

No. 53

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

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 38 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER ORDER 53 OF THE GRAND COURT RULES 1995

IN THE MATTER OF THE CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS TO REFUSE TO GIVE EFFECT TO DECISIONS OF THE IMMIGRATION APPEALS TRIBUNAL

BETWEEN

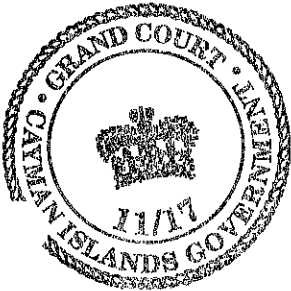
HSM CHAMBERS (A FIRM)



-v-

THE CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS


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(s)	HSM Chambers (a firm)
Judgment, order, decision or other proceeding in respect which relief is sought	1) The failure of the Defendant to accept and give effect to decisions by the Immigration Appeals Tribunal and issue the appropriate stamps in the passports of successful Appellants.
Relief Sought	

- (a) A declaration that the failure of the Chief Immigration Officer of the Cayman Islands to accept the decisions of the Immigration Appeals Tribunal and to issue appropriate stamps without delay in the following appeals is unlawful, irrational, unreasonable and procedurally unfair. The relevant appeals are those:
- Against the refusal of Permanent Residence applications pursuant to Section 30 (1) Immigration Law (2015 Revision) ("the Law"). This is limited to applications which have been submitted post 26 October 2013.
 - Against the refusal of applications to allow a child continued residence in the Cayman Islands as a dependant of a Residency and Employment Rights Certificate holder ("RERC").
 - Against the refusal of a RERC application made pursuant to Section 32 of the Law.
 - Against the revocation / refusal to renew or continue an RERC as the spouse of a Caymanian or PR holder.
 - Against revocation or denial of applications for Caymanian Status/ Right to be Caymanian.
 - Against the refusal of a work permit.
- (b) In refusing to provide the appropriate stamps forthwith the Immigration Department are acting Ultra Vires.
- (c) An order of Mandamus obliging the Chief Immigration Officer of the Cayman Islands and his Department to accept the decisions of the Immigration Appeals Tribunal and issues stamps in the passports of the successful appellants forthwith.
- (d) The Defendants pay the costs arising from and incidental to this application.

Name and address of Plaintiff's attorneys, or, if no attorneys acting, the address for service of the Plaintiff	Alastair David. HSM Chambers 68 Fort Street, George Town, PO Box 31726, Grand Cayman, KY1-1207 Cayman Islands	
Signed 	Dated 8/3/18	

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.

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CAUSE NO: OF 2018

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IN THE MATTER OF THE CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS TO REFUSE TO GIVE EFFECT TO DECISIONS OF THE IMMIGRATION APPEALS TRIBUNAL

BETWEEN

HSM CHAMBERS (a firm)

Plaintiff

-v-

THE CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS

Defendant

GROUNDS ON WHICH RELIEF IS SOUGHT

INTRODUCTION

The Application in outline

1. By this application, HSM Chambers ("the Plaintiff") seeks leave to apply to Judicially Review the failure of the Immigration Department, headed by the Chief Immigration Officer of the Cayman Islands ("CIO"), to take steps to give legal and practical effect to rulings of the Immigration Appeals Tribunal ("IAT"). This includes a refusal by the Department of Immigration to provide to those people who have successfully appealed and therefore been awarded permissions by the IAT the appropriate stamps in their passports. The failure to provide appropriate recognition of their Immigration Status can and does have adverse consequences to successful appellants and raises serious questions as to the rights of persons under Cayman Islands Law.
2. For the clarification of this application those applicants are limited to those who have brought successful appeals against:
 - Against the refusal of Permanent Residence applications pursuant to Section 30 (1) Immigration Law (2015 Revision) ("the Law"). This is limited to applications which have been submitted post 26 October 2013.
 - Against the refusal of applications to allow a child continued residence in the Cayman Islands as a dependant of a Residency and Employment Rights Certificate holder ("RERC").

- Against the refusal of a RERC application made pursuant to Section 32 of the Law.
- Against the revocation / refusal to renew or continue an RERC as the spouse of a Caymanian or PR holder.
- Against revocation or denial of applications for Caymanian Status/ Right to be Caymanian.
- Against the refusal of a work permit.

3. The Plaintiff avers that the failure of the Immigration Department is:

- Unreasonable, in that the failure to issue a stamp and thereby give effective recognition of rulings of the Immigration Appeals Tribunal:
 - Fails to recognise the hierarchical position of the IAT. Amounts to a breach of Section 9 of the Cayman Islands Bill of Rights (“the BOR”) 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 Section 19 of the BOR.
 - Amounts to a breach of Article 6 of the ECHR
- Is unlawful.
- Is irrational.
- Is Ultra Vires.

