IN THE GRAND COURT OF THE CAYMANS ISLANDS CAUSE NO: 98 OF 2017

IN THE MATTER OF SECTION 17 (2) OF THE IMMIGRATION LAW (2015 REVISION)

BETWEEN

LUXURY HOTELS INTERNATIONAL LODGINGS LTD

1st Appellant

-&-

INGRID HERRERA ZELAY DE HERNANDEZ

2nd Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

Respondent

IN THE MATTER OF AN APPLICATION FOR A WORK PERMIT FOR INGRID HERRERA ZELAYA DE HERNANDEZ BY LUXURY HOTELS INTERNATIONAL LODGING LTD.

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on the 23 day of August 2017 at 9:30 a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of Luxury Hotels International Lodging Ltd and Ingrid Herrera Zelaya De Hernandez ("the Applicant") for an order that a decision of the Immigration Appeals Tribunal ("the Tribunal") dated 2 June 2017, be set aside, and that the said application be remitted to the Tribunal to be reconsidered and decided according to law.

And for an order that the costs of and incidental to this Application may be paid by the Immigration Appeals Tribunal.

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

1. Whereas by letter dated 6 March 2017, the Business Staffing Plan Board ("the Board") refused Luxury Hotels International Lodgings Ltd ("1st Appellant") application for a Work Permit, in the position of Sales Coordinator, for Ingrid Herrera Zelaya De Hernandez ("2nd Appellant"), collectively known as the Appellants.

2. The Board's rationale for rejecting the Application was:

   i. *It was determined that at least one of the Caymanian applicants is able to fill the post being applied for.*

3. It is believed from the tenor of the Appeal Statement, dated 23 March 2017, that the Caymanian in question is SE.

4. Whereas by letter dated 2 June 2017, the Immigration Appeals Tribunal ("the IAT") upheld the original decision of the Board on the basis that:

   i. Insufficient grounds of appeal had been made out pursuant to Section 15 (6) and 15 (7) of the Immigration Law (2015 Revision) ("the Law").
   ii. It was not unreasonable for the Tribunal to determine that the Appellant would have in house training for a Caymanian applicant who was ready, willing and able to undertake the job in question.
   iii. The Board had not acted in variance with Regulation 6 (1) Immigration Regulations (2015 Revision) ("the Regulations").

5. It is respectfully averred that IAT has erred in Law in respect to the conclusions that they reached. This is on the basis that:

   - The decision of 2 June 2017 was irrational.
   - The decision of 2 June 2017 was unreasonable.
   - The decision of 2 June was reached in a manner which was procedurally unfair and/or amounts to a breach of Natural Justice.

<u>Irrational</u>

6. In the letter of 2 June 2017, the Board conclude that the SE was *ready, willing and able* to undertake the role of Sales Coordinator. This was despite the fact that the 1st Appellant had informed the Board and the Tribunal that:

i. SE lacked the ability to adapt in high stress situations.
ii. SE makes poor decisions under pressure.
iii. SE's poor performance in interview.
iv. Whether SE actually had two years *proven success in Customer Services*.
v. An experienced member of the 1st Appellant's staff did not believe that SE would be suitable for the role.
vi. SE's unrealistic impression of the role (paragraph 15, Valerie Hoppe 1st Affidavit).
vii. They had doubts as to whether SE was a proficient proof reader.

7. From the decision of the Tribunal, it does not seem that any of the above concerns played a part in the decision making of the Tribunal. By seemingly failing to weigh up the substantial negative aspects of SE and focusing on the fact that he held *a university degree specializing in the tourism industry*, the Tribunal can be seen as acting in an irrational manner.

8. Furthermore, the IAT conclude both that the *Caymanian applicant … was ready, willing and* ***able*** *to undertake the job in question* and that he would have to undergo in house training. It is respectfully submitted that this conclusion is contradictory and therefore irrational. By the very nature of having to undergo in-house training, the potential applicant is **not able** to do the required work. What is therefore necessary for a Tribunal to do, is to go on to consider, whether or not SA could have been reasonably trained into this role. This is something which the Tribunal failed to go onto consider.

