

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 235 OF 2018

IN THE MATTER OF THE CAYMAN ISLANDS CONSTITUTIONAL ORDER 2009, SECTION 26(1) OF THE BILL OF RIGHTS AND ORDER 77A OF THE GRAND COURT RULES

AND IN THE MATTER OF THE RIGHTS AND FREEDOMS OF SHARON STAPLES

BETWEEN:

(1) SHARON STAPLES



Petitioner

- and -

(1) THE CHAIRMAN OF THE CAYMANIAN STATUS AND PERMANENT RESIDENCY BOARD

(2) THE CHAIRMAN OF THE IMMIGRATION APPEALS TRIBUNAL

(3) THE CHIEF IMMIGRATION OFFICER OF THE CAYMAN ISLANDS

(4) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Respondents



PETITION



TO: THE GRAND COURT OF THE CAYMAN ISLANDS

This Humble Petition of Sharon Staples of Grand Cayman SHOWETH THAT:

- Ms Sharon Staples, the petitioner, is a citizen of Jamaica and resident in the Cayman Islands. The petitioner has been resident in the Cayman Islands since 14 September 1990 and has at present no permanent right to remain in the Cayman Islands. The petitioner has applied for, and been denied by the Cayman Status and Permanent Residency Board and the Immigration Appeals Tribunal, permanent residence and employment rights in the Cayman Islands.
- The "**First Respondent**" is the Chairman of the Caymanian Status and Permanent Residence Board (the "**Board**"). The Board is established pursuant to section 4(1)(a) of the Immigration Law (as revised) (the "**Immigration Law**") and the First Respondent appointed by Cabinet

pursuant to section 4(3) of the Immigration Law. The First Respondent is a 'public official' as defined by Schedule 2 Part 1 Section 28 of The Cayman Islands Constitutional Order 2009, S.I. 2009 No. 1379 ("**the Order**").

3. The "**Second Respondent**" is the Chairman of the Immigration Appeals Tribunal (the "**Tribunal**"). The Tribunal is established pursuant to, and the Second Respondent appointed by Cabinet pursuant to, section 11 of the Immigration Law. The Second Respondent is a 'public official' as defined by Schedule 2 Part 1 Section 28 of the Order.
4. The "**Third Respondent**" is the acting Chief Immigration Officer, appointed pursuant to section 3(1) of the Immigration Law. The Third Respondent is a 'public official' as defined by Schedule 2 Part 1 Section 28 of the Order.
5. The Attorney General (the "**Fourth Respondent**") is, pursuant to Schedule 2 Part 1 Section 56 of the Order, the principal legal advisor to the Government of the Cayman Islands and the Legislative Assembly.
6. The Petitioner brings these proceedings under Section 26(1) of the Bill of Rights. She alleges that the government has breached her rights and freedoms under the Bill of Rights.
7. Pursuant to the Grand Court Rules ("**GCR**") O.77A, r.4 (2), the respondent(s) to such a petition shall be the Fourth Respondent and any relevant public official.

## **INTRODUCTION**

8. The Petitioner came to the Cayman Islands on 14 September 1990, when she was thirty years old. Since that time, the Petitioner has been in almost constant employment in the Cayman Islands as a domestic helper.
9. The Petitioner first applied under Section 29(1) of the Immigration Law for the right to reside permanently in the Cayman Islands ("**permanent residence**") in 2006 when she had been lawfully resident in the Cayman Islands for some sixteen years. Her application was denied by notice issued to the Petitioner almost three years later, in early 2009.

10. The Petitioner appealed to the Immigration Appeals Tribunal in March 2009, and provided detailed grounds of appeal following a request to do so in May 2010. The Petitioner's appeal was not heard until November 2017: a delay of some seven years.
11. In February 2018 the Immigration Appeals Tribunal was asked to reconsider the matter and further submissions were made by the Petitioner on 6 April 2018. On 4 June 2018 the appeal was finally dismissed.
12. Notwithstanding the fact that the Petitioner has lived for most of her adult life in the Cayman Islands, that she is an active member of her church and broader community, that she lived through and worked diligently to rebuild her community in the aftermath of Hurricane Ivan, that she volunteers as a hurricane shelter co-ordinator, that she has been in gainful employment and self-supporting throughout the time her residence in Cayman and that she has been an exemplary resident in all respects, in its application of the Immigration Law and Immigration Regulations published pursuant thereto (the "**Regulations**") the Immigration Appeals Tribunal made the following assessments:
- (a) zero points were awarded for financial assessment;
  - (b) only six points out of a possible twenty were awarded for contribution to the community; and
  - (c) zero points were awarded for close Caymanian connections.
13. More than ten years after her initial application, the Immigration Appeals Tribunal concluded that by the application of the Immigration Law and the Regulations just six points out of a possible sixty should awarded to an individual who has been part of the social, economic, community and spiritual life of the Cayman Islands for almost thirty years.

