

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: <sup>166</sup> 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 30 (1) IMMIGRATION ACT (2015 REVISION).

RYAN VILLAMOR MAGNAYE

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

1<sup>st</sup> Respondent

-and-

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

2<sup>nd</sup> Respondent



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NOTICE OF  
ORIGINATING MOTION

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**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 Ryan Villamor Magnaye ("the Appellant") for an order in the following terms:

- i. The decisions of the 1<sup>st</sup> Respondent dated 7 June 2021 and 9 July 2021 to refuse to grant the Appellant a de novo hearing and reconsider the decision of the Chief Immigration Officer of the Cayman Islands dated 27 March 2018 is wrong in law / not in accordance with the Law and that the matter should be remitted to the 1<sup>st</sup> Respondent to be reconsidered and decided according to the Law; and / or
- ii. The decisions of the 1<sup>st</sup> Respondent dated 7 June 2021 and 9 July 2021 to refuse to Grant the Appellant's appeal from the decision of the Chief Immigration Officer of the Cayman Islands is

This Motion was filed by HSM Chambers, Attorneys at Law for and behalf of the Appellant herein whose address for service and correspondence is 68 Fort Street, George Town, PO BOX 31726, Grand Cayman KY1-1207, Cayman Islands

unreasonable / amounts to a Breach of Natural Justice and therefore the matter to be remitted to the 1<sup>st</sup> Respondent to reconsider their decision and reach a decision in accordance with the Law and Natural Justice.

- iii. A declaration that the 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
- iv. Section 30 (4) Immigration Act (2015 Revision) ("the 2015 Act") and Section 37 (3) Immigration (Transition) Act (2021 Revision) ("the 2021 Act") are 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 1<sup>st</sup> Respondent.

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

1. The Appellant has resided in the Cayman Islands since 1 November 2006. The Applicant is a Filipino National who applied for Permanent Residence in the Cayman Islands on 27 October 2015. At the time that he applied for PR, he listed his wife (Melyn Ayotona) as a dependant.
2. On 30 October 2017, the Appellant's wife gave birth to their son in the United States of America where she was being treated for Cancer.
3. On 9 February 2018, the Appellant sat the History and Culture Test and was awarded 36 points out of 40. He was therefore awarded 18 points for Factor 6.
4. Prior to sitting the History and Culture test, applicants are contacted by the Department of Immigration (now Workforce Opportunities and Residency Cayman ("WORC")) and provided a document entitled History and Culture Test Advisory which notifies applicants that they can attend at the University College of the Cayman Islands ("UCCI") to enroll in the course "The History, Culture, Politics and Economy of the Cayman Islands". They are also informed they could read the following books:

- Bodden, J.A., **The Cayman Islands in Transition: The Politics, History and Sociology of a Changing Society** (ISBN-13:978-9766373221)

- Craton, Michael and the New History Committee (2003): **Founded Upon the Seas: A History of the Cayman Islands and Their People** (Kingston: Ian Randle Publishers, ISBN-10:0972935835)

- Goring, Kevin (2008) **Caymanian Expressions: A collection of sayings and phrases used in the Cayman Islands** (Grand Cayman: Gapseed Publishing)

- **Foundation – the Arts and Culture of the Cayman Islands** Volumes 1-4 (available at the Cayman National Cultural Foundation)

5. There are also a number of websites and Mobile phone apps which purport to have sample copies of the History and Culture questions and answers.<sup>1</sup>
6. Once an applicant has sat the test, they are notified of their results at a later date. The scores that the applicant receives are non-appealable. In a document entitled “Caymanian Status and permanent Residency Board Policies and Procedures 2012” the procedures state:
  2. The H & C Test can only be taken **once** by an applicant. In instances where the Law allows a person to re-apply for permanent residence after initially being refused, the previous score is used again when the Board is scoring the new application.
7. It is not known whether or not the Department of Immigration (now WORC) maintain a similar policy today due to the fact that the Caymanian Status and Permanent Residency Board Policies and Procedures 2012 are understood no longer to be relied upon and have not been replaced. For the avoidance of doubt, bar the guidance notes which accompany an application for Permanent Residence, there are no policies and procedures which govern the consideration of applications for Permanent Residency.
8. On 27 March 2018, the Chief Immigration Officer of the Cayman Islands (“the CIO”) notified the Appellant that his application for Permanent Residence in the Cayman Islands was rejected. The CIO notified the Appellant that he had been awarded 96.5 points. At the date that the CIO reached

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<sup>1</sup> <https://quizlet.com/256232348/cayman-history-culture-flash-cards/>

his decision, the Law governing Permanent Residence was the 2015 Act. Section 30 (4) of the 2015 Act stated:

*(4) In considering an application for permanent residence under subsection (1), the Board or the Chief Immigration Officer upon applying the criteria set out in the points system shall grant permanent residence to all applicants attaining one hundred and ten points or more.*

9. On 17 April 2018, the Appellant appealed the decision to reject his PR application.
10. On 8 January 2019, the Appellant's wife died.
11. On 13 December 2020, HSM Chambers received the appeal bundle and documents relating to the CIO's decision and on 22 December 2020, Grounds of Appeal were filed on behalf of the Appellant.
12. In a decision dated 7 June 2021, the 1<sup>st</sup> Appellant notified the Appellant that they did not accept that there had been an error of Law in the decision of the CIO. Furthermore, they did not accept that that they could consider section 9 of the Bill of Rights ("BOR").
13. The decision specifically did not address:
  - i. Section 30 (4) of the 2015 Act, rather reference was made to Section 38 (3) of the 2021 Act.
  - ii. The failure of the CIO to disclose to the Appellant the history and culture test questions and answers.
  - iii. The lack of policies in regards to the consideration of Permanent Residence Applications renders the decision unreasonable.
14. The Appellant asked for the 1<sup>st</sup> Respondent to reconsider their decision in a series of emails dated 8 June 2021 and 10 June 2021.

