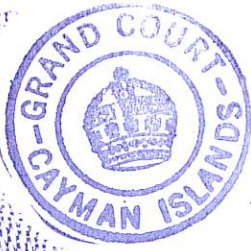


IN THE GRAND COURT OF THE CAYMAN ISLANDS

181  
CAUSE NO: OF 2009  
Legal Aid No 27/09

BETWEEN:



BASSIL ALEXANDER



PLAINTIFF

AND:

DEPARTMENT OF IMMIGRATION

CAYMANIAN STATUS AND PERMANENT RESIDENCY BOARD & IMMIGRATION APPEALS TRIBUNAL

DEFENDANT

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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| To the Clerk of the Court, Law Courts, George Town, Grand Cayman  |  |
| Name, address and description of applicant(s)   | Bassil Alexander   |
| Judgment, order, decision or other proceeding in respect of which relief is sought  | 1. Failure of Defendant to comply with requirement of s16(3) Immigration Law (2007 Revision) by failing to issue its reasons for its decision of the 8 <sup>th</sup> October 2008 within 28 days of the 22 <sup>nd</sup> October 2008. |
| <p style="text-align: center;">Relief Sought</p> 1. Order of Mandamus compelling the Defendant to provide its reasons forthwith under s16(3) of the Immigration law (2007 Revision).<br><br>2. Order of Mandamus compelling the Defendant to grant the Plaintiff's children the right to remain on island pending resolution of the Appeal. OR in the alternative;<br><br>An injunction preventing the prosecution or removal of the Plaintiff and/or his children until the determination of these |  |

|   |  |
|---|--|
| proceedings and his appeal.   |  |
| 3. Such further and other relief as the Court may deem appropriate in all the circumstances.                    |  |
| 4. Costs  |  |
| Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant | Samson & McGrath, Attorneys at Law, 5 <sup>th</sup> Floor, Genesis Building, George Town, Grand Cayman |
| Signed  | Dated  |
| <i>Samson &amp; McGrath</i>   | <i>15 Apr 09</i>   |

1. The Applicant seeks the following relief:

- (a) An Order of Mandamus compelling the Defendant to provide its reasons forthwith under s16(3) of the Immigration law (2007 Revision).
- (b) An Order of Mandamus compelling the Defendant to grant the Plaintiff's children the right to remain on island pending resolution of the Appeal. OR in the alternative;
- (c) An injunction preventing the prosecution or removal of the Plaintiff and/or his children until the determination of these proceedings and his appeal.
- (d) Such further and other relief as the Court may deem appropriate in all the circumstances.
- (e) Costs

GROUNDS ON WHICH RELIEF IS SOUGHT

**Background**

- 2. The Plaintiff is a Jamaican national, married in 2005 to Ms Nellie Alexander nee Smith from the Cayman Islands.

3. The Plaintiff works on island as a machine operator with a local company.
4. The Plaintiff's status on island is that of having a Residency and Employment Rights Certificate by virtue of his marriage.
5. The Plaintiff originally came to the Cayman Islands alone. The Plaintiff with a previous partner, Ms Samuels, has 3 children. These children are aged 12 and 9 and until 2007 resided with their mother in Jamaica.
6. In late 2007, Ms Samuels passed away after a short illness with cancer.
7. The Plaintiff's children originally resided with a relative in Jamaica. In February 2008, the Plaintiff was informed by the relative in Jamaica that she could no longer care for his children.
8. The Plaintiff pursued all options to have the children re-homed but no suitable relative or care option presented itself and the Plaintiff brought the children to the Cayman Islands in March 2008 under a visitor's visa as an emergency measure.
9. The Plaintiff applied for an extension to his Residency and Employment Rights Certificate to include his 3 children. This was lodged in March 2008 and was refused.
10. The Plaintiff's children were initially granted six month visas to remain in Cayman. These expired in September 2008 and an initial one month extension was granted to the 26<sup>th</sup> October 2008.
11. The Plaintiff filed a further application for an extension to his Residency and Employment Rights Certificate to include his 3 children on the 15<sup>th</sup> September with fresh evidence. This was again turned down by the Board on the 8<sup>th</sup> October 2008 by way of written notice.

