

IN THE GRAND COURT OF THE CAYMAN ISLANDS

60090
CAUSE NO. of 2014

IN THE MATTER OF AN APPEAL UNDER SECTION 17(2) OF THE
IMMIGRATION LAW (2013 REVISION)

AND IN THE MATTER OF AN APPEAL PURSUANT TO ORDER 55 OF THE
GRAND COURT RULES 1995

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on _____ 2014 at _____ am/pm or as soon thereafter as Counsel can be heard, by Counsel on behalf of Cayman Islands Properties Ltd for the following Orders:

1. An Order of *Certiorari* to quash the said decision made by the Immigration Appeals Tribunal ("the Tribunal") communicated by letter dated 24 April 2014;
2. that the Appellant's application for a work permit for Mr. Bright be approved;
3. Further and/or in the alternative, an Order of *Mandamus* directing the Tribunal to rehear the Appellant's application.
4. An Order of *Mandamus* directing the Tribunal to permit Mr. Bright to continue to work for the Appellant until the conclusion of this application.
5. Such further and other relief as the Court deems fit

And an Order that the costs of and incidental to this Appeal may be paid by the Immigration Appeals Tribunal as the Court in its discretion sees fit.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are as follows:-

BACKGROUND

1. The Appellant is a 100% owned Caymanian business, a CIREBA agent and a full-service professional real estate company. It consist of four employees, three of whom are Caymanian and Mr. Steven Corby Bright ("Mr. Bright") who is a United States of America citizen.

2. Mr. Bright is a highly experienced and qualified real estate agent who is licensed in Florida and the Cayman Islands and is responsible for the re-organisation of the leasing department and in addition works in the Appellant's sales department.

PROCEDURAL HISTORY

3. On 21 October 2011 the Appellant by its attorneys, Messrs. Ritch & Conolly, applied for a work permit for Mr. Bright for a two year period ("the Application").
4. The Appellant's Application was heard by the Work Permit Board ("the Board") on 7 November 2011, two weeks after the Application was filed.
5. By a letter dated 16 November 2011, the Appellant was notified that the Board had refused its Application. The reasons given by the Board were that:

'[the Appellant] failed to demonstrate a genuine need to justify the issue of a permit to [Mr. Bright], and giving consideration to the protection of local interests as well as the requirements of the community as a whole, and such other matters that may arise from the application. In this particular case, bearing in mind the interests of the community as a whole, the Board is not satisfied that there is a need for additional Real Estate Agents or that the company has justified its need.'

6. By a Notice of Appeal dated 21 November 2012, Ritch & Conolly on behalf of the Appellant, notified the Board and the Respondent of its intention to appeal the Board's decision ("the Appeal").
7. By a letter dated 22 November 2011, Ritch & Conolly on behalf of the Appellant made an interim application for Mr. Bright to continue to work under Operation of Law until the conclusion of the appeal. The Appellant's interim application was granted.
8. On 29 February 2012, the Appellant received a copy of the Board's Appeal Statement dated 7 February 2012. The Appeal Statement stated that:

'When considering an application for the grant of a work permit the Board is required under the provisions of Section 48(1) as read with Section 44(2)(a) and 44(4)(c) of the Immigration Law, (2010 Revision), ("the Law") to take particularly into account whether the prospective employer has demonstrated a genuine need to engage the services of the prospective worker. The Board is also required to take into account the requirements of the community as a whole and such other matters that may arise from the application.'

In this case, the Board considered the application for a Work Permit Grant noting from the cover letter from Ritch & Conolly on behalf of the Appellant that the position was advertised in the local newspaper with no applications being received. Additionally, the Board noted the Worker's qualifications and Real Estate Licences.

The Board took into consideration the protection of local interests. In this particular case, bearing in mind the interest of the community as a whole, the Board was not satisfied that there was a need for additional Real Estate Agents or that the company had justified its need. Subsequently, the decision was made to refuse the application.'