Relief sought

4. Due to the failure of the Immigration Department to provide stamps in the passports of successful appellants in relation to the appeals mentioned at paragraph 1, the following is sought.

5.

- (a) A declaration that:
 - i. The failure of the Chief Immigration Officer of the Cayman Islands to accept the decisions of the Immigration Appeals Tribunal and to issue the appropriate stamps without delays is unlawful, unreasonable and procedurally unfair.
- (b) An order of Mandamus obliging the Chief Immigration Officer of the Cayman Islands to accept the decisions of the Immigration Appeals Tribunal in respect of those appeals mentioned in paragraph 2 and to issue stamps in the passports of the successful appellants upon the payment of the appropriate fee (if necessary).
- (c) The CIO pay the costs arising from and incidental to this application.

The Facts

6. The role of the CIO is prescribed by law and set out in Section 3 of the Law. 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 role of the Immigration Boards is set out in Section 4 of the Law. Decisions of the Board and in certain circumstances the CIO can be reviewed by the IAT. Appeals to the IAT are limited in Section 14 and 15 of the Law and must be on the grounds that, the decision of the Board or the CIO is:

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

8. If the IAT determines that one of the grounds in (a)-(d) is made out then a hearing *de novo* shall take place and a new decision will be made.

9. The Law does not permit (section 16 (10)) matters referred to the IAT be remitted to the Board or the CIO.

10. Notwithstanding the above, HSM Chambers has encountered numerous examples of the Department of Immigration refusing to give timely effect to rulings of the IAT. The examples are as follows:

- i. In a letter dated 17 February 2017, Ref: CS/005/2016, the IAT granted the Appellant's appeal against the revocation of his Caymanian Status / Right to be Caymanian. In the letter the IAT stated that:

The Tribunal determined that the Board erred in law and its decision was contrary to Section 27 (1)(d) of the Immigration Law (2015 Revision) on the basis that the Board purported to exercise its discretion to revoke the Appellant's Caymanian Status outside the three (3) years period provided in Law. The Tribunal hereby reinstates the Appellant's Caymanian Status of the grounds of marriage.

....

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- In relation to this appeal, HSM Chambers were informed that the Appellant would only be issued a "continues to possess letter" once the decision had been formally noted and minuted. HSM Chambers were also informed in an email

dated 21 February 2017 that *“the Immigration Counter officers also recognize and adhere to this procedure as it relates to passport endorsement, certificates or fee collection (where applicable)”*. The Appellant only received his “continues to possess letter” on 23 August 2017. It appears that the delay in respect to this appellant receiving his “Continues to possess letter” was in part as a result of it being sent to the wrong address.

Due to the refusal of the Immigration Department to provide the Appellant with the appropriate stamp and the failure of the CS&PR Board to issue the appropriate letter in a timely fashion, the client was deprived of any opportunity to confirm his Caymanian Status / Right to be Caymanian for six months after the IAT had confirmed that he was and confirmed to be Caymanian.

- ii. In a letter dated 8 August 2017 Ref PR/017/2016, the IAT granted the Appellant’s appeal against the rejection of his application to continue his Residency and Employment Rights Certificate (“RERC”) as the spouse of a Caymanian. In this letter it states:

The Appellant shall be entitled to retain the continuation of his Residency & Employment rights Certificate until his Caymanian child... attains the age of eighteen (18) years or up until age (24), if attending full time tertiary education, whichever happens earlier.

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- In relation to this appeal, the Caymanian Status and Permanent Residency Board wrote to him directly on 1 September 2017 and advised him that his application was deferred for further consideration. He was only finally provided with a letter from the Board on 30 January 2018. Sadly this letter had the Appellant’s incorrect details on it in that his Christian name stated was not his actual forename name. It was only in a letter dated 16 February 2018, that the Appellant received the correct grant letter.

Due to the refusal of the Immigration Department to place a stamp in the Appellant’s passport and CS&PR Board failure to issue a letter in a timely manner, the Appellant was denied the right to confirm that he had continuation of his RERC for almost 5 months.

- iii. In a letter dated 1 September 2017, REF PR/006/2016, the IAT granted the Appellant’s appeal against the rejection of his RERC pursuant to Section 32 of the Law. In the letter the IAT stated:

On a hearing de novo, the Tribunal concluded that the Appellant qualified for the grant of Permanent Residence as a dependant of a P.R. Holder subsection to Section 32 (1) of the Immigration Law (2014 Revision).

