

THE IMMIGRATION APPEAL TRIBUNAL

(Case No: 1 of 2015)

IN THE MATTER OF AN APPEAL OF THE DECISION MADE ON 22 NOVEMBER 2013 BY THE MINISTER OF HOME AFFAIRS REFUSING THE APPLICANT'S APPLICATION UNDER THE PROVISIONS OF SECTION 19 OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956 (THE ACT) FOR GRANT OF BERMUDA STATUS

BETWEEN:

APPELLANT U

Appellant

-and-

THE MINISTER OF HOME AFFAIRS

Respondent

RULING

Hearing Date: 10th April 2015

Counsel who appeared:

Mr Peter Sanderson (Wakefield Quin), attorney for the Appellant

Mr Philip Perinchief, representative for the Respondent

History

1. The Appellant is a naturalized British Overseas Territories (Bermuda) ("BOT") citizen with permanent residency (2008) who applied for Bermudian status under section 19 of the Act. The Appellant obtained her BOT citizenship on 6 March 2013. She obtained her PRC with effect from 13 February 2008. Her father obtained his PRC status on 25 October 2007. The Appellant's application for Bermudian status was refused by the Minister and she appeals that decision.

2. The Appellant by letter dated 14 April 2013 enclosed her Bermudian status application. In her covering letter she emphasized that she arrived in Bermuda at the age of three and has been ordinarily resident here ever since. She assimilated into the culture and for all intents and purposes embraced and continues to embrace all of the traditions and pastimes of Bermudians. The only home the Appellant has ever known is Bermuda.
3. The Appellant's application was supported by three letters of reference respectively dated 14 March 2013, 18 March 2013 and 26 March 2013. They were supplemented by a letter from her current employer, and letters from Bermuda schools. The three individuals gave similar testimonials of the Appellant's good character, and her long and enduring relationship with Bermuda. Two of them gave their belief that had they not been told they would both have assumed that *"she has lived here since she was very small and appears for all purposes as if she is a Bermudian."* The other letters simply verified the Appellant's years of attendance and employment. None of these additional letters provided evidence that the Appellant was considered to be Bermudian. In fairness to the Appellant, these additional letters were requested by the Department of Immigration by letter dated 17 April 2013 and they were promptly provided by Mr Sanderson in his letter of 6 May 2013. They show the Appellant's enduring ties to Bermuda.

Relevant Law

4. The Appellant applied under section 19 of the Act which provides a gateway for the grant of Bermudian status when a person has a honest belief that she is Bermudian; conducts herself as such; the community treats the person as being Bermudian and the Minister is satisfied that that there is evidence to support the belief, the view of the community and the person's conduct.
5. The relevant elements of section 19 and the applicable First Schedule A of the Act are set out below:

Section.19 provides that a person may apply for Bermudian status if she:

- a) is a Commonwealth citizen of not less than eighteen years of age;
- b) has been ordinarily resident for the ten years preceding the application;
- c) has a qualifying Bermudian connection;
- d) is of good character, etc.

Qualifying Bermudian connections are set out at First Schedule A. The relevant connection in this appeal is connection 2 D:

“a person who can show that he has had an honest belief that he is Bermudian and who, in the Minister’s opinion, has conducted himself in everyday life as Bermudian and has been accepted by the community of Bermuda as possessing Bermudian status. In forming that opinion, the Minister must be of the view that the following conditions are satisfied in relation to that person, that is to say, that-

(a) although not in law possessing Bermudian status –

- (i) he has worked in Bermuda free of control under Part V of the Act; or
- (ii) he has obtained ostensible title to land without being required to obtain a licence from the Government; or
- (iii) he has voted in a general election in Bermuda without being challenged; and

(b) there is other evidence indicating generally that he has been accepted as a person possessing Bermudian status by persons dealing with him.”

Paragraph 3 of First Schedule A provides that *“the requirements specified in paragraph 2 must have been satisfied throughout the period in paragraph (b) of subsection (1) of section 19 of this Act.”* This is a reference to 10 years of being ordinarily resident preceding the application for status.