9. On 23 March 2012, Ritch & Conolly, on behalf of the Appellant filed the first set of its Grounds of Appeal dated 23 March 2012.
10. On 19 November 2013, Ritch & Conolly, on behalf of the Appellant, filed a Freedom of Information ("FOI") request with the Department of Immigration requesting the following information:

'Please state how many work permits (temporary grants and/or renewals) for Real Estate Agents in Grand Cayman were granted by the Work Permit Board and/or the Chief Immigration Officer or her designates and/or the Business Staffing Plan under the Immigration Law between 1 January 2011 and 31 December 2012

If any work permits (temporary grants and/or renewals) for Real Estate Agents in Grand Cayman were granted by the Work Permit Board and/or the Chief Immigration Officer or her designates and/or the Business Staffing Plan under the Immigration Law between 1 January 2011 and 31 December 2012, please identify the month that each work permit was granted.

Please specify how many Real Estate Agents were working under a Work Permit pursuant to the Immigration Law between 1 October 2011 and 31 November 2011.

Please specify how many work permits (temporary grants and/or renewals) for Real Estate Agents in Grand Cayman were granted by the Work Permit Board and/or the Chief Immigration Officer or her designates and/or the Business Staffing Plan under the Immigration Law between 1 January 2013 and 31 December 2013.

Please specify how many Real Estate Agents were working under a Work Permit pursuant to the Immigration Law between 1 October 2011 and 31 November 2011.'

11. By a letter dated 2 December 2013, the Respondent invited the Appellant to submit further *"Detailed Grounds of Appeal by no later than 5:00pm on Monday 30th December, 2013."*
12. By an email dated 20 December 2013 the Immigration Department released the following information in relation to the Appellant's FOI request :
 - 12.1. In October 2011, a month before the Board refused the Appellant's Application, the Board granted five (5) Work Permits for Real Estate Agents;
 - 12.2. In November 2011, on the same month that the Board refused the Appellant's application, the Board granted two (2) applications for Real Estate Agents;
 - 12.3. In December 2011, a month after the Board refused the Appellant's application, the Board granted one (1) Work Permit for a Real Estate Agent.
 - 12.4. Between April and June 2012, approximately five (5) to six (6) months after the Board refused the Appellant's application, the Board granted five (5) Work Permits for Real Estate Agents.
13. On 30 December 2013, Ritch & Conolly on behalf of the Appellant, filed the second set of its Grounds of Appeal on the Respondent and the Board.
14. The decision of the Respondent was received by Ritch & Conolly on 16 May 2014 by a letter dated 24 April 2014. The letter stated, inter alia, as follows:

I refer to the appeal against the decision by the Work Permit Board to refuse the grant of a Work Permit to the above named.

The Tribunal reviewed the Appeal Statement stamped dated 15th February 2012, which outlined the reasoning behind the decision to refuse the grant of a work permit to the Appellant.

The Tribunal having carefully considered the Notice of Appeal dated 21st November 2011, including detailed grounds of appeal dated 23rd March 2012. It was noted that insufficient grounds of appeal had been made out in any of the several grounds put forward on the Appellant's behalf, pursuant to Section 15(6) and 15(7) of the Immigration Law (2013 Revision) and the Immigration (Amendment) No.2) Law, 2013.

Specifically, the Tribunal concluded that the Board was entitled to take note of the prevailing conditions in the real estate market in determining that no further agents were needed and further, that the Board's decision was not so "unreasonable that no reasonable authority could ever come to it." Accordingly, the appeal was dismissed.

Should further appeal be desired, the Appellant may appeal to the Grand Court pursuant to Section 17 of the Immigration Law (2013) from a decision of the Tribunal on a point of law only, within twenty eight (28) calendar days after receipt of the decision against which the appeal is brought.'

THE LEGISLATION

15. Section 44 of the Immigration Law (2010 Revision) ("the Law") provides that:

"(1) The Work Permit Board, the Business Staffing Plan Board or the Chief Immigration Officer, as the case may be, in considering an application under section 42-

(a) shall in respect of an application for a grant; [our emphasis] or

(b) may in respect of an application for a renewal

subject to any general directions which the Governor may, from time to time, give in respect of the consideration of such application, take into account the matters listed in subsections (2) to (4)" [our emphasis].

