# THE IMMIGRATION APPEAL TRIBUNAL

**(Case No: 2 of 2013)**

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

***IN ACCORDANCE WITH RULE 15(2) OF THE BERMUDA IMMIGRATION AND PROTECTION (APPEAL) RULES 2013 THE NAME OF THE APPELLANT AND RELATED PARTIES DO NOT APPEAR IN THIS PUBLISHED RULING**

**B E T W E E N:**

**APPELLANT A**

**Appellant**

**-and-**

**THE MINISTER FOR HOME AFFAIRS**

**Respondent**

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# APPEAL RULING

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**Hearing Date:** Friday, 9 August 2013

**Counsel who appeared:**

Mr. Jeff Elkinson for the Appellant
Mr. Philip Perinchief, Representative for the Respondent

## HISTORY

1. The Appellant ("Mrs A"), a Jamaican national, applied on 15 May 2009 for Bermudian status as the spouse of a Bermudian, Mr. A, under section 19A of the Bermuda Immigration and Protection Act, 1956 ("the Act").

2. Mr. and Mrs. A were married in Bermuda on 30 January 1995. At the time of the application for status they had been married for 14 years, 4 more than the minimum requirement of the Act. During the course of the marriage they have resided at [address deleted], Pembroke Parish.

3. To qualify for the grant of Bermudian status under section 19A of the Act , the following requirements must be met by the spouse of the Bermudian:

   (a) be married to a Bermudian for ten continuous years;

   (b) have been ordinarily resident in Bermuda for seven years;

   (c) the Bermudian spouse must provide a letter supporting the application.

4. On the face of the application submitted by Mrs. A, all of those qualifying requirements were met. That is not, however, the end of the process. Under section 19A of the Act an application must be refused by the Minister if any one of the following three circumstances exist:

   (a) In the Minister's opinion the applicant has been estranged from his or her Bermudian spouse within the period of two years immediately preceding the application; or

   (b) The applicant has been convicted of an offence during the seven year residency period which in the opinion of the Minister shows moral turpitude; or

   (c) The applicant's character or previous conduct in the Minister's opinion disqualifies the applicant for the grant of Bermudian status.

5. In this case the Minister was of the opinion that the applicant was estranged from her husband and refused the application on that basis. Mrs. A's application triggered three letters of objection in 2009 from members of the public, claiming

that Mr. and Mrs. A were not living as husband and wife, and that their marriage was for all intents and purposes a sham marriage. The allegation was that Mrs. A had married a homeless person in order to live and work in Bermuda. In response to the objections, the Department of Immigration conducted an investigation. On 27 September 2010 (16 months after the status application was filed) Mr. and Mrs. A were interviewed separately about their marriage and their knowledge of each other. The investigating officer, PCO Daniels, concluded that the marriage was a sham and recommended that the Minister not approve the application.

6. There is no evidence that the substance of these letters of objection or Officer Daniels' report to the Minister were ever put to Mrs. A at any stage. In the future, it is the Immigration Appeal Tribunal's ("IAT") expectation that the substance of all letters of objection and such reports must be given to the applicant and it must be given in writing to ensure that the applicant is afforded a fair opportunity to understand and respond to what is being alleged by objectors and any findings of the investigating officer. An application for Bermudian status is a serious matter that has profound implications for the applicant, his or her family and Bermuda. There must be full and frank disclosure of all objections. There may be reason from time to time not to disclose the identity of the objector but there can never be a good reason for not providing the substance of the objection to the applicant.