The Minister’s decision

6. By letter dated 22 November 2013 the Department of Immigration wrote to the Appellant’s attorney, set out the above provisions and informed him that the Minister had refused the application on the basis that the *“records of this department indicate that your client does not meet any of the provisions of section 19 and the schedule to the Act.”* The letter could have been written with greater care as it was common ground at the appeal that the Appellant was a Commonwealth citizen; and had been ordinarily resident in Bermuda for ten years immediately preceding the date of the application. The Recommendation Memorandum dated 14 August 2013 and prepared by the Department of Immigration highlights that their *“records indicate that the said subject did not always consider herself to be Bermudian as she was listed as a dependent on her father’s work permit. In addition she asked for permission to seek work in Bermuda while on summer holiday on 13 February, 2005.”*

7. In light of the Appellant's appeal and the Minister's Response dated 8 April 2015, the issues have been narrowed. The appeal is principally concerned with First Schedule A, paragraph 2 D and the assertion by the Appellant that she can show that she has had an honest belief that she is Bermudian, and the Minister ought to have been satisfied that she has conducted herself in everyday life as Bermudian and has been generally accepted as possessing Bermudian status.
8. The Minister's position is that,
 - (i) The Appellant has not worked in Bermuda for the requisite period of 10 years "*free of control under Part V of this Act*". She worked in 2005 by virtue of a work permit having been granted to her. She was a dependent on her father's work permit.
 - (ii) She has not obtained title to land without being required to obtain a license from the Government;
 - (iii) She has not voted in a general election in Bermuda without being challenged. In this case, there is no evidence that the Appellant has ever voted.
 - (iv) There is no evidence indicating generally that she has been accepted as a person possessing Bermudian status by persons dealing with him.

Jurisdiction of the IAT

9. The IAT has jurisdiction to hear this appeal as section 19 (8) of the Act provides that a person who is aggrieved by the Minister's rejection of his application under this section may, subject to section 124, appeal to the IAT against the rejection.

HEARING 10 April 2015

10. Mr Sanderson reiterated the positions that he had helpfully outlined in his written submissions of 30 September 2014. His arguments are highlighted below in the Ruling. Mr Perinchief expanded on the arguments that he outlined in the Minister's Response dated 8 April 2015.

RULING

11. The Appellant no doubt has had such a close and enduring relationship with Bermuda and Bermudians that she genuinely identifies herself as being in substance a Bermudian. This affinity towards Bermuda is not surprising given the fact that the Appellant has spent virtually her entire life in Bermuda. The Appellant is not alone in her aspirational quest to be accepted as a Bermudian. It

is a phenomenon that operates where foreign born infants accompany their parents to a new country for a better life or where children are born to immigrants and grow up in the new country.

12. Countries that invite non-nationals to come and work are not insensitive to this heartfelt desire for citizenship or in Bermuda's case, status. Indeed, to the west, even in the realm of illegal immigration, there is debate on whether ordinarily resident immigrants should be given a pathway to citizenship. The Bermuda Government has grappled for years with these immigration issues and paths have been opened, closed, reopened and modified, sometimes leading to Permanent Residency and sometimes leading to Bermudian status.
13. Section 19 and First Schedule A, paragraph 2 D are drafted in precise and narrow terms. It is not an easily accessible route to Bermudian status for those who have a close affinity to Bermuda or who genuinely identify themselves with Bermudians and the culture of Bermuda. More is required:

Requirement 1, Section 19 (1) (a): The person must be a Commonwealth citizen of not less than eighteen years of age. This requirement was met.

Requirement 2, Section 19 (1) (b): The person must have been ordinarily resident for 10 years preceding the application. This requirement was met.

Requirement 3, First Schedule D: The person must show the Minister that he has had an honest belief that he is Bermudian. The Minister is not satisfied that the Appellant has such an honest belief.

Requirement 4: First Schedule D: The Minister must be of the opinion that the person has conducted himself in everyday life as Bermudian and has been accepted by the community of Bermuda as possessing Bermudian status. Before the Minister is able to form that opinion the legislation mandates that he must be satisfied that certain conditions are satisfied within the context of Requirement 4.

