IN THE GRAND COURT OF THE CAYMANS ISLANDS CAUSE NO: 17 OF 2018

IN THE MATTER OF SECTION 17 (2) OF THE IMMIGRATION LAW (2015 REVISION)

BETWEEN

DERIK EULICER FARIAS HERNANDEZ Appellant

-V-

IMMIGRATION APPEALS TRIBUNAL Respondent

AND IN THE MATTER OF AN APPLICATION FOR ASYLUM BY DERIK EULICER FARIAS HERNANDEZ.

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on the _____ day of _____ 2018 at _____ a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of Derik Eulicer Farias Hernandez ("the Applicant") for an order that a decision of the Immigration Appeals Tribunal ("the Tribunal") dated 30 November 2017, be set aside, and that the said application be remitted to the Tribunal to be reconsidered and decided according to law.

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

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

1. Whereas by notice dated 20 April 2017, the Department of Immigration refused the Appellant's application for Asylum. The rationale behind this decision was:

"I have considered carefully the reasons you have given during the interview in support of your claim. I am not satisfied that you have demonstrated a well found fear of persecution in the sense anticipated by

the 1951 Convention. Having reviewed your position, according to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, your application for asylum in the Cayman Islands is accordingly denied.

2. The Appellant appealed that decision to the Respondent in a notice dated 25 April 2017.

3. In a decision dated 30 November 2017 ("the decision"), but provided to the Appellant on the 27 December 2017, the Respondent rejected the Appellant's Application. The reason given for rejecting the appeal were:

"The Tribunal carefully considered the appeal bundle before it and the Appellant's evidence and concludes that the basis of this claim for asylum is for economic reasons. He had tried to leave Cuba illegally via boat several times but was thwarted from doing so. He stated his aim was to reach the United States via Honduras.

Based on the Appellant's written and oral evidence, it is the Tribunal's view that the Appellant has a fear of persecution (emphasis provided) for departing Cuba illegally in a boat of which he was part owner and the master in charge, but there is insufficient evidence of a well-founded fear of persecution (emphasis provided) if returned to Cuba.

On balance, the Tribunal is not convinced that the Appellant satisfied the requirements of being a refugee as defined in section 2 of the Law for the purposes of the 1951 Convention. Therefore the decision of the Acting Chief Immigration Officer as recorded in the Department of Immigration's letter dated 20th April 2017 is upheld".

4. It is respectfully averred that the Respondent has erred in Law in respect to the decision they reached. This is on the basis that:

- The Respondent has applied the wrong standard of proof when considering whether the Appellant was a refugee.
- The Respondent has failed to consider whether any prosecution the Appellant faced in Cuba amounted to persecution as per the refugee convention.

- The decision of 30 November 2017 was procedurally unfair and / or amounts to a breach of natural justice.
- That Section 84 (6) Immigration Law (2015 Revision) is incompatible with Part 1, Section 3 of the Cayman Islands Bill of Rights, Freedoms and Responsibilities ("the Bill of Rights").

Standard of Proof

5. When considering whether or not an asylum seeker is a refugee, it is averred that the decision maker has to consider the following test:

   i. Whether the applicant is outside of the Country that he is seeking asylum from, in this case Cuba.
   ii. Whether the applicant has a well found fear of persecution if returned to the country that he is seeking asylum from.
   iii. Whether the applicant's fear of persecution is on the basis of his race, religion, nationality, or membership of a particular social group or political opinion.
   iv. Whether the applicant is unable to or unwilling to avail himself of the protection of Cuba.
   v. Whether the Applicant is unable or unwilling to return to Cuba because of his well founded fear.

6. It is accepted that the burden is upon the applicant to convince the decision maker that he satisfies the above requirements.

7. The degree of likelihood of persecution needed to establish an entitlement to asylum is on a basis lower that the civil standard of "the balance of probabilities". In the case of *R v Secretary of State for the Home Department ex parte Sivakumaran and Ors* [1998] AC 958, it was held that the existence of a well founded fear of persecution required the established of what was described by Lord Keith of Kinkel as *"a reasonable degree of likelihood* (Page 994, paragraph G), by Lord Templeman as " *a real and substantial danger* (page 996, paragraph F)" and by Lord Goff as *"a real and substantial risk"* (page 1000, paragraph A). When *Sivakumaran* was before

the Court of Appeal, it was rejected that *"a well founded fear" needed to be established on the balance of probabilities* (page 964, Paragraph F).

8. While it is correct to say that at page 5 of the decision the Respondent states, *there is insufficient evidence of a well-founded fear of persecution (emphasis provided) if returned to Cuba.* It appears that in the next paragraph the Respondent has applied a "balance of probabilities test" when they state *"**On balance** [emphasis added], the Tribunal is not convinced that the Appellant satisfied the requirements of being a refugee".*

9. It is submitted that it appears that the Respondent has applied a higher standard of proof that the appropriate standard in the current circumstances. By applying an higher standard the Respondent has applied a more onerous test on the Appellant and therefore erred in Law. It is therefore submitted that the decision should be set aside and the matter remitted to the IAT for a fresh hearing.

Prosecution v Persecution.

