IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 471 OF 2012

BETWEEN	SCOTT MURRAY AITKEN	APPLICANT
AND	THE IMMIGRATION APPEALS TRIBUNAL (the "IAT")	RESPONDENT

IN CHAMBERS AS OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 21ST DAY OF JANUARY 2015

APPEARANCES: Ms. Martha Rankine of Goldfield (Cayman) attorneys-at-Law, for the Applicant

Mrs. Suzanne Bothwell, Senior Crown Counsel of the Attorney General's Chambers, for the Respondent

Right of appeal under the Immigration Law (2010 Revision) from decisions of the Caymanian Status and Permanent Residency Board to the Immigration Appeals Tribunal; whether appeal involves a two-stage process or whether an automatic right to a rehearing de novo.

JUDGMENT

1. This matter came before the Court by way of an application by Mr. Aitken for judicial review of the IAT'S decision. By that decision, the IAT refused his appeal against an earlier decision of the Caymanian Status and Permanent Residency Board ("the Board") by which the Board had refused his application for permanent residence.

2. By his judicial review application, Mr. Aitken sought the usual discretionary remedies of certiorari, mandamus and injunction; respectively to quash the IAT's decision, to direct the IAT to reconsider his appeal against the Board's decision and

injuncting the Department of Immigration from taking any further action to bring about his removal from the jurisdiction until the determination by the IAT of his resubmitted appeal.

3. In light, however, of the statutory right of appeal given to him by section 17(2) of the Immigration Law (2010 Revision) ("the Law")[1] to appeal to this Court against decisions of the IAT, I was obliged to enquire whether he had exercised that right before the institution of his judicial review application.

4. Judicial review is not normally available where there is an alternative remedy by way of appeal. While the Court retains a discretion even where there is an alternative remedy, to entertain an application by way of judicial review, it will do so only exceptionally: see *Kirk Freeport Plaza Limited v Immigration Board et al 1997 CILR 502.* In that case, the Court of Appeal adopted the settled principle that an application for judicial review may be entertained *"where the alternative…remedy (of appeal) is nowhere near so convenient, beneficial and effectual"* or *"where there is no other equally effective and convenient remedy*" (at 515 and 516). The principle has often been followed and applied in subsequent cases; see for example: *Proprietors Strata Plan No. 103 v Development Advisory Board and Dios Mar Limited* 2000 CILR 489 and *Ford v Immigration Appeals Tribunal* 2007 CILR 258.

5. In this case, far from there being a showing of such exceptional reasons to justify departure from the settled principle, it appears that the statutory right of appeal was simply overlooked. This, although not expressly admitted on the part of Mr. Aitken, is the reasonable inference to draw when his real ground of complaint, which is a point of law, is understood. It is that the IAT misconstrued and misapplied the Law

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[1] That which applied at the times of his application to the Board and appeal to the IAT.

in its insistence that he first established one of four grounds of appeal set out in the Law, before he was entitled to have his appeal against the decision of the Board heard by the IAT by way of rehearing.

6. Such an argument of construction is one which is obviously suitable for being taken by way of the statutory right of appeal rather than by way of judicial review – the latter requiring the showing either of illegality, irrationality or procedural irregularity[2] tainting the administrative decision which is to be reviewed. What is involved here is the notion instead that the IAT misunderstood and so misapplied the statutory right of appeal. This is a pure issue for construction of the Law, well given to being argued and resolved by way of appeal.

7. These concerns having been brought to the attention of Ms. Rankine, it was accepted by her on behalf of Mr. Aitken, that the right of appeal must first be exhausted and that – as a practical matter - I should proceed to dismiss the judicial review application and hear the application as if by way of the statutory appeal.

8. Mrs. Bothwell appearing for the IAT did not object to this course and as it would save time and the significant costs of Mr. Aitken having to start over, I decided to adopt it.

9. This judgment is therefore rendered following the hearing of his appeal on the identified point of law alone, pursuant to section 17(2) of the Law.

