

IN THE GRAND COURT OF THE CAYMAN ISLANDS

137
CAUSE NO: OF 2021

IN THE MATTER OF SECTION 23 (2) OF THE IMMIGRATION (TRANSITION) ACT, 2021

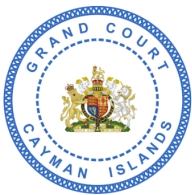
IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES

IN THE MATTER OF SECTION 23 OF THE BILL OF RIGHTS

AND IN THE MATTER OF AN APPLICATION FOR A RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE
PURSUANT TO SECTION 37 (1) IMMIGRATION (TRANSITION) ACT, 2018.

RUPERT AUGUSTUS THOMAS

Appellant



-v-

IMMIGRATION APPEALS TRIBUNAL

1st Respondent

-and-

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

2nd Respondent

NOTICE OF
ORIGINATING MOTION

TAKE NOTICE that the Grand Court at the Law Courts, George Town, Grand Cayman will be moved on the _____ day of _____ 2021 at _____ a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of Rupert Thomas ("the Appellant") for an order in the following terms:

- i. The decision of the 1st Respondent dated 4 June 2021 (but received on 6 June 2021) to refuse to grant the Appellant Permanent Residence ("PR")/ Residency and Employment Rights Certificate ("RERC") is wrong in Law / not in accordance with the law, and that matter should be remitted to the 1st Respondent to be reconsidered and decided according to the Law; and / or

- ii. The decision of the 1st Respondent dated 4 June 2021 to refuse to grant the Appellant PR / RERC is unreasonable / amounts to a breach of Natural Justice and therefore the matter should be remitted to the 1st Respondent to reconsider their decision and reach a decision which is reasonable and in accordance with the Law and rules of Natural Justice.
- iii. A declaration that the 1st Respondent must obtain the History and Culture Test questions and answers from the Caymanian Status and Permanent Residency Board prior to any final decision and that they must disclose those test questions and answers to the appellant.
- iv. A declaration that the 1st Respondent and any decision maker when considering an application for Permanent Residence and seek to rely upon a policy or precedent must ensure that the policy has been disclosed to the applicant prior to any decision, so that the applicant can make submissions on the policy / precedent or amend their application.
- v. A published declaration by the 1st Respondent what their policy is and what their expectations are in regards to Market Value reports.
- vi. A declaration that the 1st Respondent and any decision maker, when considering an application for Permanent Residence must consider an applicant's right to a family life and private life pursuant to Section 9 of the Bill of Rights when considering whether not grant or reject an application for Permanent Residence, or;
- vii. Section 37 (3) Immigration (Transition) Act 2021 ("the 2021 Act") is incompatible with Section 9 of the Bill of Rights.

And for an order that the costs of and incidental to this Application be paid by the Respondent.

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

1. On 26 October 2013, the Cayman Islands Government introduced a new points system for the consideration of PR/ RERC. Despite almost 8 years since the current points system coming into

effect the only guidance in regards to the Permanent Residence system is the limited guidance set out in the application forms and guidance notes.

2. The Appellant is 57 year old Jamaican. On or around 8 November 2018, when the Appellant was 54 years old, he applied for PR/ RERC. PR/ RERC applications can be considered by the Caymanian Status and Permanent Residency Board ("the Board") and the Director of WORC (previously known as the Chief Immigration Officer of the Cayman Islands ("CIO"). In the Appellant's case, his application was considered by the Board.
3. In a decision dated 12 March 2019, the Board rejected the Appellant's application for PR and assessed him as having scored 56.5 points out of a possible 200. On 9 August 2019, the Appellant appealed the decision of the Board after providing an explanation to the 1st Respondent as to why the application was submitted outside the usual 28 day time limit for an appeal.
4. In a document dated 16 August 2019, the Department of WORC provided to the Appellant an Appeal bundle in which they set out the full rationale for their decision.
5. The Appellant submitted Grounds of Appeal on 17 September 2019. The Appellant's grounds were based upon errors in Factor 3 and Factor 4.
6. On 10 June 2020, the 1st Respondent rejected the Appellant's appeal.
7. In a letter dated 26 June 2020, the Appellant asked for the 1st Respondent to reconsider their decision in regards to the rejection of his appeal against the decision of the Board.
8. After giving careful consideration to the further grounds submitted in the letter of 26 June 2020, the 1st Respondent acceded to the request of the Appellant and concluded that the Board had erred in Law and as a result granted the appeal and requested that the Appellant provide certain information which would be relevant to the *de novo* hearing. The Appellant was notified of this fact in a letter dated 4 September 2020.