The Minister must be satisfied that the Appellant:

- (i) has worked in Bermuda free of control under Part V of the Act; or
- (ii) he has obtained ostensible title to land without being challenged; or
- (iii) he has voted in a general election in Bermuda without being challenged;

and

(iv) there is other evidence indicating that he has been accepted as a person possessing Bermudian status by persons dealing with him.

- 14. As can be seen one or more of the three specific prerequisites - (i) working free of control, (ii) land acquisition without a license or (iii) voting in an election, must exist or the application fails and it matters not whether generally the applicant can point to other general indicia that he has been accepted as a person possessing Bermudian status. If however, one or more of the specific prerequisites are a feature of the applicant's life in Bermuda, then in order for the application to succeed the Minister must also be satisfied that there is other evidence indicating generally that he has been accepted as a person possessing Bermudian status by persons dealing with him. It is a two part test. The Minister in this case was not satisfied that any of these prerequisites were met.**

- 15. Section 19 as read with First Schedule A is not a highway that leads to Bermudian status. It is a gateway for very few applicants who find themselves in the highly unusual circumstance of believing they are Bermudian, conducting themselves as such and then discovering they are not Bermudian or discover that there is some doubt, some unresolved or unresolvable issue as to whether they are Bermudian. It is not a provision for those persons who (i) knowingly turn a blind eye to their true immigration status or (ii) know or ought to have known their immigration status but feel their ties to Bermuda are so strong and enduring that they truly identify themselves as being Bermudian and wish to have that identity recognized. The Appellant in this case falls into category (ii) herein.**

- 16. The Appellant clearly knows that she is not Bermudian. The Appellant was listed on her father's work permit as a dependent. In 2005 the Appellant sought permission from the Department of Immigration to work in Bermuda and was granted a work permit. The Appellant made application for a Permanent Residency Certificate in 2008. The fact that she applied for and successfully obtained a PRC is really the strongest of evidence that she was aware of her non- Bermudian immigration status. In 2013 the Appellant applied for an Entry/Re-Entry document (dependent document) for her son to be added as a dependent based on having a PRC, where in the letter of application she further states that "I am a permanent resident certificate holder." This is not a case where the Appellant one day is happily going about her business, discovers to her surprise and shock that she is not a Bermudian and then makes the best of a bad situation by making such applications as she can, namely an application for a PRC followed by or simultaneously accompanied by a section 19 Bermuda status application. This, however, is a situation where the IAT is satisfied that the Appellant has always known of her true immigration status but understandably she feels Bermudian in every sense of the word because she has grown up in**

Bermuda, has embraced its culture and considers this country to be her homeland. It is hard not to have the greatest sympathy for the Appellant but those circumstances are not sufficient to obtain a grant of Bermudian status under section 19 as read with First Schedule A, paragraph 2 D.

17. Mr Sanderson argues that because the Appellant has a PRC and is a naturalized BOT citizen that she meets the definition of Bermudian. He notes that the Act does not define Bermudian and he offers the definition given in section 2 (1) of the Human Rights Act of 1981: *"a person having a connection with Bermuda recognized by the law relating to Immigration for the time being in force."*
18. He emphasizes the strong and enduring connection that a PRC and BOT status gives the Appellant to Bermuda and highlights that under section 11(5) of the Bermuda Constitution Order 1968 the Appellant by virtue of her BOT citizenship is deemed to belong to Bermuda (just as is the case in respect of a female spouse of a Bermudian). The IAT accepts that the Appellant belongs to Bermuda and has all the rights and privileges that flow therefrom.
19. However, these connections do not make you Bermudian. Certain defined rights may flow from these connections but it does not follow that these connections make a person Bermudian as a matter of law. A female spouse of Bermudian may belong to Bermuda and have all the rights of a Bermudian but she is not Bermudian until she meets the requirements of the Act (10 years of marriage).
20. The reference to "Bermudian" in Section 19 and in First Schedule A, paragraph 2 D must be understood in the context of the Act. Being Bermudian is like referencing a citizenship. It is not an esoteric construct or one where resort has to be made to the Human Rights Act. Its definition is not met by simply showing connections to the island. The Human Rights Act steers the reader right back to the Act by using the words *"recognized by the law relating to Immigration for the time being in force"*. It does not provide for any broader or different understanding other than what section 4 of the Act provides for, namely that *"any reference in this Act to the acquisition, possession or enjoyment of Bermudian status shall be construed as a reference to the acquisition, possession or enjoyment of such status by virtue of section 16 of this Act or section 6 of the Bermudian Status by Birth or Grant Register Act 1992"* (the 1992 Act).
21. A reference in section 19 and First Schedule A, paragraph 2 D to *"being Bermudian"* must therefore mean having Bermudian status under either section 16 of the Act or section 6 of the 1992 Act. All Bermudians are status Bermudian. It does not matter whether they obtained their status by virtue of birth or by grant,