Background

10. On 8th July 2010 the Applicant Mr. Aitken made his application to the Board for the grant of permanent residence pursuant to section 6(2) of the Law.

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[2] As compendiously described in Lord Diplock's famous dictum from the *GCHQ* CASE [1985] ac 374 AT 410. The Law has since developed to include lack of proportionality as a further ground for review and as is quintessentially required by the Cayman Islands constitutional Bill of Rights, Article 19.

11. On the 4th January 2011, the Board refused his application on the basis that he had attained only 95 points under the Permanent Residence Assessment Points System prescribed by the Immigration Regulations (2010 Revision).

12. The Points System required a minimum of 100 points for the making of a grant.

13. In its assessment, the Board awarded the applicant zero points under Factor 4 of the Points System – "Financial Assessment" – for which a maximum of 20 points could have been awarded. The Board appears to have awarded zero points because the applicant had failed to show that he came within either of the two sub-factors identified by Factor 4 ; that is:

    (a) Investment in property in the Islands; or

    (b) Investment in a local company.

14. The material put before the Board by the Applicant and in light of which his application was considered, revealed that although he and his wife (now estranged) were then in the course of transacting for the purchase of a residence in Grand Cayman, that transaction had not yet been completed.

15. On 17th January 2011, the Applicant appealed by letter to the IAT on the single ground that the decision of the Board was "unreasonable". He enclosed his own points assessment by which he asserted that the Board should have awarded him 106 points. It is to be noted, however, that while he proffered an explanation for not having completed the acquisition of a property (viz: the unwillingness of the local banks to lend to persons whose permanent residence is in doubt), he did not propose that the Board should have awarded him any points under the Financial Assessment Factor 4.

16. His assertion of unreasonableness on the part of the Board was therefore in respect of the Board's failure to have awarded more points (11 more, according to him); in respect of other Factors.

17. Thus, in essence, his single ground of appeal to the IAT – unreasonableness on the part of the Board – joined issue not with the legality of the Board's decision but with the Board's discretionary factual assessment of the relevant factors.

18. Having received his letter of 17 January 2011, the IAT wrote to the Applicant on 7 February 2011 enclosing the Board's Appeal Statement – that which outlines the Board's reasons for the refusal of his application. The IAT advised that pursuant to sections 15(2) and 16(4) of the Law, detailed grounds of appeal were required to be submitted by him to the IAT for further consideration. The IAT further advised that it had the right to dismiss the appeal on the basis of the Applicant's failure to comply with section 16(4) of the Law which required that the Applicant, within 28 days of receipt of the IAT's letter, file his grounds of appeal with the IAT. This letter concluded: "*Kindly advise if you wish to attend the hearing of the matter.*"

19. In response by letter dated 28 February 2011, the Applicant acknowledged receipt of the IAT's letter of the 7th February 2011 as he saw it, "*advising me of the additional requirements pertaining to the Appeal process in respect of my Permanent Residency Application.*"

20. In this letter, the Applicant goes on to inform the IAT about his change of circumstances including employment with a new employer, an updated letter from his wife's employer and advising that he and his wife had recently made another offer to purchase a property (enclosing a copy of the offer document but explaining that

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although unfortunately even that offer had not come to fruition, they were continuing to search for something suitable). Additionally, that they had also been "*liaising with others of the Cayman based financial institutions, to ensure that funding is in place, prior to any contract being entered into.*"

21. The Applicant in this letter also went on to explain that he had contacted "Big Brother Big Sisters", to enroll himself in their mentoring programme; participation in such programmes being a factor to be considered under the Points System.

22. He concluded: "*If the Board deem it appropriate that I attend the hearing, please advise of such date and time and I will, of course endeavor to appear in person. Alternatively, I am also agreeable to the Board processing the Appeal in my absence.*"

23. It must be noted that the Applicant raised no further ground of appeal beyond that of "*unreasonableness*" raised in his first letter of appeal.