Additionally under the Bill of Rights, the tribunal was of the view that the Appellant was entitled under the bill of rights to continue the right to Family Life and there is no reason to justifying depriving the Appellant of such right.

...

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- In regards to Appeal Ref: REF PR/006/2016, the Appellant only received the grant letter on 23 February 2018 some 5 months after the appeal was granted. The Appellant had himself tried to obtain a stamp in his passport confirming his Immigration status, during the Christmas period of 2017, however the Immigration Department rejected this application.

- iv. In an letter dated 6 December 2017 Ref: PR/006/2017, the IAT granted the Appellant's appeal against the renewal of his RERC as the Spouse of a Caymanian and advised that :

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- In relation to Appeal Ref: PR/0006/2017, the Appellant only received a grant letter from the Board in a letter dated 27 February 2018 (received 2 March 2018). In January 2018, the Appellant needed to leave the Caymanian Islands to attend a funeral in Jamaica. Attempts were made to get a stamp in his passport confirming that he held an RERC. Those attempts were rejected and he was provided with a re-entry stamp permitting him to reenter the Cayman Islands without a visa. The reason the Immigration Department gave for refusing the application was because the Board needed to provide a grant letter.

Due to a failure of the Immigration Department to issue to the appropriate stamp in the Appellant's passport and the CS&PR Board to issue an appropriate letter, the Appellant has been denied the right to confirm what immigration status he has in the Cayman Islands between 6 December 2017 and 2 March 2018.

- v. In a letter dated 4 January 2018, REF PR/015/2017, the IAT granted the Appellant's appeal against the rejection of his Permanent Residence application ("PR") and advised him that:

The Appellant has achieved sufficient points to qualify for the grant of Permanent Residency...

Accordingly, the appeal was allowed and permanent residence is granted.

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- In the period between the 4 January 2018 and 16 January 2018, attempts were made to obtain a stamp in the passport of PR/015/2017. Those attempts were unsuccessful and it was not until the Appellant received his letter from the Caymanian Status and Permanent Residency board on 18 January 2018, that he was able to obtain the appropriate stamp in his passport. The reason giving for the Immigration Department refusing to stamp the passport was because he did not have a grant letter from the Board.

In the period between 4 January -18 January 2018, due to the Immigration Department's failure to issue the appropriate stamp, the Appellant was denied the right to confirm what Immigration status he held in the Cayman Islands.

- vi. In a letter dated 19 January 2018 REF BSP/003/2017, the IAT granted the Appellant's appeal against the rejection of Work Permit Application. The letter states that:

It is hereby directed that a work permit for the above named Appellant be granted until 9 May 2019, subject to payment of all or any applicable work permit fees and the appellant providing documentary evidence of up to date Health Insurance and National Pension Law coverage.

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- An attempt to obtain a stamp in the passport of Appellant BSP/003/2017 was made on 1 February 2018. That attempt was unsuccessful. The reason given for rejecting the application was because a letter from the appropriate board needed to be provided. It was only once the letter from the Board was received and provided to the Immigration Department on 21 February 2018, that this Appellant was able to obtain a stamp in his passport.

In the period between 19 January 2018 and 21 February 2018, due to the failure of the Immigration Department to recognise the letter from the IAT, the Appellant was denied the right to confirm what immigration status he held in the Cayman Islands.

- vii. In a letter dated 22 February 2018, Ref: PR/008/2016 was informed that her appeal against the refusal to vary her RERC to permit her daughter to remain in the Cayman Islands was successful. The letter stated:

The Appellant's non-Caymanian daughter is entitled to remain as a dependant under the Appellant's RERC until such time as she turns the age of 24 or completes her tertiary education.

In communicating this decision it is recommended that the Appellant attend the Department of Immigration Headquarters in order to have his / her authorization to remain in the Islands regularized to avoid any breaches under the Immigration Law.

- On 26 February 2018, HSM Chambers attempted to get a stamp in the passport of the daughter of PR/008/2016. It appears that a stamp was initially provided to the daughter however this was cancelled and the reason given for canceling the stamp was because a letter from the Board had not been provided.

Relevant Statutes and Legal Definitions

11. Section 19 of the BOR 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.

12. 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.

13. 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

14. The Plaintiff would aver that the failure of the Immigration Department to issue the appropriate stamps, without delay, is wholly unreasonable in the circumstances. In the cases mentioned above, no fees were outstanding in relation to the individual appellants and therefore there

appears to be no good reason why the Immigration Department should not issue the appropriate stamps.