10. It appears from the decision of the Respondent that they have concluded that the Appellant's fear is related to prosecution for departing Cuba illegally. However, it appears from the decision that the Respondent has not considered whether or not that prosecution in itself amounts to persecution. In the case of *R (On the Application of Tientchu v Immigration Appeal Tribunal)* C/2000/6288, Arden LJ held at paragraph 14:

a prosecution for legitimate and acceptable reasons will not amount to persecution. But if it is politically inspired or being used to repress political activity, it may amount to persecution. Alternatively, persecution may be demonstrated by excessive or disproportionate or criminal acts on the part of a state, thus suggesting a political motive for its actions.

11. By not even appearing to consider whether the potential prosecution amounts to persecution, it is submitted that the Respondent has erred in Law. It appears that the Respondent has concluded that prosecution for departing Cuba is legitimate without any reference to human right norms. It is submitted that this approach is wrong in law in that it does not:

i. Take into account whether prosecution for illegal exit is regarded as normal on an international basis.

ii. The purpose behind the Law, i.e. whether or not the Law is designed to prosecute people who are regarded as political opponents of the regime.

iii. Whether the Appellant will suffer ill treatment upon his return to Cuba if he was to be prosecuted.

iv. Whether that ill treatment would be on the basis of his actual or imputed political beliefs, i.e. the Cuban's would treat the Appellant more harshly because they perceive him to have anti-government views.

Breach of Natural Justice

12. It is respectfully submitted that the Respondent in this case has either not correctly directed themselves as to the Law or that they have failed to clearly set out the directions that they have given themselves and that this amounts to a breach of natural justice. In the case of *National Roads Authority v A. Bodden, Thompson and Wright (as personal representatives of the estate of H. Bodden)* [2014] (2) CILR 47,

> 25. *The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough simply to state a result on the principle issues; the parties are entitled to know the reasoning [emphasis added] and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this fashion by the House of Lords in South Bucks. D.C. v. Porter (No. 2) (3) ([2004] 1 W.L.R. 1953, at para. 35):*
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> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds"*

13. Further support can be found in the case of *South Bucks D.C v Porter, the case of Re Poyser and Mills Arbitration* [1964] 2 QB 467 and Megaw J's judgement was quoted with approval. In particular at paragraph 24 the following section of Megaw J's Judgment was highlighted:

"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

14. In the current matter, it is submitted that the decision of the Respondent is deficient for a number of reasons including the fact that the Respondent has failed to:

i. Set out the burden and standard of proof that they have applied in the current matter.
ii. The test that they had to apply to consider if someone was a refugee.
iii. What evidence they relied upon to reach the conclusion that the Appellant was an economic migrant.
iv. Whether the Respondent have considered that prosecution for an alleged act can amount to persecution for a convention reason.
v. Whether the fears of the Appellant raises amount to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion Whether the Appellant was credible.
vi. What parts of the Appellant's evidence they accepted and which parts they did not.
vii. Whether the Appellant would suffer any treatment on his return which would amount to a breach of his Section 3 rights as set out in the Bill of Rights.

15. By failing to set out appropriately what it is that the Respondent concluded, how the Respondent reached these conclusions and what evidence the Respondent relied upon when reaching these conclusions, it is averred that the decision is a breach of natural justice as it is not possible for Appellant to understand the decision.

Section 84 (6) Immigration Law (2015 Revision)

16. Section 84 (6) Immigration Law (2015 Revision) ("the Law") sets out that:

> *(6) Notwithstanding section 14, a person whose application for asylum has been refused may appeal to the Immigration Appeals Tribunal, within fourteen days of his being notified of the decision, against the refusal on the grounds that requiring him to leave the Islands would be contrary to the Refugee Convention.*

17. It appears that from Section 84 (6) of the Law that the Respondent is prevented from considering whether or not returning the Appellant or any asylum seeker to their country of origin amounts to a breach of Article 3 of the Bill of Rights due to the restrictive nature of Section 84 (6). It is submitted that this is incompatible with Section 3 of the Bill of Rights for the following reasons:

i. There appears to be no such restriction placed upon the Chief Immigration Officer and if there is, then this restriction would also be incompatible with Section 3 of the Bill of Rights.

ii. It would not be possible to Judicially Review the Respondent in the basis that they have not considered Article 3 due to restrictive nature of Section 84 (6) of the Law.

iii. Because of the overlap between Article 3 and the Refugee Convention, the Respondent (and the Immigration Department) would be the appropriate body to consider the appellant's submissions in respect to Article 3.

iv. It appears that no other body is considering an asylum seekers (be that an the application stage or post, i.e. after their application has failed) Article 3 Rights, prior to removal.

18. It is therefore submitted that the fettering of the Respondent (or the Immigration Department's discretion) by Section 86 (4) of the Law is incompatible Section 3 of the Bill of Rights.

Conclusion

19. Further to the above, it is averred that the Tribunal acted erroneously and unlawfully Accordingly, the decision of the Tribunal should be set aside so that the Applicant's application can be reheard in accordance with law.

DATED: 24 January 2018

HSM CHAMBERS

HSM CHAMBERS
Attorneys for the Applicant

TO: The Clerk of the Court

AND TO: The Chairman
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