24. On 2nd March 2011, the IAT acknowledged his letter of 28th February 2011 which it described as his "*Detailed Ground of Appeal Statement*" and advised the Applicant that its decision will be remitted pursuant to Section 16(11) of the Law, with the least possible delay.

25. In the meantime, on 1st June 2011, the Applicant wrote to the Board providing that body with a further update of his personal circumstances, in particular that he and his wife had made an offer to purchase a property which had been accepted. Further, that the property would be held in his wife's name, as he was a personal director of multiple entities and was anxious to ensure asset preservation should any of those directorship appointments become litigious. On 18th July 2011, he also wrote to the

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IAT stating that the property purchase had finally been settled and confirmed that the property would be in his wife's name, explaining again that this was to protect against the property being subjected to attack in the event of his being sued as a personal director of companies.

26. Eventually, on 10th October 2012, the IAT met and considered the Applicant's appeal and, concluding that no grounds of appeal had been made out against the Board's decision under section 15(2) and 16(4) of the Law, dismissed his appeal.

27. He was so notified in a letter from the IAT of 1st November 2012 and in which the IAT explained that it had reviewed both of his letters of 17th January 2011 and 28th February 2011.

28. The IAT's letter of 1st November 2012 also advised that should he wish to appeal further, the Applicant had the right to appeal to this Court pursuant to section 17 of the Law (citing the 2011 Revision[3]) from a decision of the IAT on a point of law only, within 28 days of receipt of the notification.

29. That right of appeal is in effect, and as explained above, that which the Applicant has exercised and in respect of which this judgment is given.

The Grounds of Appeal against the IAT's decision

30. While confusingly set out as "Grounds of Appeal" in the Applicant's arguments in support of his application for judicial review, for the purposes of being assimilated as his statutory appeal, the grounds had to be clarified during exchanges in Court with Ms. Rankine.

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[3] But the same as the Law in all material respects.

31. Essentially, the grounds of appeal as explained and elaborated upon by her in her submissions, amount to an argument that the two-stage process adopted by the IAT (on which more below) did not (and still does not) allow the IAT to consider properly any further information submitted by an appellant and therefore unlawfully fetters the IAT's discretion. The two-stage process adopted by the IAT was (and still is) first to consider whether a ground of appeal is made out against the decision of the Board before proceeding to the second stage of entertaining the appeal by way of a full rehearing de novo.

32. This complaint – that the IAT had unlawfully fettered its discretion by adopting the two-stage process – became the discernible "*point of law alone*" upon which this appeal proceeded. It arises from the procedure adopted by the IAT as explained more fully in the response of the IAT to the Applicant's arguments.

33. That explanation, which Mrs. Bothwell now adopts in supporting the IAT's defence, is contained in the affidavits of Mr. Morris Garcia, attorney-at-Law and Deputy Chairman of the IAT. As it describes in detail the procedure adopted by the IAT, it is convenient that I quote from Mr. Garcia's affidavits beginning at paragraph 3 of his first:

> *"3. I chaired the IAT meeting of 10 October 2012, when the IAT considered the Applicant's Appeal....*
>
> *Appeals to the IAT.*
>
> *As Deputy Chair of the IAT I occasionally chair the meeting of the IAT where appeals are considered. At the time of Mr.*

Aitken's appeal, a quorum of three members was required to convene the IAT.

4. *Appeals to the IAT are conducted in two stages. The first stage is to establish whether any ground of appeal is made out under S. 15(2) of the Immigration Law ("grounds stage"). If grounds are made out under S. 15(2), the IAT proceeds to the second stage, and conducts a full rehearing of the decision ("rehearing").*

Grounds stage

5. *The grounds of appeal to the IAT are specified (in) s.15(2) of the Immigration Law. The appellant specifies which ground he is relying on in his Notice of Appeal or in subsequent Grounds of Appeal submitted to the IAT. The permitted grounds are that the Board's decision was:*

   (a) *erroneous in law*

   (b) *unreasonable*

   (c) *contrary to the principles of natural justice; or*

   (d) *at variance with the Regulations.*

6. *When considering the grounds stage, the IAT scrutinizes the Appeal Statement by the Board, which gives the Board's reasons for its decision, together with any defence submitted by the Board.*

For example, if the appellant alleges that the points allocated by the Board under a particular category was unreasonable, the IAT will scrutinize the Board's description of the point allocation in the Appeal Statement. If the IAT agrees that the points allocated by the Board was unreasonable, then that ground of appeal is made out.