7. Despite the conclusion reached by the investigating officer in this case, namely that the marriage was a 'sham' marriage, the Minister proceeded on a different premise, namely that Mrs. A was estranged from her husband within the period of two years immediately preceding the application. By letter dated 7 November 2011 sent to Mrs. A the Minister refused her status application and quoted section 19A (4) as the basis for his decision:

> *"The Minister shall not approve an application under this section if-*
> *in the Minister's opinion the Applicant has been estranged from the applicants (sic) spouse within the two (2) years immediately preceding the application."*

There is nothing in the letter that sets out why or how the Minister came to have an opinion that Mrs. A had been estranged from her husband. There is no circumstance that is identified in the letter by which a reader could reasonably conclude "Oh yes, I can see how the Minister arrived at that opinion". As with disclosure of objections, it is the IAT's expectation that the Minister must set out the factual basis in his or her refusal letter for the decision reached. It cannot be right for an applicant to be left in the dark as to what caused the Minister to state, in a particular case, that there was estrangement, or that a conviction amounted to

moral turpitude or that the applicant was not of good character. The Minister must provide facts and reasons in support of that conclusion.

8. Based on the record of documents before the IAT there was no evidence of estrangement and the recommendation of the investigating officer was based on her assessment that the marriage was a sham. The Act does not define estrangement but Black's Law Dictionary (8th ed) suggests that it means to be separated, where the state of the relationship has been destroyed or where affection, trust and loyalty has been diverted. The term presupposes the existence of a valid, matrimonial relationship that has broken down. In contrast, where there is a sham marriage, there simply never was a valid relationship which could subsequently become estranged.

9. The Minister's letter of 7 November 2011 helpfully notified Mrs. A of her appeal rights and she by letter dated 14 November 2011 ("the Appeal Letter") wrote to the IAT setting out a brief response to the Minister's decision and asked that the IAT reconsider her application. A copy of the Appeal Letter is attached to this Ruling as it was the topic of much debate as to whether it amounted to an admission of estrangement.

10. The Appeal Letter acknowledges that the basis of the Minister's decision was estrangement from her husband, and that there were marital issues prior to the application due to financial and personal issues and there was a two and a half month separation during the marriage followed by reconciliation. Taken on its own, the Appeal Letter does seem to be acknowledging estrangement and one would forgive any reader for concluding that Mrs. A is accepting that the estrangement occurred in the prohibited two year period.

11. The appeal process moved slowly but by the Spring of 2013 Mrs. A had retained Mr. Elkinson of Conyers Dill and Pearman Limited to represent her. He filed brief submissions on 22 April 2013 that made it known that the Appeal Letter was written without legal advice or counsel, and that Mrs. A did not accept the characterization of the relationship as one of estrangement. Mr Elkinson said that evidence would be called showing that at all material times Mr. and Mrs. A regarded themselves as husband and wife and whilst there may have been issues between them as may arise in marriages, at no time in the period of two years immediately preceding the application for status were they estranged.

12. Mr. Perinchief filed an equally brief Reply in Response dated 30 July 2013 and relied on the contents of Mrs. A's letter as being a clear admission of estrangement from one's spouse. He argued that the Minister exercised his discretion in not granting the appellant Bermuda status as a result of the hiatus caused by the estrangement, and there was nothing unlawful or arbitrary about the decision.

## JURISDICTION OF THE IAT

13. Section 19A (6) incorporates by reference the appeal rights set out in section 19 (8) of the Act. Section 19 (8) gives an express right of appeal. It uses crystal clear language: *"A person who is aggrieved by the Minister's rejection of his application under this section may, subject to section 124, appeal to the Immigration Appeal Tribunal against the rejection."*

## THE HEARING

14. On the date of the hearing, 9 August 2013, it became apparent that Mr. Elkinson and the Appellant had not seen any of the objection letters or the record of the interview carried out by Officer Daniels. The IAT notes that in this case there was no request by either party for a directions hearing and as such the IAT naturally assumed that in terms of correspondence and documents the parties had what they needed to proceed. As it turned out, Mr. Elkinson had not seen the above-mentioned material, although his client at a time when she was unrepresented was given an opportunity to review the IAT's file. The documents were part of the IAT's file. As the IAT had seen the correspondence it was of course only right that Mr. Elkinson and his client should have the opportunity to consider the material and decide how they wished to proceed. Mr. Elkinson elected to proceed with the hearing on the basis that the marriage was lawful and the critical issue for determination was whether there was estrangement or no estrangement. Indeed, Mr. Perinchief in his written submissions emphasized that,