"(2) In relation to the prospective employer, that-

(a) he has demonstrated his genuine need to engage the services of the prospective worker;

(b) he has, unless he has been exempted by the Governor or by the Board, sought, by advertising in at least two issues for consecutive weeks in a local newspaper, to ascertain the availability of any one or more of the following in the order in which they are listed -

i. a Caymanian

ii. the spouse of a Caymanian; or

iii. the holder of a residency and Employment Rights Certificate; and

iv. a person legally and ordinarily resident in the Islands who is qualified and willing to fill the position; and

(c) *in the case of an application in respect of a professional, managerial or skilled occupation, the Board of the Chief Immigration Officer, as the case may be, is satisfied as to the extent to which he has established adequate training or scholarship programs for Caymanians.*

(3) *In relation to the worker -*

(a) *his character, reputation and health, and where relevant, the character reputation of health of his dependants;*

(b) *his professional and technical qualifications and his experience and competence to undertake the position applied for;*

(c) *the economic and social benefit which he may bring to the Islands;*

(d) *the sufficiency of the resources or the proposed salary of the worker and his ability to adequately maintain his dependants*

(e) *his facility in the use of the English language*

(f) *the location, type and suitability of the residential accommodation available for the worker and his dependants, if any, throughout the term of the work permit; and*

(4) *Generally*

(a) *the protection of local interests and in particular of Caymanians, including without limitation and where applicable, the provisions set out in section 44(2)(c);*

(b) *the availability of the services of a suitable person already legally ordinarily resident in the Islands; and*

(c) *the requirements of the community as a whole, the demographics referred to in section 24(j), and such other matters that may arise from the application."*

16. Section 48 of the Law provides that:

“(1) Subject to section 52, the Board or the Chief Immigration Officer in considering an application under section 42 may-

(a) refuse an application for a work permit; or

(b) grant such an application with or without limitations or conditions.”

GROUNDS OF APPEAL

17. The Respondent erred in law by committing and/or permitting a procedural irregularity capable of making a material difference to the outcome or the fairness of the proceedings contrary to the principles of natural justice.

Particulars

17.1. The Respondent failed to have any regard to the Appellant’s detailed Grounds of Appeal dated 30 December 2013.

17.2. The Appellant’s detailed Grounds of Appeal were filed with the Board and the Respondent on 30 December 2013 in accordance with the letter from the Board dated 2 December 2013 which stated that *“hearings shall be on the basis of written grounds only.”* It was therefore, incumbent upon the Respondent to ensure that the Appellant’s Grounds of Appeal dated 30 December 2013 which contained additional detailed particulars should form part of its decision making process.

17.3. It is clear from the Board’s letter dated 24 April 2014 that the Appellant’s Grounds of Appeal dated 30 December 2013 were wholly disregarded contrary to the principles of natural justice.

18. The Respondent erred in law by considering factors which were not supported by evidence.

Particulars

18.1. The Board’s letter dated 16 November 2011 stated that:

“In this particular case, bearing in mind the interest of the community as a whole, the Board is not satisfied that there is a genuine need for additional Real Estate Agents[...].”

18.2. The Board's Appeal Statement further stated that:

[...] The Board took into consideration the protection of local interests. In this particular case, bearing in mind the interest of the community as a whole, the Board was not satisfied that there was a need for additional Real Estate Agents or that the company had justified its need. Subsequently, the decision was made to refuse the application.' [Our emphasis]

18.3. The Respondent's letter dated 24 April 2014, dismissing the Appellant's Appeal states that:

"the Board was entitled to take note of the prevailing conditions in the real estate market in determining that no further agents were needed"

18.4. However, this conclusion is inconsistent with the Board's decisions to grant other Real Estate Agents two (2) work permits in November 2011, one (1) in December 2011 and five (5) between April and June 2012. It follows that the Board's decision was unreasonable and/or irrational.

18.5. Moreover, the Board has failed to provide any evidence that the prevailing conditions in the real estate market were such that no further estate agents were needed. If, such evidence was available to the Board, its failure to provide the evidence to the Appellant was a contrary to the principles of natural justice.

19. The Respondent erred in law because it failed to consider matters it was mandated to consider by section 44(1)(a) when it concluded that there was no genuine need for additional Real Estate Agents in the Cayman Islands.

Particulars

19.1. By virtue of the words "*The Work Permit Board [...] shall in respect of an application for a grant* [our emphasis], the Board had to take into consideration all the matters listed in Section 44 (2) to (4) of the Law.