7. *The IAT also looks at any other document provided by the Appellant, including new information. At the grounds stage the IAT will look at, but not consider, information that was not before the Board when it made its decision.*

   If the IAT is satisfied that one or more of the grounds alleged by the applicant is made out, the IAT will move on to the rehearing stage. If the IAT does not find any of the grounds alleged by the appellant to be made out, the IAT writes to the appellant to inform him of this decision.

Rehearing

8. *If the IAT is satisfied that one or more of the grounds of appeal under S.15(2) are made out, the IAT will immediately proceed to the rehearing. This is a rehearing de novo, where the IAT considers all new information provided by the appellant, even if this was not available to the Board.*

Mr. Aitken's appeal

9. *The minutes show that Mr. Aitken's grounds of appeal were not made out. Accordingly, Mr. Aitken's appeal did not proceed to the rehearing stage. Mr. Aitken was informed of this decision by letter." [That of the 1st November 2012 discussed above.]*

34. In his second affidavit filed in response to Mr. Aitken's application, Mr. Garcia further explains that in adopting and following the two-stage process described above, the IAT relied on and is guided by a Guidance Note prepared for the IAT by Lord Pannick QC on 22nd February 2010. He exhibits a copy of the Guidance Note and I will return to comment on its contents below.

The relevant provisions of the Law

35. Given the point of law for appeal, I need only consider the provisions relating to appeals to the IAT.

36. Section 15 gives the right to appeal to the IAT. It provides as follows:

""(1) Save as otherwise provided in this law, any person aggrieved by, or dissatisfied with, any decision of the Chief Immigration Officer under section 42(f) or of a Board[4] other than a decision under section 14[5] may, within:

(a) twenty-eight days of the communication of the decision to him; or

(b) such longer period as the Chairman of the [IAT] may, for good reason shown, allow, appeal therefrom by way of

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[4] Including the Board.

[5] Decisions under section 14 are those of Immigration Officers in respect of which the Law provides that there shall be no further right of appeal beyond the relevant Board.

rehearing to the [IAT], and matters referred to the [IAT] may not be remitted to that Board or to the Chief Immigration Officer.

(2) An appeal under sub-section (1) may be lodged on the ground that it is –

(a) erroneous in law;

(b) unreasonable;

(c) contrary to the principles of natural justice;

(d) at variance with the Regulations

....”

37. Section 16 makes further provision for the conduct of appeals. It prescribes the procedure that governs the filing and processing of appeals and the manner by which they may be heard – that which is largely reflected in the steps taken by the IAT as described in the background set out above in Mr. Garcia's first affidavit.

38. As no objection is taken to the IAT's or the Board's compliance with the requirements of section 16 in the processing of or response to Mr. Aitken's appeal, I will set out here only those provisions of section 16 in respect of which he complains.

39. They include subsections (6) – (9) and (11) which provide:

“*(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.*

(9) *At every hearing of an appeal where the appellant or his representative shall be given an opportunity to address the Appellate Tribunal, and the Chief Immigration Officer or his representative or the representative of the Board, as the case may be, shall be heard in answer, but the Appellate Tribunal may, in its absolute discretion, call upon either party further to address it.*

....

(11) *The decision of the Appellate Tribunal shall be notified to the appellant with the least possible delay."*

40. As mentioned above, the gravamen of the Applicant's argument is that the two-stage process adopted by the IAT for dealing with his appeal is an impermissible fetter of the IAT's discretion and an impermissible abridgement of his right to appeal by way of a rehearing as mandated by section 16(7). On his behalf, Ms. Rankine argues that section 16(7) is expressed in mandatory terms and so, whatever procedure the IAT might adopt for dealing with appeals, may not operate so as to curtail the right to a rehearing. Moreover, and as the IAT acknowledges through Mr. Garcia, this is a right to a rehearing de novo and during which any new material put before the IAT by the

Appellant must be considered – in his case specifically, the eventual completion of the purchase of a property that would attract points under Factor 4 of the Points System.

