# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2012 No: 101**

IN THE MATTER OF THE ADMINISTRATION OF JUSTICE (PREROGATIVE WRITS) ACT 1978[1]

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

TRACEY ELIZABETH ROBERTS

Applicant

-v-

IMMIGRATION APPEAL TRIBUNAL

Respondent

## EX TEMPORE RULING ON COSTS

(In Chambers)

Date of Hearing: August 8, 2013

Mr. Paul Harshaw, Canterbury Law Limited, for the Applicant
Mr. Craig Attridge, C. Craig S. Attridge Barrister & Attorney-At-Law, for the Respondent

**Background**

1. This is an application for costs in relation to a judicial review application which was disposed of in favour of the Applicant by Order dated June 28, 2012 at which time the costs of the proceedings were reserved.

2. The Applicant sought to compel the Immigration appeal Tribunal to determine an appeal in relation to her attempts to obtain Bermudian Status. After the Order was made by this Court on June 28, 2012 directing the Tribunal to set down the appeal for

[1] The reference to the 1978 Act in the title is clearly based on an old precedent. The 1978 Act was repealed by section 5(1) of the Supreme Court Amendment Act 2009. Sections 64-68 of the Supreme Court Act 1905 now provide the statutory basis for judicial review applications.

hearing and determine the appeal, the Minister, who was the respondent to the appeal, granted the Applicant Bermudian Status by certificate dated July 13, 2012.

**The factual basis for the present application for costs by the Applicant**

3. Thereafter the matter, one might have expected, should have come to a very simple and timely end. However, the Applicant was concerned to bring to a conclusion the appeal proceedings in an orderly manner and on August 24, 2012, through her attorneys, wrote the Clerk to the Immigration Tribunal in relation to the disposition of the appeal. The letter read as follows:

> "*We write further to our letter to you of 16 July, 2012. The Minister of National Security has now granted the Appellant herein Bermuda Status. In the circumstances this appeal is no longer necessary and counsel for the parties have agreed that this appeal should be withdrawn with no order as to costs.*
>
> *Enclosed herewith please find the original and two copies of a minute of a consent order granting the Appellant leave to withdraw her appeal with no order as to costs.*
>
> *We trust that the Immigration Appeal Tribunal will agree to this course of action so that this appeal may be disposed of <u>without more</u>. If the tribunal does agree we would be grateful to receive two copies of the consent order endorsed by or on behalf of the Tribunal.*" [emphasis added]

4. The Tribunal never, it is conceded by Mr. Attridge on its behalf, responded to that letter in open correspondence.

5. The Applicant responded to the impasse by issuing a Summons dated February 21, 2013 in this action, the judicial review proceedings, against the Respondent seeking an Order:

> "*that the Immigration Appeals Tribunal to hear and determine her appeal within seven days, failing which the Chairman be ordered to appear in court to explain the contempt of the Immigration Appeals Tribunal of the order of 28 June 2012 and that the Applicant be awarded her costs on an indemnity basis to be paid forthwith*".

6. The Tribunal was seemingly flummoxed by this application. It is unclear why, if there was a simple answer to it, the Tribunal had not communicated this in response to the August 24, 2012 letter. However, the Affidavit sworn in support of the Summons by

the Applicant dated February 20, 2013 did make it clear that the substance of her complaint was that the Tribunal was declining to dispose of the appeal.

**Determination of application**

7. Before me, Mr. Attridge advanced various elegant and technical arguments as to why, as a matter of law, the Tribunal was not required to sign the consent order and why a consent order was not actually necessary at all.

8. The question before this Court, in looking at the question of costs, is not whether or not there was any strict legal requirement to sign a consent order. It is whether or not it was reasonable for the Tribunal to fail to do so in circumstances where, for reasons that are best known to the Tribunal itself and which may (by the time one comes to February 2013) be partly attributable to the change of Government and the change in the identity of the Chairman, the Tribunal simply failed to communicate its views in open correspondence. This left the Applicant with an anxiety, even if that anxiety, standing by itself, might not seem to have much foundation to it, about the Tribunal's refusal to sign the order.

9. It is difficult it must be said to understand, looking at the matter fairly, why the Tribunal would not have understood that the application issued in this Court in February was simply an attempt to formally bring the appeal proceedings to an end. In fact it appears that the Tribunal did in fact, when it applied its mind to it, realise that the consent order was in fact the sticking point in this whole affair. Because on March 7, 2013, not long after the application to seek further judicial review relief was filed in this Court, the new Chairman of the Tribunal signed the consent order actually disposing of the appeal in terms that the parties had agreed to in August 2012.

10. The fact that the consent order was in fact signed is the most cogent evidence that there was no substantive legal impediment to the Tribunal disposing of the appeal in that way and that all of the costs that have been incurred by the Applicant between August 2012 and March 7 need not have been incurred if the Tribunal had simply signed the order as requested when asked. It appears that after March 7, 2013 the arguments have been about whether or not the costs of these judicial review proceedings, which were reserved, should be awarded to the Applicant.

11. The Applicant, it seems, would have been willing to forego those costs- had the matter been resolved in the summer of 2012. But she considers, in my view reasonably, that she should not have been required to pursue signature of the consent order over the 6 to 7 month period that she was compelled to. I say "compelled" appreciating Mr. Attridge's argument that, in light of the settlement between the parties, they could perhaps have taken the view that:

    (a) the appeal was at an end; and

(b) that the possibility of any costs order being made by the Tribunal itself, of its own motion, was unrealistic or remote.

12. But in my judgment it was, on balance, reasonable for the Applicant to seek closure in the most traditional way possible, namely through a consent order, in circumstances where the Tribunal was acting manifestly unreasonably in failing to explain in open correspondence to the Applicant what its position was for failing to sign the Consent Order before March 7, 2013. It is true that, in the interim, its position was set out to some extent in "without prejudice" correspondence. But in that correspondence, it seems to me the Tribunal was clearly not acting as the Tribunal in relation to the appeal but was acting *qua* Respondent to the present judicial review proceedings. And what the Tribunal was seeking to do in the without prejudice correspondence which was placed before the Court was in effect to insist that the Applicant withdraw her present proceedings without any costs before the Tribunal signed the consent order.

13. That may be a very rough and ready view of the "without prejudice" correspondence. But it seems to me that the main highlights of the position are clear beyond serious argument. And those highlights are that on August 24, 2012 the Tribunal was asked to sign an order disposing of the appeal by consent and the Tribunal failed to either sign the order or give any reason in open correspondence for not signing the order before finally capitulating on March 7, 2013. In these circumstances it seems to me to be obvious that the Applicant is entitled to her costs of the judicial review proceedings generally including the costs of the present application[2].

14. Mr. Attridge invited the Court to have regard to the [marital] relationship between the Applicant and her counsel, a principal in Canterbury Law Ltd. It seems to me that any question relating to her actual liability to pay her attorneys should be resolved on taxation.

**Summary**

15. And so, in summary, the Applicant is awarded the costs of the present action, to be taxed if not agreed, on the standard basis.

Dated this 8th day of August, 2013 ____________________________________

IAN R.C. KAWALEY CJ

[2] This analysis broadly accords with the approach adopted by this Court to a somewhat similar costs application in *J Stevens-v-The Governor et al* [2013] SC (Bda) 46 Civ (16 May 2013).