9. By failing to examine how long it would have taken SE to be trained to a reasonable standard (or to enquire with the 1st Appellant) and the costs and effect on the business of this training, the Tribunal have acted irrationally and reached a conclusion which is absent of many of the necessary considerations. Therefore the conclusion reached by the Tribunal in respect to the suitability of SE cannot stand up to scrutiny.

10. It is also contended that in the current appeal, by focusing on the provision of in house training, the Tribunal have acted irrationally in that they have failed to take into account the concerns of the 1st Appellant, in particular:

i. SE's inability to adapt in high stress situations.
ii. SE's poor decision making under pressure.
iii. SE's trustworthiness.

11. It is not abundantly clear, how the provision of in house training could elevate the above concerns of the 1st Appellant. These concerns arose from examples given by SE about how he acted in the past in a job which he was presumably fully trained for. Therefore acting without information as to the nature of the in house training provided by the 1st Appellant and an understanding as to how training could address the concerns of the 1st Appellant, the Tribunal have acted irrationally.

12. It is further averred that the Tribunal have acted in an irrational way in that they seemingly have concluded that due to the fact that as the 2nd Appellant had previously been a Food and Beverage Server, SE could have been trained into the position of Sales Coordinator. This has completely failed to take into account the 2nd Appellant's work history and in particular the fact that she had been a Guest Service Agent for a number of years. By failing to take into account the 2nd Appellant's work history in its entirety and reaching conclusions on the basis of previous job history which is not relevant to the role, the Tribunal have acted in an irrational manner.

Unreasonable

13. The Appellants would also submit that the decision of the Tribunal was unreasonable in the circumstances. This is on the basis that:

i. The conclusions that the Tribunal reached are not one which a reasonably directed Tribunal could have reached.
ii. The concerns of the 1st Appellant have been dismissed without comment and seemingly consideration.
iii. The Tribunal have failed to address the fact that the concerns of the 1st Appellant were based upon reasonable conclusions arising out of an interview which was objectively fair in the circumstances and therefore greater weight should have been placed upon those conclusions.
iv. The Tribunal have raised issues and reached conclusions which have never previously been addressed to the 1st Appellant.
v. The Tribunal has reached conclusions which are flawed due to the fact that they have failed to take into account relevent considerations or have taken into account irrelevant matters.

14. Section 19 of the Cayman Islands Constitution provides that all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair. It is respectfully submitted that by acting in the way alleged above the Tribunal have satisfied the standard test of unreasonabless in the leading case of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] WKB

233, in the sense of the Decision being so unreasonable that no reasonable body properly informed could have arrived at it.

15. The standard test as to reasonableness has been widened since the later 1940s and this is reflected in the case of *R v Ministry of Defence, Ex P. Smith* [1996] QB 517, where Bingham M.R. recognised a *heightened scrutiny* test in respect to fundamental freedoms. In any event in the current circumstances, the Tribunal has acted unreasonably / disproportionately in the circumstances detailed above.

16. In the currently matter, the Tribunal have concluded that SE was *ready, willing and able* to undertake the relevant role. In doing so, as previously been stated, the Tribunal have rejected without comment the concerns of the 1st Appellant but also they have failed to take into account the way in which the conclusions of the 1st Appellant were reached.

17. As part of the recruitment process SE was interviewed. That interview was conducted by Daniela Rico. In the interview, SE was asked questions based upon certain scenarios and was asked for examples of how he had acted in the past. This on the face of it, and there is no evidence to the contrary, is a fair and reasonable way to conduct an interview. Arising out of that interview were the concerns detailed above.

18. It is contended that when an objectively fair and reasonable interview has taken place and when there are conclusions which are based upon that interview which are reasonable in the circumstances greater weight should be placed upon those conclusions. Those conclusions should have sufficient standing so as to convince a reasonable tribunal of the unsuitability of a candidate, in this case SE. However, in the current case, the Board and Tribunal have failed to take into account the reasonable conclusions of the 1st Appellant and have imposed their own believes based upon seemingly flawed logic and conclusions which do not stand up to scrutiny.

<u>Procedurally Unfair / Breach of Natural Justice.</u>

19. In the letter of 2 June 2017, the IAT concluded that because of the availability of in house training, SE was able to undertake the job. At no point in time has the issue of the 1st Appellant being able to train SE so that he could undertake the role ever been raised before. The Appeal Statement, makes no reference to this fact and at no point in time had this matter been raised as an issue as to why the Work Permit could not be granted to the Appellants.