41. Thus, he asserts, the adoption of the two-stage process by the IAT and the refusal of his appeal at the first stage, operated as an undue fetter upon the discretion vested in the IAT to review the merits of his case, by having regard to new material and change of circumstance by way of rehearing de novo.

Analysis

42. It is well-established that an authority acts *ultra vires* if, in the exercise of its powers, it adopts a policy which effectively precludes it from exercising a discretion which is vested in it and which it is required by law to exercise.

43. It appears that the earliest authoritative exposition of this principle is to be found in the English Court of Appeal's judgment in *R v Port of London Authority, ex parte Kynoch* [1919] 1 K.B. 176.

44. In *Kynoch,* the applicant had been refused permission by the Port of London Authority to construct a wharf on land he owned located along the banks of the River Thames. Permission was refused on the basis that the Authority itself had a duty to provide the facilities; the decision which the appellant criticized as having been based upon a rigid policy which prevented the Authority from considering the application on its merits in the exercise of the discretion vested in it. The challenge to the Authority's decision failed. While it was held that the Authority could not adopt a rigid policy which had the effect of ensuring that applications of a certain category would invariably be refused; on the facts the Court of Appeal found that there had

been no refusal by the Authority to consider and exercise their discretion according to law. Moreover, that it appeared to the Court that the Authority had given genuine consideration to the application on the merits.

45. A different conclusion was reached in *H. Lavender and Sons Ltd. v Minister of Housing and Local Government* [1990] 1 W.L.R. 1231; although the same basic principles were reaffirmed.

46. Lavender had applied for planning permission to extract sand and gravel from high grade agricultural land, a portion of which was deemed to be included in a reservation area. The local planning authority refused permission and Lavender appealed to the Minister of Housing and Local Government. The Appeal was dismissed, the Housing Minister having been persuaded by the Minister of Agriculture that such lands should be preserved for agricultural purposes. In his letter of decision, the Housing Minister stated that it was his present policy that land in the reservations should not be released for mineral working "*unless the Minister of Agriculture is not opposed to working*" and that since the agricultural objection had not been waived, he had decided not to grant planning permission.

47. Not surprisingly, the decision was set aside. It was held that although the Housing Minister was entitled to have a policy and to decide an appeal in the context of that policy, he was nevertheless obliged properly to exercise his statutory discretion by giving genuine and unfettered consideration to whether on planning (including agricultural) grounds, the land could be worked; but that by applying and adopting his stated policy he had in effect inhibited himself from exercising a proper, or any

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discretion, in a case where the Minister of Agriculture had made and maintained an objection.

48. The principle – which may be described as the rule against fettering the discretion vested in a decision-maker – has been considered in several subsequent cases with varying outcomes[6].

49. Its most authoritative exposition is to be found in the House of Lords decisions in *British Oxygen Co. v Board of Trade* [1971] AC 610; in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 and in *R (on the application of Daly) v Secretary of State for the Home Department* [2001] AC 532.

50. In *British Oxygen*, the House of Lords upheld the right of the Board of Trade in deciding upon applications for eligibility for grants, to have a general policy; provided that the policy did not preclude the Board from considering individual cases. Lord Reid considered the scope of the discretion and declared in his judgment on behalf of the Court that (at 624 F-G and 625 D):

> *"There are two general grounds on which the exercise of an unqualified discretion can be attacked. It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion. But, apart from that, if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him...what the authority [Minister] must not do is to refuse to listen at all."*

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[6] Including: *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281; *Sagnata Investments v Norwich Corporation* [1991] 2 Q.B.614; *R v Chief Constable of North Wales Police ex parte AB and another [1997] 3 WLR* 724; *R (WL (Cargo)) v Secretary of State for the Home Department* [2010] EWCA Civ. 11.