the status is equal in all respects and it is this status that allows a person to say that he or she is a Bermudian. Being Bermudian is having Bermudian status. It is as simple as that.

22. In the context of section 19 having an honest belief that he or she is "Bermudian" is a reference to having or believing that you have Bermudian status under the Act. Having a PRC or being a BOT citizen does not make person a Bermudian.
23. Mr Sanderson also argued that the fact that the Appellant was on a work permit in 2005 is irrelevant because First Schedule A, paragraph 2 D (a) (i) only requires that the person *"has worked"* in Bermuda without restrictions. His argument is that his client eventually received rights that has allowed her to work free of control under Part V of the Act by virtue of her PRC status and presumably in light of the recent decision of *Williams v Minister for Home Affairs* and the Attorney General by virtue of her being a BOT citizen.
24. The IAT considers it be a highly relevant consideration that the Appellant was on a work permit. The whole focus of section 19 of the Act and First Schedule A, paragraph 2 D is on whether there is an honest belief that the person considers him or herself as Bermudian. If a person had to apply for a work permit, it must follow that that person (unless he or she reserved his rights to claim Bermudian status) understood that he or she was not Bermudian. There is no evidence that the Appellant when making application for a work permit in 2005 ever asserted she believed herself to be Bermudian and was reserving her rights. Mr Sanderson is giving an unnatural interpretation to the consideration of whether the person has *"worked in Bermuda free of control under Part V of the Act"* in order to negate the consequences arising from the fact that the Appellant previously applied for and obtained a work permit in 2005. He wants the IAT to find that because she is now free of the work permit regime that the Minister ought to have been satisfied that she has in fact worked in Bermuda without restrictions.
25. The natural meaning and scope of the wording is, however, for the Minister to be satisfied that the Appellant's belief of being Bermudian is corroborated by a well understood indicia of Bermudian status and that is the circumstance of freely working in Bermuda (not by virtue of having PRC status or being a BOT citizen) but by virtue of the honestly held belief that you are a Bermudian and your work conduct corresponds with that belief. It is an entirely relevant consideration for the Minister to look at the full employment history and make a determination as to whether the belief of the Appellant matches with the employment history. Where

there is an unexplained or inexplicable inconsistency (ie applying for a work permit) the Minister is duty bound to turn down the application unless a compelling explanation is proffered for conduct that is inconsistent with the purported belief of being Bermudian. Here no explanation is put forth save for a legal argument that at one point in time the Appellant was free of control under Part V of the Act. What freed the Appellant from control is not a belief in being Bermudian but other forms of status that fall well short of being Bermudian.

26. Further, First Schedule A, paragraph 3 stipulates that the requirements specified in paragraph 2 of First Schedule D must have been satisfied "*throughout*" the 10 year ordinary residency period that must be met under section 19 (1) (b) of the Act. The Appellant was certainly not free of control under Part V of the Act for the 10 years preceding her application for status as she had a work permit in 2005.
27. If the IAT's ruling on this fine point is wrong, we would still have nonetheless concluded that the Minister's decision can and should be upheld on the basis that the Appellant did not satisfy him under First Schedule A, 2 D (b) that there was other evidence indicating generally that she has been accepted as a person possessing Bermudian status by persons dealing with her. The three reference letters are not compelling in that they do not give an account of someone who is generally perceived to be Bermudian. In one reference letter (dated 18 March 2013) the emphasis is on the length of time the Appellant has been in Bermuda and reading between the lines of the letter the author appears to know that she was an immigrant to Bermuda. The two other reference letters (respectively dated 14 March 2013 and 26 March 2013) come from people that have known the Appellant for most of the time that she has been in Bermuda and they both use virtually identical language: "*if I hadn't been told that [that the Appellant] did not have Bermudian status, I would have assumed that she did, as she lived here since she was very small and appears for all purposes as if she is a Bermudian.*" There is nothing in the letters that explains why they would have assumed the Appellant was Bermudian or when or under what circumstances they were told that the Appellant did not have Bermudian status.
28. The letters do not provide satisfactory evidence that "*generally*" the Appellant was accepted as a person possessing Bermudian status. While not attempting to put any limits on what satisfactory evidence might be, the IAT can envision situations where it could be a combination or cross section of testimonials from school principals attesting to their belief that the applicant was considered to be a Bermudian; or from companies attesting to the fact that the applicant obtained scholarships as they considered the person to be Bermudian; or organizations