15. The hierarchical nature of the IAT means that the Caymanian Status and Permanent Residence Board, the Business Staffing Plan Board, the Work Permit Board and the Immigration Department are bound by the decisions of the IAT. Therefore, the noting and minuting of the decision should not prevent a stamp being issued in the passport of successful appellant by the Immigration Department.
16. Furthermore, by not recognising the hierarchical nature of the IAT and waiting for the Boards to ratify the decision of the IAT and issue a letter to that effect the Immigration Department is in effect ignoring the decision of the IAT.
17. The failure to issue stamps has a knock on effect on successful appellants in that inter alia:
 - i. They may have difficulty in traveling freely to and from the Cayman Islands.
 - ii. They may have difficulty proving their status in the Cayman Islands.
 - iii. They may have difficulty in obtaining/maintaining their employment.
 - iv. They may have difficulty in obtaining mortgages.
 - v. Their dependent's will be effected in that applications such as acknowledgement of Caymanian Status / Right to be Caymanian and RERC applications pursuant to Section 32 will be delayed.
 - vi. They may suffer significant consequences, financial or otherwise
 - vi. They or their dependants may be denied educational opportunities.
18. All of the above adversely effect the successful appellant's rights pertaining to Section 9 of the BOR and Article 8 of the European Convention on Human Rights.
19. It appears that the only reason the Immigration Department are not providing these stamps is because the appropriate Board have not issued a letter to the Appellant. It is contended that this in itself is not a good reason enough reason to deny the issuing of the appropriate stamp as the relevant Board has no power to overrule the IAT and their only function is to note and minute the decision of the IAT. Therefore, the issuing of the letter is a mere formality. As it can take up to 5 months for some Boards to provide a letter confirming the appeal, a successful appellant can be left in limbo during that time.
20. Due to the time that it takes for some Board's to issue grant letters, the fact that the Boards have no other option but to issue the grant letter and the potential serious consequences which a successful applicant could face if he was not issued with a stamp, it is averred that the Immigration Department are acting unreasonably in not providing the stamps upon request.
21. Section 19 of the Constitution makes it clear that all decisions of public officials must be lawful, rational, proportionate and procedurally fair. By ignoring the decision of the IAT and awaiting the decision of the relevant Board, the Immigration Department cannot be seen as acting rationally, proportionately nor procedurally fairly. Therefore they cannot be seen as acting lawfully either.

Irrational

22. It is contended that the failure of the Immigration Department to issue the relevant stamp in a successful appellant's passport is irrational. It appears from the explanations given to the Plaintiff that the relevant stamps can only be issued when the Appellant has provided a letter from the relevant Board. As there is no reasonable reason for this requirement it is contended that the Immigration Department are acting irrationally in imposing it.

Ultra Vires

23. Section 3 of the Law confirms that the purpose of the CIO and the officers of his department is to carry out the Immigration Law. With the Immigration Departments refusal to accept decisions of the IAT, the Immigration Department are acting Ultra Vires and therefore illegally.

Locus

24. It is respectfully contended that HSM Chambers have sufficient *Locus Standi* to bring this Judicial Review. HSM Chambers are a well-known local Cayman Islands Law firm which among the many services it provides, is Immigration advice and assistance on an hourly rate, on a fixed fee paying basis and from time to time on a pro bono basis. As of the 22 February 2018, HSM Chambers have over 40 appeals pending before the IAT and vast majority of those Appellant's (if successful) will benefit from being able to obtain stamps in their passport as soon as the IAT's decision is provided to HSM Chambers. Equally, HSM Chambers have to advise and provide the Appellant's with guidance as how it is that they can obtain the relevant stamps (if successful on appeal) in their passports.
25. At the present time, HSM Chambers are unable to say how long (after a successful appeal) it will take for a successful applicant to obtain the grant letter from the Board and therefore obtain the necessary stamp. That means Appellants, some of whom who have already been waiting for over 3 years for their matter to be concluded have no certainty as to when they will be able to obtain the necessary proof that they have the immigration status that the IAT has confirmed them to have.
26. One of the central issues in this case is the maintenance of the rule of law, i.e. the Immigration Department being bound by the decisions of the IAT. In that context, the attorneys' of HSM Chambers who are all officers of the Grand Court have a direct interest in the maintenance of the rule of law in the Cayman Islands.
27. In this matter it is unlikely that an individual will bring a challenge on their own in that their focus is likely to be on their appeal. In some cases the successful Appellant will suffer no harm and be prepared to wait up to 5 months for the production of the grant letter so that they can acquire the necessary stamp. However, it is believed of the (at present) 40 outstanding appeals there will be Applicants who will need a stamp in their passport as soon as the IAT reach their decision. It is believed that in the circumstances it is more appropriate to bring a preemptory challenge now, than wait for numerous additional clients to be prejudiced.

Conclusion

28. 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