9. On 2 October 2020, the Appellant provided an affidavit to the 1st Respondent. In this affidavit a number of documents were exhibited which were provided to support the Appellant's contention that he should be granted in excess of 110 points. In particular, the Appellant provided a valuation report prepared by R.A Thomas (a Chartered Professional Accountant) in respects to the business that he was a part owner of, namely Path Limited T/A Bethel Pool and Spa Construction ("the business"). The report concluded that a fair market value for the business is CI\$275,000 and therefore a 40% ownership of that business would be valued at CI\$110,000.

10. It was the Appellant's position that when one applies the equation found at Factor 3 of the Points system, he should have been awarded 30 points.

11. In a decision dated 4 June 2021, the 1st Respondent refused to award the Appellant 110 points. The 1st Respondent scored the Appellant for the various factors in the following manner.

Factor 1a (Current Occupation)	15 points
Factor 1b (Priority Occupation)	0 points.
Factor 2a (Years of Experience)	10 points.
Factor 2b (Education)	7 points.
Factor 3 (Local Investment)	0 Points.
Factor 4 a (Cash and Savings)	15 points.
Factor 4b (Salary and Income)	3 points
Factor 5 (Community Involvement)	20 points.
Factor 6 (History and Culture)	10.5 points
Factor 7 (Cayman Connections)	0 points
Factor 8 (Demographic and Cultural Diversity)	0 points.
Factor 9 (Age Distribution)	6 points.
Total	86.5

12. In regards to Factor 3, the 1st Respondent stated:

Factor 3 – Local Investment – The Tribunal did not award points to the Appellant as proof of the his monetary investment in excess of \$50,000 into Path Limited T/A Bethel Pool & Spa was not provided, in accordance with Schedule 2 of the Immigration Regulations (2019 Revision).

The Tribunal noted the letter dated 26th August 2019 from Melody Ann Williams of Path Limited T/A Bethel Pool & Spa, however proof of the investment was not included. The Tribunal also did not accept the Business Valuation Report issued by Chartered Professional Accountant, CPA, CMA dated 15th September 2020 with disclaimer for its audit and review.

The Tribunal further noted that the Appellant holds shares in a privately owned locally licensed company and not investments such as “stocks, bonds, etc.” in a locally licensed company for which Market Value may be considered.

13. If the Appellant had been awarded **30 points** for Factor 3, the Appellant would have achieved 116.5 points and therefore been granted Permanent Residence.
14. At the end of the decision the IAT confirm that Section 38 (3) of 2021 Act, prevented them from considering the Appellant’s Section 9 Bill of Rights (“BOR”) rights.¹
15. In the absence of an appeal to the Grand Court, the failure to award the Appellant Permanent Residence means that the Appellant’s right to a private life has been interfered with in a manner that is not reasonably justifiable and therefore amounts to a breach of Section 9 of the BOR.

Wrong in Law

16. It is respectfully averred that the 1st Respondent erred in the consideration of the Market Value Report in the following manner:
 - i. Concluding that proof of investment was not included. Factor 3 of the Points system does not require proof of investment, i.e. actual proof that CI\$50,000 or more has been invested, when one is relying upon the Market value of an investment.
 - ii. Attempting to differentiate between shares in a “privately owned locally licensed company” and potentially a publically traded company.
 - iii. Attempting to differentiate between shares and “stocks and bonds”.

¹ It is believed that the Tribunal were referring to Section 37 (3) of the 2021 Act not Section 38 (3) of the 2021 Act.

17. It is therefore averred that the decision of the 1st Respondent is wrong in law and as such the matter should be remitted back to them for a properly considered decision.

Section 9 of the Bill of Rights.