attesting to the fact that the applicant was given a position on the team because they thought the person was Bermudian; or employers confirming that they gave summer jobs to the applicant because they thought the person was Bermudian. It has to be more than a letter saying "well if you asked me, I would have thought the person was a Bermudian".

International Covenant and Political Rights

29. Mr Sanderson asserts that if section 19 is ambiguous in the sense of being in conflict with the International Covenant on Civil and Political Rights ("ICCPR") we should interpret the section in a manner that gives full recognition of the Appellant's status as BOT citizen, The argument goes that under section 25 of the ICCPR, a BOT Citizen should have the right to engage in the public affairs of one's country by voting and running for office and the like. Because the grant of Bermudian status carries with it the right to vote and participate in elections, the section should be interpreted generously to accommodate and give effect to the Appellant's status as a BOT citizen and section 25 of the ICCPR.

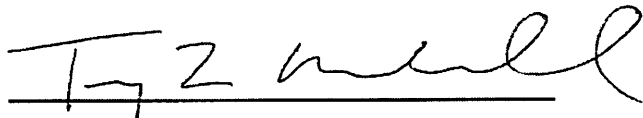
30. The IAT does not find section 19 as read with First Schedule A, paragraph 2 D to be in conflict with the ICCPR. Section 19 is not a designated gateway for a BOT citizen to gain Bermudian status and rights to participate in the public affairs of the country. Section 19 as read with First Schedule A, paragraph 2 D is to address a rare injustice when a person honestly believes she is a Bermudian, is believed to be Bermudian by the community and conducts herself as a Bermudian and then discovers that she is not or may not be a Bermudian. Trying to invoke the ICCPR into this narrow gateway to Bermudian status is not particularly helpful save for the possibility of an argument being advanced by an appellant that she believed herself to be Bermudian by virtue of being a BOT citizen. The Appellant did in her letter of 4 April 2013 provide a host of reasons as to why she considered herself to be Bermudian including the fact that she is a BOT citizen and holds a Bermuda passport (no doubt because of her BOT status) but these features, which may have been capable of contributing to a person's honest belief of being Bermudian, were undermined by her application for a work permit in 2005, her knowledge that her father was on a work permit, her status as a dependent which was recorded on her father's work permit and her subsequent, successful application for a PRC and the application for her son in June 2013.

31. The IAT is satisfied on all of the evidence that the Appellant genuinely identifies with being Bermudian but that she knew that the Bermuda Government (the

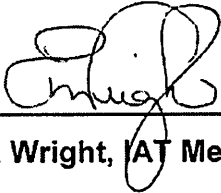
Department of Immigration) and the law of Bermuda as it was applied to her circumstances over the years did not recognise her to be Bermudian. She conducted her affairs based on those circumstances and when the law permitted, she made application to improve her immigration status in Bermuda. In the face of that evidence, her appeal must fail.

32. In the circumstances, the Minister's decision is upheld.

DATED this 20th day of August 2015



Timothy Z Marshall, Chairman of the IAT



Belinda Wright, IAT Member



Michael Jay Landy, IAT Member

IMPORTANT NOTICE: Where a person is aggrieved by a decision of the IAT, he may lodge an appeal with the Supreme Court within 21 days from the date of the decision of the Immigration Appeal Tribunal pursuant to section 13G of the Act.