19.2. It follows that the word in section 44(1)(a) "shall", required the Board to take into account all matters referred to in Sections 44(2) to (4) of the Law.

19.3. The Board's letter dated 16 November 2011 stated that:

"In this particular case, bearing in mind the interest of the community as a whole, the Board is not satisfied that there is a genuine need for additional Real Estate Agents[...]."

19.4. The Board's Appeal Statement further stated, inter alia, that:

In this case, the Board considered the application for a Work Permit Grant noting from the cover letter from Ritch & Conolly on behalf of the Appellant that the position was advertised in the local newspaper with no application being received. Additionally, the Board noted the Worker's qualifications and Real Estate Licenses.

The Board took into consideration the protection of local interest. In this particular case, bearing in mind the interest of the community as a whole, the Board was not satisfied that there was a need for additional Real Estate Agents [...]."

19.5. It is clear from the Board's Appeal Statement that the Respondent misdirected itself by placing undue weight on section 44(4)(c) over the remaining matters set out in section 44(2) to (4) of the Law.

19.6. In particular, when considering the protection of local interest, the Board failed to take into account the Respondent's interest as a Caymanian owned entity.

19.7. It follows that by failing to take into account matters the Respondent was mandated to take into account in accordance with section 44(1)(a) of the Law the Respondent's decision was unlawful.

20. The Respondent erred in law because it failed to consider matters it was mandated to consider by section 44(1)(a) when it concluded that the Appellant had not demonstrated a genuine need to engage Mr. Bright's services.

Particulars

20.1. By virtue of the words "*The Work Permit Board [...] shall in respect of an application for a grant* [our emphasis], the Board had to take into consideration all the matters listed in Section 44 (2) to (4) of the Law.

20.2. It follows that the word in section 44(1)(a) "shall", required the Board to take into account all matters referred to in Sections 44(2) to (4) of the Law.

20.3. The Board's Appeal Statement stated that:

*"When considering an application for the grant of a work permit the Board is required under the provision of Section 48(1) as read with Section 44(2)(a) and 44(4)(c) of the Immigration Law (2010 Revision) ("the Law") **to take particularly into account** whether the prospective employer has demonstrated a genuine need to engage the services of the prospective worker." [our emphasis]*

20.4. It is clear from the Board's Appeal Statement that the Respondent misdirected itself by predetermining that section 44(2)(a) was to be given more weight over the remaining matters set out in section 44(2) to (4) of the Law.

20.5. It follows that by failing to take into account matters the Respondent was mandated to take into account in accordance with section 44(1)(a) of the Law the Respondent's decision was unlawful.

21. The Respondent erred in law because it misdirected itself when it concluded that the Appellant had not demonstrated a genuine need to engage Mr. Bright's services.

Particulars

21.1. The Board's Appeal Statement stated that:

"When considering an application for the grant of a work permit the Board is required under the provision of Section 48(1) as read with Section 44(2)(a) and 44(4)(c) of the Immigration Law (2010 Revision) ("the Law") to take particularly into account whether the prospective employer has demonstrated a genuine need to engage the services of the prospective worker.


[...] The Board took into consideration the protection of local interests. In this particular case, bearing in mind the interest of the community as a whole, the Board was not satisfied that there was a need for additional Real Estate Agents or that the company had justified its need. Subsequently, the decision was made to refuse the application.
[Our emphasis]

21.2. The first part of section 44(4)(c) of the Law confers upon the Respondent a power to consider "the requirements of the community as a whole".

- 21.3. The legislative intent and objective behind the first part of section 44(4)(c) was the protection of the community which is a matter independent from section 44(2)(a) which required the Respondent to demonstrate its own need to engage Mr. Bright's services.
- 21.4. It is clear from the Appeal Statement that the decision taken that the "*company had not justified its need*" was based on irrelevant considerations.

INTERIM RELIEF

22. Where the relief sought is an order of certiorari, the Court has jurisdiction by virtue of GCR 0.55 r.3 to impose a stay on the proceedings to which the application relates until the determination of that application or further order, and thus to allow Mr. Bright to continue to work by operation of law.


Ritch & Conolly

TO: The Clerk of the Court

AND TO: The Immigration Appeals Tribunal
AND TO: The Attorney General's Chambers