. The Board's role is made clear in Section 7 (3)(b) (2015 Revision) and is defined as:

(3) The Boards shall have the following functions and powers-

(a)

(b) the Caymanian Status and Permanent Residency Board shall have responsibility for the processing, determining and granting of applications for the right-

(i) to be Caymanian;

(ii) to reside permanently in the Islands; and

(iii) of a spouse of a Caymanian to possess a Residency and Employment Rights Certificate;

6. The role of the CIO is also prescribed by law and set out in Section 3 of the Immigration Law (2015 Revision). The Law states:

(1) There shall be a Chief Immigration Officer and such other immigration officers as are necessary for the purposes of carrying out this Law, who shall be public officers.

7. The facts as is set out in the Plaintiff's affidavit which accompanies this application:

- The Plaintiff is British.
- The Plaintiff became legally and ordinarily resident in the Cayman Islands on 18 March 2006.
- The Plaintiff is employed with Maples and Calder BDO as Counsel.
- The Plaintiff lives at 86 Shorelink Terrace, West Bay, Grand Cayman.
- The Plaintiff applied for Permanent Residence on 17 April 2014.
- The Plaintiff's children Francesca Hacking and Felix Hacking were born in Grand Cayman on 23 August 2016.
- At the time that the Plaintiff applied for PR she also paid the required fees of this application which amounted to CI\$37800.
- HSM Chambers, on behalf of the Plaintiff, submitted further evidence in support of the PR application on 23 June 2015, 4 August 2016 and 21 November 2016.
- On the 26 May 2017, HSM Chambers on behalf of the Plaintiff, wrote to the Defendants and the Attorney General advising them of the Plaintiff's intention to seek to Judicially Review the Defendants failure to consider her PR application.

Relevant Statutes and Legal Definitions

8. Article 9 of the Cayman Islands Constitution sets out:

(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.

(2) Except with his or her own consent or as permitted under subsection (3), no person shall be subjected to the search of his or her person or his or her property or the entry of persons on his or her premises.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

(a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) for the purpose of protecting the rights and freedoms of other persons;

(c) to enable an agent of the Government or a public body established by law to enter on the premises of any person in order to inspect those premises or

anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or that public body;

(d) to authorise, for the purpose of enforcing the judgment or order of a court, the search of any person or property by order of a court or the entry on any premises by such order; or

(e) to regulate the right to enter or remain in the Cayman Islands.

9. Article 19 of the Cayman Islands Constitution is as follows:

(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.

10. Article 6(1) of the ECHR provides for:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

11. Article 8 of the ECHR confers:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Unreasonable

12. The Plaintiff would aver that the failure of the Board or the CIO to reach a decision in regards to her PR application is wholly unreasonable in the circumstances. The Board is under a duty to reach a decision in a reasonable period of time and to date they have failed to reach a decision in over 37 months of the application being submitted. It is contended that this failure to reach a decision falls foul of the *anxious / heightened scrutiny test* and therefore the decision is so unreasonable that no reasonable body properly informed could have acted in this way.

13. The Plaintiff would contend that the failure of the Board or the CIO to reach a decision within a reasonable period of time amounts to a Breach of Article 19 of the Constitution. All acts of public officials (which the Board and the CIO are) must be *lawful, rational, proportionate and procedurally fair* and by failing to reach a decision after 37 months, this failure cannot be seen as satisfying any of the requirements of Article 19. The Plaintiff would seek inferences to be drawn from the fact that the Defendants have failed to explain why they have not reached a decision in their response to the letter before action. It can only be assumed that there is no satisfactory reason why a decision cannot be reached and that the Defendants have made a deliberate decision not to consider the application before now.
14. The failure to reach a decision within a reasonable period of time is also unreasonable when one considers the situation the Plaintiff finds himself in, in light of Article 9 of the Constitution and Article 8 of the ECHR. The Board is required to consider Article 9 as they are a public body. As a direct consequence of the Board's failure to consider the Plaintiff's application, the Plaintiff has had her life disrupted as is set out in her affidavit. It is averred that the failure to reach a decision on the application cannot be reasonably justifiable in a democratic society and therefore amounts to a direct breach of Article 9 of the Constitution and on that basis unreasonable/unlawful.
15. While it is accepted that ECHR does not form a part of Cayman Islands law, since 2006, individuals have been able to petition the European Court of Human Rights ("the European Court") directly and judgments from the European Court are binding upon the Cayman Islands. It is therefore averred that the Defendants have to take into account the ECHR when reaching (or in this case, not reaching) a decision.
16. Contained within Article 6 of ECHR is the right for a person's civil rights and obligations to be dealt with within a reasonable period of time. In the Plaintiff's case the delay of 37 months and counting is outside what can possibly be considered a reasonable period of time and therefore by acting contrary to Article 6 ECHR, the Board have acted unreasonably.
17. Further and in the alternative, it is averred that the failure to reach a decision within 29 months of the date of the application is fundamentally disproportionate and therefore amounts to a breach of Article 8 ECHR thus rendering the inaction unreasonable.