51. The more recent House of Lords decisions in *Simms* and *Daly,* are significant in demonstrating the Court's refusal to allow a strict administrative policy to undermine individual rights.

52. In *Simms*, the applicants had been convicted of murder but continued to protest their innocence. Their appeals had been dismissed but they wished to obtain further hearings before the Court of Appeal through the Criminal Justice Review Commission and hoped that by public exposure of their cause through the press, their convictions would be investigated and their appeals would be re-opened. However, the Home Secretary had adopted a policy which imposed a blanket ban on journalists interviewing prisoners with a view to publication (requiring written undertakings which journalists refused to give); on the basis that such publicity could undermine prison control and discipline. Lord Steyn concluded – using the language of proportionality and human rights (at 130. C):

> *"I have no doubt that these provisions are exorbitant in width in so far as they would undermine the fundamental rights invoked by the applicants in the present proceedings and are therefore ultra vires."*

53. The different opinions contributing to the unanimous decision of their Lordships in *Simms* is summarized in the headnote and I adopt in relevant part as follows: Although the impugned provisions of the Prison Service Standing Order could not be regarded as ultra vires in themselves, their application by way of an indiscriminate ban on all interviews by journalists with prisoners, amounted to an unwarranted policy of infringement of the prisoners' freedom of expression which they sought to exercise with a view to challenging the validity of their convictions.

54. Similarly in *Daly* – a case decided after the coming into effect of the Human Rights Act 1998 – the exercise of powers given under the Prison Act 1952 aimed at maintaining security, order and discipline in prison; was held to be curtailed by the right of prisoners to communicate confidentially with legal advisers under the seal of legal professional privilege. This meant that the policy adopted by the prison authorities of requiring prisoners to be absent from their cells whenever legally privileged correspondence was being examined by prison officers therein, was unlawful both as a matter of the common law principles, as well as under the European Convention for the Protection of Human Rights and Fundamental Freedoms as enforced by the Human Rights Act 1998.

55. The two-stage policy adopted by the IAT here must be tested against this powerful and authoritative line of cases. Thus, the questions become: has the application of the two-stage policy resulted in an unwarranted infringement upon the Applicant's right to a fair hearing of his appeal in keeping with the provisions and mandate of the Law? By the adoption of the policy, has the IAT fettered the exercise of the discretion vested in it to ensure that the Applicant is afforded a fair hearing of his appeal according to the Law?

56. In my view, it is clearly demonstrated from Mr. Garcia's affidavits that no such infringement had taken place at the first stage – what the IAT describes as the "grounds stage". Mr. Garcia explains that the requisite notifications had been given and the Applicant was allowed to respond to the Statement of Reasons issued by the Board. He did so extensively in writing, taking the opportunity to put information about further developments which had not been before the Board, before the IAT. He

opted not to appear in person, leaving it to the IAT to proceed to consider his case on the papers.

57. The IAT did so by scrutinizing the decision of the Board as against his single ground of complaint: unreasonableness. As the Applicant had alleged that the points allocation allowed by the Board was unreasonable; according to Mr. Garcia, the IAT scrutinized the Board's description of the point allocation in the Board's Appeal Statement.

58. If the IAT had agreed that the points allocated by the Board was unreasonable, then that ground of appeal would have been made out, leading to a full rehearing de novo being afforded to the Applicant. In the event, the IAT found the ground to be unsubstantiated and on that basis, refused to take the matter to the second stage of entertaining the appeal further by way of rehearing de novo.

59. The Applicant having thus been afforded a deliberate consideration of his ground of appeal, it cannot be said that the exercise by the IAT of its discretionary powers by way of the imposition of the two-stage policy requiring that an appellant first establishes what I would describe as a *prima facie* ground of appeal before there will be a rehearing de novo, is an unwarranted or impermissible fetter upon the powers.