18. It is the Appellant's case that in a circumstances where a decision of a public official will infringe on an individual's rights protected by the Bill of Rights, the public official must consider whether or not it is, in the case of Section 9 of the BOR, reasonably justifiable to infringe on those rights.
14. In the case of the Permanent Residence points system, the decision maker is under a duty to firstly consider what points an applicant should be awarded and in the event that the applicant does not achieve 110 points, the decision maker is required to consider whether or not to grant the applicant Permanent Residence on the basis of his right to a private / family life.
15. In circumstances where the public official is prevented from / required not to consider Section 9 of the BOR by the Act, the Court must make a declaration of incompatibility. It would appear that the 1st Respondent's position is that they are prevented from considering Section 9 of the BOR by the Section 38 (3) of the 2021 Act.²
16. It is the Appellant's position that Section 25 of the BOR requires the 1st Respondent to interpret Section 37 (3) of the 2021 Act so far as it is possible to do so to give effect to Section 9, and therefore apply a two stage test.
17. In the event that Section 37 (3) of the Act prevents a public official from consider whether or not to grant Permanent Residence to an individual outside of the points system it is averred that Section 37 (3) should be declared incompatible.

² See footnote 1.

Breach of Natural Justice.

18. Save for the limited guidance contained within the application form the guidance notes which are / were a repeat of the regulations as they pertain to the points system there are no policies and procedures in regards to the consideration of Permanent Residence. This means that in many cases the decisions of the Board, the Director of WORC and 1st Respondent are prone to arbitrariness. In particular, this arbitrariness is found in the consideration of Factor 3 and specifically in regards to Market Value Reports.
19. It is the Appellant's position that the lack of policy in regards to Market Value Reports, renders the consideration of Factor 3 opaque and arbitrary. As is detailed in the Appellant's affidavit there seems to be a lack of consistency internally with the consideration of Market Value reports by the 1st Respondent and with the Board and internally within the Board. This lack of consistency renders the consideration of Factor 3 arbitrary and opaque and therefore unlawful.
20. Furthermore, the failure to create and publish a policy or publish a precedent means that applicants for permanent residence are prejudiced by the fact that it is not clear what they have to satisfy to obtain points for Factor 3, if they seek to rely upon the Market Value of their shares in a locally licensed and solvent company. It is therefore averred that the decision of the 1st Respondent in respects to Factor 3 is unreasonable.
21. While it is accepted that in the normal course of events, one would expect the Board or the Director of WORC to provide a policy and or guidance in regards the Permanent Residence system, one has not been produced. When it is the case that the aforementioned groups / individuals have failed to provide any adequate policies or procedures since October 2013, it is incumbent upon the 1st Respondent when they have a duty to act reasonably, proportionately and procedurally fairly to provide a policy of their own. As the 1st Respondent have failed to do this, it is averred that their decision is unreasonable and as such should be quashed and remitted to them for further consideration.
22. In the event that the 1st Respondent (or the Board or the Director of WORC) have a policy in regards to valuation reports that policy has not been disclosed and published which amounts to

a breach of Section 5 and Schedule 1 of the Freedom of Information Act (2021 Revision) (“the FOI Act”). It is therefore averred that the 1st Respondent has acted not in accordance with the Law in failing to disclose their policy. It is therefore averred that the decision not to award the Appellant Permanent residence is in breach of Section 9 of the BOR as the decision is not in accordance with the Law.

23. Further and in the alternative, it is the Appellant’s case the decision is unreasonable / amounts to a breach of natural justice in that the 1st Respondent:
- i. Failed to require the Board / Department of WORC to disclose to the Appellant the History and Culture Test Questions that he sat and the answers that he provided.
 - ii. Failed to ensure that the appeal process was fair.
 - iii. Failed to award the Appellant 20 points for Factor 6 in the absence of obtaining the History and Culture Test questions and answers from the Board.

Conclusion

24. Further to the above, it is averred that the 1st Respondent acted erroneously and unlawfully and in breach of natural justice. Accordingly, the decision of the Respondent should be set aside so that the Applicant's application can be reheard in accordance with law.

Dated: 28 June 2021



HSM CHAMBERS

TO: The Clerk of the Court

AND TO: The Chairman
Immigration Appeals Tribunal
Government Administration Building
Elgin Ave,
George Town
Grand Cayman

And to: Attorney General of the Cayman Islands.