12. The application was stated as having been refused under Section 31(3)(f) of the Immigration Law (2007 Revision), that ground being that;  
*"the applicant and his spouse have sufficient financial means to support himself and his dependants listed on the application as accompanying him."*

#### **Appeal**

13. The Plaintiff appealed this decision and lodged an appeal on the 14<sup>th</sup> October 2008 in accordance with Section 16(1) of the Immigration Law (2007 Revision).

14. Section 16(1) of the Immigration Law states as follows:

16. (1) Appeals under sections 14 and 15 shall be by notice in writing addressed to the Secretary of the Board or of the Immigration Appeals Tribunal, as the case may be, and such notice-

(a) shall set forth-

(i) the decision against which the appeal is made;

(ii) whether or not the appellant wishes to be heard personally or by a representative; and

(b) shall be accompanied by a copy of the original application and in the case of an appeal to the Immigration Appeals Tribunal, by the prescribed non-refundable processing fee.

(2) On receipt of the notice of appeal the Appellate Tribunal shall, within fourteen days, notify the Chief Immigration Officer or the Board, as the case may be, of the decision against which the appeal is made.

(3) Within twenty-eight days of receipt of the notice referred to in subsection (2), the Chief Immigration Officer or the Board, as the case may be, shall deliver to the Board or the Immigration Appeals Tribunal, as the case may be, and the appellant the reasons for his or its decision.

(4) The appellant shall, within twenty-eight days of receipt of the reasons referred to in subsection (3), file his grounds of appeal with the Board or the Immigration Appeals Tribunal, as the case may be, and serve a copy thereof on the Chief Immigration Officer or the Board.

(5) The Chief Immigration Officer or the Board may, within twenty-eight days of the receipt of the grounds of appeal referred to in subsection (4), provide a written defence which shall be filed with the Board or the Immigration Appeals Tribunal, as the case may be, and served on the appellant.

(6) Where the appellant has applied to be heard personally or by a representative, the Appellate Tribunal shall fix a time and a date for such hearing and notify the appellant and, as the case may be, the Chief Immigration Officer or the Board thereof.

(7) Appeals to the Immigration Appeals Tribunal shall be by way of rehearing.

(8) The Immigration Appeals Tribunal, when hearing an appeal, may take into account fresh evidence and any change in circumstances that may have arisen in relation to the parties.

15. By virtue of a letter from the Appeal Tribunal to the Plaintiff's Attorney it is believed that a memorandum requesting the Board's Appeal Statement was sent on the 15<sup>th</sup> October 2008, complying with the Statutory timeframe as set out in Section 16((2).
16. To date the Board has not delivered to the Plaintiff/Appellant the reasons for its decision.
17. The matter therefore remains unresolved and the Appeal has not progressed any further.
18. A further letter was sent on behalf of the Plaintiff on the 18<sup>th</sup> February 2009 seeking the reasons for the decision to of the Board and stating that the Plaintiff would make an application for a judicial review in failure of the Board providing their written reasons. No response was received to this letter and no further correspondence has been received from the Board or the Appeal's Tribunal.

#### **Children's Status on island**

19. As of the 26<sup>th</sup> October 2008 and pending their appeal the children were not in possession of visitors' visas. On the 14<sup>th</sup> October 2008 the Plaintiff sought further extensions from the Immigration Board to allow his children to remain in Cayman pending the hearing of the Appeal.
20. On Friday 24<sup>th</sup> October 2008 an extension was granted for 2 weeks.
21. The Plaintiff caused a further letter to be written to the Defendant seeking a further extension to the children's visitors' visas which was due to expire on the 9<sup>th</sup> November 2008. No response was received from the Defendant until after the extension had elapsed.
22. On the 13<sup>th</sup> November 2009 a further extension was granted for 2 weeks.

23. On the 21<sup>st</sup> November 2008 a request was made for a further extension to the Chief Immigration Officer, this request was never replied to by the Chief Immigration Officer.
24. An e-mail was received on the 14<sup>th</sup> April 2009 from the Chief Immigration Officer indicating that the Plaintiff did not avail of the extension of the 13<sup>th</sup> November and that the matter was being forwarded to their Enforcement section for investigation and possible prosecution.
25. There are no provisions in the Immigration Law (2007 Revision) dealing with the right to remain on island pending hearing of an appeal.