60. The rationale of the two-stage policy is that it serves as the necessary filter required by section 15(1) and 15(2). These subsections are interpreted as requiring that there is a *prima facie* showing of at least one of the four grounds of appeal recognised by subsection 15(2) before the IAT is required to afford a rehearing de novo under section 16(7).

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61. As section 16(7) does not mandate otherwise, it cannot be said that the two-stage policy as operated by the IAT is ultra vires its authority given under the Law.

62. This conclusion must however, be tested as against the requirements of section 16(7) itself, properly construed.

63. On the face of it, section 16(7) is expressed in mandatory terms where it states that "*Appeals to the [IAT] shall be by way of rehearing.*"

64. Taken by themselves, those words convey a meaning that is readily understood. As Henderson J. explained, albeit in the different statutory context of a planning appeal: "*a rehearing is intended to be a fresh look at the evidence and at the arguments by the appellate tribunal, not a debate about whether the (first instance tribunal) was right or wrong*[7]".

65. Furthermore, when used accurately, otherwise than in a temporal sense, the word "shall" denotes an obligation and should be construed accordingly[8].

66. However, to mandate a strict obligation to embark upon a full rehearing de novo upon the filing of every appeal, would be to require the IAT to overlook the requirements of the Law for the establishment of at least one of the four grounds of appeal stipulated by section 15(2).

67. Thus, there is an apparent tension to be resolved in the application of these seemingly conflicting provisions of the Law and it is to this end that the policy adopted by the IAT is directed. In taking this approach, the IAT in my view should not be criticized.

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68. The Law must, as a matter of the proper construction of its purpose be read as a whole:

[7] In the context of the Development and Planning Law (2005 Revision) , which provides a right of appeal by way of rehearing: *C.P.A. Mirage Dev. Ltd.* (unreported): Cause 611 of 2007, 14 August 2009.
[8] Thornton, Legislative Drafting, Butterworths, London, 1970, p.81,.

"No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in a way of a black-letter lawyer, but in a meaningful and purposeful way giving effect to the basic objectives of the legislation":

A-*G's Reference (No. 5 of 2002)* [2004] UKHL 40, [2004] 4 All E.R. 901 at [31] and see *Bennion on Statutory Interpretation, Sixth Edition*, p.845.

69. As part of the purpose of the Law, the purpose of the appellate provisions must be to provide a fair process for the filing and resolution of appeals against decisions with which applicants may be genuinely aggrieved.

70. In giving the right of appeal to such persons, the Law expressly provides, at section 15(2), that the appeal to the IAT may be brought on one of four grounds (as set out above at para. 36). If a workable meaning is to be ascribed to this provision, as a first step a valid appeal must be brought within at least one of the four permissible grounds. Otherwise, the IAT could be invited to embark upon an appeal which is not prescribed upon any ground deemed permissible by the Law. For that reason, it seems plain to me that the IAT may not overlook the limitations of section 15(2).

71. As advised by Lord Pannick QC in his Guidance Note, in terms of which I agree – the IAT has correctly regarded itself as required to direct its mind to whether or not the particular ground(s) of appeal relied upon by an appellant is made out. And, if it decides that no ground of appeal within section 15(2) has been made out, to dismiss the appeal.

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72. Thus, the particular ground upon which an aggrieved person seeks to challenge a decision of the Board must be *prima facie* established within the limitations of the grounds permitted by the Law.

73. It must follow, and I also conclude, that the further provisions of the Law which state that the IAT shall "*rehear*" a matter – section 16(7) – or can "*make such order as it thinks fit*" – section 17(1) – must be read in light of the statutory context set also by section 15(2) which expressly delimits the grounds upon which an appeal may be made to the IAT.

74. I also accept that there may be cases where fresh evidence or change in circumstances may be relevant to whether or not a ground under section 15(2) is made out. Because the appeal is by way of "rehearing", as it has been advised, the IAT should be prepared to consider such matters, but only in the context of a section 15(2) ground of appeal.