15. In a decision dated 9 July 2021, the Tribunal rejected the Appellant's reconsideration request. In this decision, they failed to address the fact that the decision of the CIO was made under the 2015 Act and incorrectly referred to the 2018 Act.

### **Error of Law**

16. When the CIO reached their decision in regards to the Appellant, Section 30 (4) of the 2015 Act stated:

(4) In considering an application for permanent residence under subsection (1), the Board or the Chief Immigration Officer upon applying the criteria set out in the points system shall grant permanent residence to all applicants attaining one hundred and ten points or more.

17. It is respectfully averred that Section 30 (4) of the 2015 Act is sufficiently ambiguous so as to ensure the 2015 Act is considered in a manner which is compatible with Section 9 of the BOR. In particular, the CIO was required to consider a two stage test, i.e. firstly considering the Act / points system and then once reaching a decision in regards to the appropriate level of points, if the applicant has not received 110 points, the CIO and the 1<sup>st</sup> Respondent were required to consider the Appellant's BOR rights.
18. 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 1<sup>st</sup> Respondent's position is that they are prevented from considering Section 9 of the BOR by Section 38 (3) of the 2021 Act. However, the correct Law at the time that the CIO reached the decision, and therefore the Act and sections which should have been considered, was the 2015 Act which is different to the current law. By the 1<sup>st</sup> Appellant considering the 2018 Act in both their original decision and the reconsideration decision, the 1<sup>st</sup> Appellant has erred in Law and the matter should be remitted to the IAT so that they consider the matter under the correct Law.
19. It is the Appellant's position that Section 25 of the BOR requires the 1<sup>st</sup> Respondent to interpret Section 30 (4) of the 2015 Act so far as it is possible to do so to give effect to Section 9, and

therefore apply a two stage test. As the CIO failed to do this, the 1<sup>st</sup> Respondent should have quashed the original decision of the CIO and ordered a de novo hearing.

20. In the event that Section 30 (4) of the 2015 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 30 (4) of the 2015 Act and Section 37 (3) of the 2018 should be declared incompatible with Section 9 of the BOR.

**Unreasonable / Procedurally Unfair/ Breach of Natural Justice.**

21. For the 1<sup>st</sup> Respondent to overturn a decision of the Caymanian Status and Permanent Residency Board (“the Board”) or the CIO / Director of WORC, they have to be satisfied that the decision is:
- Erroneous in Law.
  - Unreasonable.
  - Contrary to the Principles of Natural Justice; or
  - At variance with the Regulations.
22. It is therefore averred that the 1<sup>st</sup> Respondent are responsible for ensuring that the Board, the Director of WORC or the CIO not only award the correct marks under the points system but that the points system is interpreted fairly and that the Board/ the CIO and the Director of WORC carry out a fair procedure not only when considering applications but when they are responding to appeals.
23. It is respectfully averred that the 1<sup>st</sup> Respondent have failed in ensuring that a fair procedure is carried out by the Board, the CIO and the Director of WORC not only when considering applications but also when responding to appeals.
24. In particular the 1<sup>st</sup> Respondent failed to ensure that the Appellant was disclosed the history and culture test questions that were presented to him and the answers that he provided.

25. It is the Appellant's position that when an issue in the case is whether or not a decision is reasonable or not the CIO are under a duty to disclose all documents with relate to the factors considered. In particular, the Appellant would submitted that the CIO and the Board are required to disclose the questions that that the Appellant sat and the answers he gave as part of the disclosure in the Appeal Statement / Bundle.
26. By the CIO failing to disclose this information it is averred that the Appellant has been denied an opportunity to:
  - i. Confirm that he was awarded the correct points.
  - ii. Challenge the veracity of the questions asked.
27. Issues have been raised with the 1<sup>st</sup> Respondent for a number of years in respects to potential issues in regards to History and Culture Test, yet the 1<sup>st</sup> Respondent has failed to require the CIO / the Board or the Director of WORC to disclose the relevant material as part of the appeal disclosure. As such the 1<sup>st</sup> Respondent has failed to ensure that fair procedure has been carried out in respect to appeals.
28. Despite the fact that the 1<sup>st</sup> Respondent has the power to order disclosure or require individuals attend hearings, the 1<sup>st</sup> Respondent has failed to carry out its functions and therefore as such acted procedurally unfairly.
29. It is therefore the Appellant's case that the decision of the 1<sup>st</sup> Respondent is unreasonable / irrational / procedurally unfair and as such should be remitted so that the matter can be considered *de novo*.

## **Breach of Natural Justice**

30. In the decision of 7 June the 1<sup>st</sup> Respondent failed to address;
- i. The failure of the Board to disclose the History and culture test questions and answers to the Appellant.
31. From the decision it is not clear:
- i. What primary findings of fact they made.
  - ii. Whether or not they believe that the CIO is under a duty to disclose the history and culture questions and answers.
  - iii. What attempts they made to require the disclosure of the documents.
32. It is contended that as it is not possible to understand the rationale behind the decision nor is it possible to see what legal tests have been applied by the Respondent the Appellant has been substantially disadvantaged in that his potential grounds of appeal have been limited. It is therefore submitted that this matter should be remitted to the Respondent for a fresh reconsideration and to allow them to provide a properly reasoned decision which is compliant with the Law and Constitution.

## **Conclusion**

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

Dated: 30 July 2021

HSM Chambers

**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.