Irrational

18. It is contended that the failure to consider the Plaintiff's application is irrational in the circumstances. It is suspected that one of the concerns that the Defendants have in relation to the PR system is in respect to Factor 1 of the Points system. At the time that the Plaintiff made the application, the Immigration (Amendment) (No.2) Law 2013 ("the 2013 Law") was in force. Factor 1 of the Points Scheme as introduced by the 2013 Law divides the points that an applicant can receive into two categories (a) Current Occupation and (b) Priority Occupation. Under Factor 1 the maximum points an applicant can receive is 30 points.
19. In the explanation for Factor 1, a priority occupation is described as *one that is needed for advancement of national, economic, cultural or social objectives on a long term basis*. The

explanation also states that the priority list of occupations will be published which has not happened. Section 114 (3) of the 2013 Law provides that:

(3) *For the avoidance of doubt an application for the grant of the right to reside permanently in the Islands or a work permit made on or after the commencement of the Immigration (Amendment) (No. 2) Law 2013 shall be determined in accordance with the law in effect at the time the application is being heard by the Board or, in the case of an appeal, by the Immigration Appeals Tribunal.*

20. It therefore seems that the Defendants will have to consider the law as it is today which is the Immigration Law (2015 Revision) and the associated regulations which are The Immigration (Amendment) Regulations 2017. The preamble, in respect to Factor 1 states:

1. The Cabinet, in its discretion, may publish a list of occupations specified as priority occupations.

2. Where such a list is published, the Board or the Chief Immigration Officer, as the case may be, in considering an application for permanent residence under section 30, shall take such priority occupations into account.

21. As the Cabinet has not published a list of specified priority occupations, it is not presently possible for any applicant to be awarded points under Factor 1(b).

22. Factor 1 (a) has been drastically changed as of 8 March 2017. Previously, Factor 1 (a) was a similar scoring matrix as has been considered by the Board for applications prior to 25 October 2013 in which hundreds/ thousands of PR applications have been considered and more recently was presumably considered by the Board in the recent grants of PR to Bradley Carpenter, Mark Edmunds and Derek Larner.

23. The Law as it currently stands has been amended so that every application scores 15 points in respect to Factor 1.

24. It is submitted that the Regulations and in particular Factor 1 as of the date of application were clear and had been used for a number of prior years. It is therefore not obvious, absent an explanation from the Board or the CIO, as to why the application could not have been considered soon after submission.

25. Further, if the Board or the CIO thought that Factor 1 posed a problem, then they could have chosen not to assess Factor 1 and assessed the other Factors. If the Plaintiff was assessed as achieving 110 points from the scores she received on Factors 2-9, then the application could still have been granted.

26. Currently all applicants will receive 15 points for Factor 1. It is not clear and not believe that any applications are currently being considered. This continued delay is the very definition of irrationality. This continued delay should also been seen in light of the fact that Bradley Carpenter, Mark Edmunds and Derek Larner have all had their PR applications considered and

granted. It is therefore averred that there is nothing preventing the Defendants from considering the Plaintiff's application.

27. By failing to assess the Plaintiff's application within a reasonable period of time for no apparent justifiable reason, it is contended that the Defendants have acted irrationally.