75. This, it appears from Mr. Garcia's affidavit, is what the IAT did in coming to its conclusion that, even in light of the further material put before it, the Applicant could not show that the Board was unreasonable in concluding that he was not entitled to any points under Factor 4 of the Point System.

76. It appears to me that the IAT was entitled to take that view in the Applicant's case. As the further material had still not confirmed his entitlement to be considered under Factor 4, it could hardly be said that the Board came to the wrong conclusion in that regard, based on the even more inconclusive information with which it had been presented. This "*looking at but not considering*" the further material at the Grounds

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Stage by the IAT (as Mr. Garcia puts it) must therefore only have been for the purpose of testing whether the Board had misdirected itself.

77. It perhaps is therefore not surprising that the Applicant's challenge was not to the Factor 4 assessment, but more generally to the assessment of the Board on other factors.

78. Further, for the sake of completeness and also as the IAT has been advised – where the IAT holds that a ground of appeal has been made out (or if, on further appeal to this Court it is determined that it should have so held) such that the decision appealed from can no longer stand; the IAT will have no power to remit the matter to the Board: see section 15(1).

79. The IAT must therefore go on to decide the substance of the appeal itself and this will be by way of rehearing of the original application; that is: de novo.

80. The IAT may then decide to exercise its power to admit "fresh evidence" or consider any "changes in circumstances" arising after the original decision was taken: see section 16(8).

81. Indeed, this, I acknowledge, was the context in which *Ford* (above) was decided, because in that case; this Court had held that there had been a failure of natural justice such that the Board's and IAT's earlier decisions could not stand and referred the matter back to the IAT for rehearing. In so doing, this Court explained, in terms not unlike those adopted now, that "by way of rehearing" implied the existence of the wider remit in the IAT to exercise both an original and an appellate jurisdiction, in hearing the matter de novo.

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82. In *Ford* the issue was whether the IAT, upon a rehearing de novo, had the power to issue interrogatories to Mr. Ford about matters which had not been raised before either by the Board or by the IAT itself.

83. While the present question of the validity of the two-stage process did not arise for consideration in *Ford* (the IAT had not yet adopted it); it was recognised that on an appeal by way of rehearing de novo, the IAT was not to be confined only to the particular ground(s) upon which the Board had considered and refused the application – the proposition which I take the opportunity to clarify here as holding true at the second stage of the rehearing de novo.

84. So, in summary, I conclude:

(i) Section 15(2) of the Law requires an aggrieved person to identify his ground(s) of appeal upon which he relies in bringing an appeal under that section to the IAT.

(ii) Such ground(s) must come within those identified and permitted by section 15(2). A person aggrieved must be aggrieved upon at least one of those grounds.

Any other construction would render the prescribed grounds meaningless as the IAT would be required to embark upon a rehearing de novo in every case of an appeal, on whatever ground – or absence of ground – is presented by an appellant.

In this regard, I am content for the sake of emphasis, to adopt Lord Pannick Q.C.'s advice as appears from para. 25 of the Guidance Note:

"First, a valid appeal must be grounded within one of the four permissible grounds, as set out in section 15(2). The IAT cannot simply ignore the limitations in section 15(2) and consider appeals on some other basis. It must do justice to the words of section 15(2), and only consider grounds of appeal which are there set out."

(iii) As the right of appeal to the IAT is delimited by the permissible grounds, the IAT is correct in regarding itself as needing to be satisfied that at least one of the permissible grounds can be made out before it embarks upon a rehearing de novo of the matter.

(iv) In doing so, the adoption of the two-stage policy by the IAT is sensible and a reasonable exercise of its discretionary powers vested in it for the fair and timely dispensation of appeals. The two-stage policy is not a fetter upon those powers but is a workable implementation of the discretion compliant with the principles of the case law most authoritatively settled in *British Oxygen, Simms* and *Daly* (and as discussed above).

85. For these reasons, the applicant's appeal upon this discrete point of law alone fails and is dismissed. No order as to costs.

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Hon. Anthony Smellie
Chief Justice

February 9, 2015