**Timeline as per Law**

26. Having lodged an Appeal on the 8<sup>th</sup> October 2008 the sequence of events from then should have been as follows:
  - (a) Appellate Tribunal shall within 14 days notify the Board of decision being appealed.
  - (b) Within 28 days of this, the Board shall deliver to the IAT and appellant the reasons for their decision.
  - (c) After receipt of these reasons the appellant has 28 days to respond.
  - (d) Further 28 days for Board to put forward defence
  - (e) Tribunal listed for hearing.
27. The Plaintiff calculates that step (b) should occur by latest the 12<sup>th</sup> November 2008.
28. Step (c) should have been completed by the 26<sup>th</sup> December 2008.
29. Step (d) should have been completed by the 23<sup>rd</sup> January 2009 and thereafter the Tribunal listed for hearing.
30. At this time all steps from (b) onwards remain outstanding with no indication from the Board or the Appeal Tribunal that any steps are going to be taken to remedy their default.

### **Procedural Fairness**

31. The Plaintiff asserts that the failure to adhere to the procedure for progressing the appeal as set out in the Immigration Law (2007 Revision) constitute procedural unfairness.

### **Prejudice**

32. The Plaintiff has suffered prejudice as a result of the failure to give the decision in the matter and allow the appeal to progress.

33. The Plaintiff has 3 children, two aged 9 and one aged 12. These children have been resident here since November last year in circumstances where it is not clear if they remain here legally or not. Attempts to have Immigration confirm their status on island pending appeal have been unsuccessful.

34. In the circumstances whereby the Department of Immigration were to find that the children were residing here illegally, then this may well prejudice their chances of success upon appeal and also open them to criminal prosecution.

35. The ground for rejecting the application at first instance was that the Plaintiff and his spouse did not have the financial means with which to support the children.

36. The failure of the Board to expedite this appeal only weakens the Plaintiff's position with regard to the appeal as he has to expend money upon legal fees, schooling fees for the children and payment for extensions to their visitor's visas.

### **Delay**

37. The Board's decision was due on the 12<sup>th</sup> November 2009. It is a matter for the Court whether this timeframe is mandatory or directory, although we believe it to be mandatory. The Plaintiff caused a letter to go to the Board on the 18<sup>th</sup> February 2009 to encourage the Board to provide its reasons and proceed with the matter without the necessity of Court involvement.

38. The Plaintiff is aware that by taking this action it is taking an action will come to the attention of the very Tribunal to which it seeks to bring an appeal and is therefore keen to avoid confrontation with the Tribunal.
39. The costs involved in any legal action in the Cayman Islands are such that they are beyond the means of the Plaintiff without the assistance of legal aid which was granted on the 17<sup>th</sup> March 2009.
40. On the 14<sup>th</sup> April 2009 e-mail correspondence from the Defendant indicates that the Plaintiff and his children may be prosecuted for being on the island illegally.
41. It has therefore now become a matter in which any further delay will potentially have serious consequences for the Plaintiff and his children.
42. The failure to make a decision is an on-going breach of procedure and it is submitted that there can be held to be no delay as the breach continues.
43. Any delay here has caused no prejudice to the Defendant.

**Relief Sought**

*Order of Mandamus compelling the Defendant to provide its reasons forthwith under s16(3) of the Immigration law (2007 Revision).*

44. We believe that a clear breach of procedure has occurred here by the Defendant and submit that this is a matter in which leave should be granted.

*Order of Mandamus compelling the Defendant to grant the Plaintiff's children the right to remain on island pending resolution of the Appeal. OR in the alternative;*

*An injunction preventing the Defendant from prosecuting the Plaintiff or his children for remaining on island pending resolution of the Appeal.*

45. We submit that the failure of the Defendant as of the 21<sup>st</sup> November 2008 to allow a further extension of the children's visitors' visas is a failure to exercise a discretion which should be subject to judicial review.

46. In the alternative we submit that the failure of the Defendant to progress the appeal has caused the Plaintiff and his children to potentially be in breach of the Immigration law by over-staying. As such the Defendant should be prohibited from acting upon his own delay by prosecuting the Plaintiff and/or his children for overstaying.

47. In both cases we say that leave should be granted to the Plaintiff to pursue this matter.