Ultra Vires

28. One of the Board's duties as set out in Section 7(3)(b) of the Law is the *processing, determining and granting of applications* for the right to be a Permanent Resident. It is not within the Board's power to stay decisions for 37 months. In the case of *Warren v Immigration Board* [2002] CILR 188, the Governor's moratorium on Caymanian Status applications was held to be *ultra vires*. Similarly, it is contended that by the Board not considering the Plaintiff's and the numerous other outstanding applications for PR, the Board can be seen as acting *ultra vires* and therefore unlawfully.

Failure to take over the running of the PR system from the Board.

29. Section 3 of the Law clearly states that the role of the CIO (and other Immigration Officers) is to carry out the Law. On 26 October 2013 Section 14 (a) of the Immigration (Amendment) (no 2) Law 2013, amended Section 29 of the Immigration Law (2013 Revision) so that Section 29 (1) now reads,

(1) The Caymanian Status and Permanent Residency Board and the Chief Immigration Officer may grant to non-Caymanian applicants

(a) the right to reside permanently in the Islands, to persons who have been legally and ordinarily resident in the Islands for a minimum period of eight years; and

(b) the Residency and Employment Rights Certificate, to spouses of Caymanians.

30. That power has been maintained in the 2014 Revision and also the 2015 Revision of the Law. It is the duty of the CIO to carry out the Law and by failing to take over responsibility for the PR system which he clearly had the power to do after the 26th October 2013, the CIO can be seen as acting unlawfully.
31. As the CIO has the power to make decisions in regards to Permanent Residence, yet has failed to exercise this power, for the same reasons as set out in paragraphs 11-23 the actions or inactions of the CIO are unreasonable/unlawful.
32. The Plaintiff would further contend that the CIO by failing to take over the running of the PR system from the Board, he has given approval to the unlawful moratorium imposed by the Board. Therefore, this approval it is averred is the CIO acting outside of his statutory powers and therefore it can be regarded as an act of *ultra vires*.

DAMAGES

33. On the 17 April 2014, the Plaintiff had to pay three fees for her PR application to be processed, a Grant Fee of CI\$12,500, an Administration Fee of CI\$1,000.00 and an Annual Residency and Employment Rights Certificate Fee of CI\$24,300. As of yet the Plaintiff's application is yet to be considered therefore the Plaintiff seeks to recover the interest on the sums paid, calculated at 8% which is the post judgment interest rate which amounts to CI\$9560 and rising by CI\$8.28 per day.
34. Since 18 March 2015 and every six months thereafter the Plaintiff has been forced to provide a police clearance certificate and medical evidence to the Immigration Department so that she can obtain a PCW. To date the Plaintiff has had to provide this on five separate occasions. The Plaintiff therefore seeks to recover those costs.
35. Currently, the Plaintiff is being prevented from progressing in her career. If her Application had been granted within a reasonable period of time the Plaintiff would have been able to become a Partner with her current employer, this would have led to a substantial increase in her remuneration. The Plaintiff therefore seeks compensation in respects to the difference in her current salary and that of the remuneration which she could have been expected to achieve if she had been able to become a Partner.
36. The Plaintiff has been further deprived of holding a professional designation that she has earned and ought to be able to hold. This has caused her disadvantage in her career and has undermined her status. She accordingly seeks compensation for this to be assessed as the Court sees fit.
37. The Plaintiff's two children who were born in the Cayman Islands have been deprived of British Overseas Territories Status from birth and as a result, the Plaintiff will suffer inconvenience, cost and expense in obtaining this for them if she is granted PR. The Plaintiff therefore seeks damages to compensate her for this.
38. The Plaintiff further seeks to recover costs related to this application.
39. The Plaintiff further seeks to recover damages for injury to feelings and unwarranted stress that he has suffered as a result of having to wait over 37 months for a decision to be reached in relation to her PR application.

Conclusion

40. For the reasons set out above, the Plaintiff respectfully invites the Court to grant leave to apply for Judicial Review. The grounds of challenge are clearly arguable and there is a clear public interest in these matters being considered by the Court.

HSM CHAMBERS

HSM Chambers