20. In Hutchinson-Green & Racz 2015, Chief Justice Smellie reiterated the importance of full and frank disclosure as an aspect of natural justice.

"Equally, there can be no doubt therefore, that to enable the Court to investigate the actions of the IAT and to subject those actions to the heightened scrutiny which the case law and circumstances require, the parties (here especially the IAT) have an obligation to present the fact in a full and transparent manner. Not only must all decisions and act of public officials be lawful, rational, proportionate and procedurally fair, they must appear manifestly to be so. Nor, moreover, can the IAT be in any doubt that the duty of full and frank disclosure applies to an administrative body like itself – the duty was recognized and explained by this Court as long ago as in December 1998 in Streeter v Immigration Board."

21. The Tribunal's failure to disclose their belief that in house training would mean that the SE was able to undertake the role to the Appellant and invite further comment was both peremptory and disproportionate and was contrary to the express Immigration law guidelines of Smellie CJ in Ford v Immigration Appeals Tribunal 2007 CILR 258, where he states at paragraphs 40-41 that it is incumbent to notify an Appellant "*in the clearest terms*" of the real nature of any concerns that must be done for the Appellant to be "*dealt with fairly when the proceedings as a whole are considered.*"

22. The failure to disclose to the Appellants, the Tribunal's belief that SE could have been trained into the role meant that the Appellants have been denied the opportunity to comment on this erroneous belief. Therefore, the Appellants have been denied the opportunity to fully argue their case and therefore this failure amounts to a breach of Natural Justice and an example of the Tribunal acting in a procedurally unfair manner.

23. Furthermore, it is averred that the Tribunal; has not expressly dealt with the issues raised in the Grounds of Appeal. In particular the following contentions:

i. The 1st Appellant had provided ample justification as to why SE was not suitable for the role (paragraph 17 – 19 Grounds of Appeal).
ii. What extra evidence was necessary to support the 1st Appellant's view that SE was not suitable (paragraph 20-22 of the Grounds of Appeal).
iii. The reasons why SE was not suitable for the role (paragraph 25 – 26 of the Grounds of Appeal).
iv. The failure of the Board to ask for further information as to why SE was not suitable (paragraph 29- 34 Grounds of Appeal).

24. By failing to expressly deal with the Grounds of Appeal and issues raised within them the Tribunal has acted in a manner which is procedurally unfair and / or amounts to a breach of Natural Justice. Support for this contention can be found in *National Roads Authority v A. Bodden, Thompson and Wright (as personal representatives of the estate of H. Bodden)* [2014] (2) CILR 47,

25. *The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough simply to state a result on the principle issues; the parties are entitled to know the reasoning [emphasis added] and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this fashion by the House of Lords in South Bucks. D.C. v. Porter (No. 2) (3) ([2004] 1 W.L.R. 1953, at para. 35):*

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds"

25. Further support can be found in the case of *South Bucks D.C v Porter, the case of Re Poyser and Mills Arbitration* [1964] 2 QB 467 and Megaw J's judgement was quoted with approval. In particular at paragraph 24 the following section of Megaw J's Judgment was highlighted:

"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

26. By failing to address each the concerns and the arguments put forward by the Appellants, the Tribunal has failed to provide adequate reasoning so as to enable the Appellants to understand how the decision was reached. This is not possible in the current circumstances due to the fact that the concerns of the Appellant have not been addressed, rather a short finding of fact

seemingly not based upon evidence and supported by faulting logic is put forward as a justification for rejecting the application.

27. It is for these reasons that the Tribunal can be seen as acting in a procedurally unfair manner or in a way which amounts to a breach of Natural Justice.

Conclusion

28. On the basis of the above it is averred that the Tribunal acted unfairly, irrationally, unlawfully, erroneously, and in a manner that was ultra vires its statutory duties and responsibilities. Accordingly, the decision of the Tribunal should be set aside for substantial wrong and miscarriage of justice so that the Applicant's application can be reheard in accordance with law.

DATED: 8th day of June 2017

HSM CHAMBERS

HSM CHAMBERS
Attorneys for the Applicant

TO: The Clerk of the Court

AND TO: The Chairman
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