#### **THE CAYMAN ISLANDS CONSTITUTIONAL ORDER 2009**

14. On Friday 23<sup>rd</sup> October 2009 the Order<sup>1</sup> came into force<sup>2</sup>.

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<sup>1</sup> Which had previously been published on 7 July 2009 with Cayman Islands Gazette No.14 Supplement No. 1.

<sup>2</sup> Section 1(2) states "*This Order shall come into force on such day as the Governor, acting in his or her discretion, shall appoint by proclamation published in a Government Notice.*" In a Proclamation No. 4 of 2009, printed in Extraordinary Gazette No. 69/2009 dated Friday 23<sup>rd</sup> October 2009, the Governor announced the "appointed day" to be 6<sup>th</sup> November 2009.

15. The Order contained, at Schedule 2, the revised Constitution of the Cayman Islands (the "**Constitution**") which, for the first time, contained a Bill of Rights for the Cayman Islands (the "**Bill of Rights**") at Part 1 of Schedule 2 of the Order.
16. The preamble to the Constitution of the Cayman Islands published at Schedule 2 to the Order secures to persons in the Cayman Islands certain inalienable rights and freedoms: it promises a country based on traditional Christian values expressed in moral living and social justice; a caring community based on mutual respect for all individuals and their basic rights; a country with an immigration system that protects Caymanians and gives security to long-term residents. The Bill of Rights recognises, and guarantees, the human dignity, equality and freedom of all persons. It is submitted for the reasons which follow that the application of the Immigration Law and the Regulations to the Petitioner is in clear conflict with these founding principles and with the constitutionally protected provisions of ss.3, 7, 9, 13, 16, 19 and 24 of the Bill of Rights.

#### **THE AVOIDANCE OF INHUMAN TREATMENT (s.3)**

17. Section 3 provides as follows:

*"3.—(1) no person shall be subject to...inhuman or degrading treatment..."*

18. It is in all material respects the same as Article 3 of the European Convention on Human Rights. This article was authoritatively explained by the European Court of Human Rights in *Pretty v UK* (2002) 12 BHRC 149 at para 52:

"As regards the types of 'treatment' which fall within the scope of Article 3 of the Convention, the Court's case-law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see *Ireland v. the United Kingdom*, cited above, p. 66, § 167; *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see amongst recent authorities, *Price v. the United Kingdom*, no. 33394/96, §§ 24-30, ECHR 2001-VII, and *Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII)."

19. Although dismissed on the facts, that the effect of a failure to recognise a right of belonging may be inhuman or degrading was recognised by the Supreme Court of Bermuda (see Michael Barbosa and Christine Barbosa v The Minister for Home Affairs and Attorney General, [2016] SC (Bda) 21 Civ (4 March 2016)).

20. The effect of the application of the Immigration Law and Regulations would separate the Petitioner of her church and community and deprives the Petitioner of work at an age when it is patently far more difficult to find suitable alternative employment and consequently extremely difficult to recover financially in order to be able adequately to make provision for her retirement. The ability to work, to be self-supporting and to be an active and constructive member of a community is a cornerstone of the human condition and contributes materially to the Petitioner's sense of security and self-worth. This effect of the application of the Immigration Law and Regulations has caused significant and ongoing anguish for the Petitioner is as a consequence:

- (a) she is unable to undertake paid work and is fearful for her future;
- (b) she is to be deprived of her community; and
- (c) there is no alternative pathway for her to continue to remain lawfully resident in the Cayman Islands,

all of which has caused the Petitioner unconscionable and material mental suffering in a manner inconsistent with the traditional Christian values and principles of social justice upon which the Constitution is founded.

#### **FAIR TRIAL (s.7)**

21. Section 7 provides as follows:

*"7.—(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."*

22. In considering an appeal in relation to the denial of an application for citizenship in Antigua and Barbuda, the Privy Council (in Oliveira v the Attorney General (Antigua and Barbuda), [2016] UKPC 24) concluded that two years was too long a period to wait for the matter to be adjudicated.

23. The Petitioner's initial application for permanent residence was not adjudicated for some three years. The appeal against the initial refusal of her application for permanent residence was not

decided for some seven years. This delay violated the Petitioner's right to have her legal rights determined within a reasonable time.

**PRIVATE AND FAMILY LIFE (s.9(1))**

24. Section 9(1) provides as follows:

*"9.—(1) Government shall respect every person's private and family life..."*

25. The right to a private and family life is multi-faceted, including the imposition of a positive obligation on the State to ensure effective respect for that right. This positive obligation requires the State to have in place legislation that enables the enjoyment of the right.

26. The Petitioner has been part of the local community for almost thirty years and her personal life is consequently inextricably linked to that community. Moreover, the Petitioner has been engaged as a domestic helper by a single family for some twelve years. In that time she has been intimately involved in day-to-day family life and affairs of, and is properly regarded by both the children and parents as, part of that family.

27. The effect of the application of the Immigration Law and Regulations to the Petitioner deprives her of her rights under s.9(1) of the Constitution.

**MOVEMENT (s.13)**

28. Section 13(1) provides as follows:

*"13.—(1) No person shall be hindered by government in the enjoyment of his or her freedom of movement, that is to say, the right to move freely throughout the Cayman Islands, the right to reside in any part of the Cayman Islands, the right to enter the Cayman Islands, the right to leave the Cayman Islands and immunity from expulsion from the Cayman Islands."*

29. Section 13(2) provides as follows:

*"13.—(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision:*

*...(d) for the imposition of restrictions on any person who is not a Caymanian or a permanent resident; but—*

*...(iii) no such person shall be liable, by virtue only of this paragraph, to be expelled from the Cayman Islands unless the requirements specified in subsection (3) are satisfied.*

30. Section 13(3) provides as follows:

*"13.—(3) The requirements to be satisfied for the purposes of subsection (2)(d)(iii) are as follows:*

*(a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;*

*(b) that person has the right to submit reasons against his or her expulsion to a competent authority prescribed by law;*

*(c) that person has the right, save where a court has recommended his or her deportation, to have his or her case reviewed by a competent authority prescribed by law; and*

*(d) that person has the right to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority;"*

31. It is not the Petitioner's contention that the laws may not be published in the Cayman Islands that seek to restrict the right of non-Caymanians to live and work in the Cayman Islands. However it is the Petitioner's contention that the effect of the application of any law so published be not reasonable, rational, fair and proportional and consistent with the general principles stated in the preamble to the Constitution: *"an immigration system that protects Caymanians and gives security to long-term residents"* founded on Christian values and principles of social justice.

32. It is not reasonable, rational, fair or proportional, nor is it consistent with the Christian values and principles of social justice upon which the Constitution is expressed to be founded, for the effect of the application of the Immigration Law and Regulations to be to deprive a person lawfully resident in the Cayman Islands for almost thirty years of her right against expulsion.

#### **NON-DISCRIMINATION (s.16)**

33. Section 16(1) of the Bill of Rights and the interpretive s.16(2) provide as follows:

*"16.—(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*

*(2) In this section, "discriminatory" means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status."*

34. It is the Petitioner's contention that, in awarding her only six points out of a possible twenty for contribution to the community, and zero points for close Caymanian connections, the Immigration Appeals Tribunal has discriminated against the Petitioner in a manner that violates her rights under Section 16(1) of the Bill of Rights.

#### **LAWFUL ADMINISTRATIVE ACTION (s.19)**

35. Section 19(1) of the Bill of Rights provides that:

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

36. The principle of proportionality is an element of the globalised, common constitutional grammar, and is indispensable in constitutional rights reasoning. The Petitioner contends that the effect of the application of the Immigration Law and Regulations on the Petitioner:

(a) does little or nothing to protect Caymanians because the work of domestic helper undertaken by the Petitioner is not work for which there is significant competition amongst Caymanians; but

(b) has a material and disproportionately adverse effect on the financial and social security of the Petitioner, a long-term resident of the Cayman Islands.

37. For the several reasons stated above, the Petitioner contends that the application of the Immigration Law and Regulations to the Petitioner is neither national nor proportionate. Neither is the delay in either the original decision to refuse the application for permanent residence or the determination of the Petitioner's original application and/or the appeal procedurally fair.

#### **REMEDY SOUGHT**

38. Where the Court is confronted by the claim that government has breached or threatened her rights and freedoms under the Bill of Rights, then pursuant to s.26(1) of the Constitution the Court shall determine such application fairly and within a reasonable time.

39. In relation to any decision or act of a public official which the Court finds is, or would be, unlawful, then pursuant to s.27(1) of the Constitution it may grant such relief or remedy, or make such order, within its powers as it considers just or appropriate.

**AND THE PETITIONER HUMBLY PRAYS THAT:-**

1. A declaration that the application of the Immigration Law and Regulations to the Petitioner does not conform with the Petitioner's rights' and freedoms under ss.3 (he Avoidance of Inhumane Treatment), 7 (Fair Trial), 9 (Private and Family Life), 13 (Movement), 16 (Non-discrimination) or 19 (Lawful Administrative Action) of the Bill of Rights and that the decision to deny the Plaintiff's application for permanent residence is consequently unlawful;
2. A declaration that the legislation as applied by the Status and Permanent Residency Board and the Immigration Appeals Tribunal is incompatible with the Bill of Rights;
3. A declaration either that the Petitioner is entitled to remain in the Cayman Islands as a permanent resident under Section 29(1) of Immigration Act;
4. Such further or other relief as this Honourable Court deems fit; and
5. Costs of these proceedings.

Dated the 5<sup>th</sup> day of December 2018

Filed the 5<sup>th</sup> day of December 2018

Walkers

**Walkers**

Attorneys-at-Law for the Petitioner

This petition is intended to be served on:-

- (1) The Chairman of the Caymanian Status and Permanent Residency Board
- (2) The Chairman of the Immigration Appeals Tribunal
- (3) The Chief Immigration Officer of the Cayman Islands
- (4) The Attorney General