> *"THE MAIN QUESTION ON APPEAL FROM THE MINISTERS POINT OF VIEW: Was the applicant estranged from her spouse within the period of two years immediately preceding her application."*

15. Mr. Elkinson sought to call three witnesses in support of the Appeal, namely Mrs. A, Mr. A and Mrs. A's daughter, [name deleted] (a student at the Bermuda College). Mr. Perinchief did not object to the calling of evidence in this case, and no doubt he appreciated (as did the IAT) that there was an uncomfortable disconnect in terms of what material the Minister had before him in reaching his decision on estrangement, and the fact that the Minister was now retrospectively seeking to rely on Mrs. A's Appeal Letter. There was no evidence of estrangement before the Minister and if the only document that could point toward estrangement was a post decision letter written by Mrs. A. It was appropriate and just to give her

an opportunity to give the background behind the letter and what she was attempting to articulate. In addition, Mr. Perinchief reserved the possibility of Officer Daniels giving evidence and therefore, the specter of the sham marriage or an argument being advanced from that material remained a possibility. As Mrs. A had not had a fair opportunity before the Minister to address the sham marriage material and in fact had been quite unaware until the date of the hearing that this had been an issue, justice also demanded that she be given the opportunity to address these allegations before the IAT.

***Mrs. A's evidence***

16. Mrs. A gave evidence that during the relevant time of the marriage, namely the two year period prior to the application there was no estrangement. There were certainly arguments and disagreements, and at times they would keep out of each other's way but they have always lived under the same roof and genuinely consider themselves to be husband and wife. She was honest about her husband's shortcomings which include a history of drug and alcohol abuse, and unstable employment. Mrs. A did not come across as having the benefit of higher education. .She is a hard working woman whose life has been spent working with her hands. She explained that the letter she sent to the IAT was written for her by her daughter who was attending the Bermuda College at the time. She explained that she did not mean to leave the impression that the period of separation occurred in the prohibited two year period. Mrs. A told the IAT that the period of estrangement occurred in 2001 when her father died in Jamaica and her husband refused to go to the funeral in Jamaica. Mrs. A described her husband as a very stubborn man. She candidly admitted that the marriage has had its share of challenges but there has been no separation or estrangement in the two years leading up to the application. On cross examination, Mr. Perinchief carefully took Mrs. A through the contents of the Appeal Letter with a view to establishing that it means what it says. Mrs. A was adamant that the period of estrangement was in 2001. Mr. Perinchief cross examined Mrs. A on some of the answers that were given to Officer Daniels such as why Mr. A called her [name deleted] and not [name deleted] and why he didn't know the date of her birth. Mrs. A explained that her mother's pet name for her was [name deleted]. She said that Mr. A knows her birth date. Mrs. A was questioned about why she did not know how many siblings Mr. A had and she explained that she did not know all of them. The questions did not relate to estrangement but rather to the allegation of sham marriage.

### *Mr. A's evidence*

17. Mr. A was adamant that Mrs. A is his wife and that the only period of separation/estrangement was at the time of his father- in- law's death. He told the IAT that he refuses to fly. Mr. A is a colourful figure and it is clear from his demeanor and appearance that he has abused himself with drugs and alcohol. Notwithstanding his history of addiction, he considers himself to be the husband of Mrs. A and his home during their marriage has always been under the same roof as his wife. He comes and goes as he pleases and this is the nature of their relationship. Like his wife, he has not had the benefit of higher education and comes across in a rough and cryptic manner. Mr. A is adamant that Mrs. A, as his wife, should have the benefit of Bermudian status. He calls her [name deleted] and also by her pet name, [name deleted]. Mr. A recalls telling his wife that she had to reply to the Minister's letter, and that her daughter wrote the letter. On cross examination, Mr. A told the IAT of the 2001 separation and how he refused to travel by plane. The Appeal Letter was explored and he said it was written by his step-daughter based on what Immigration was presenting to her. He repeated quite forcefully that Mrs. A is his wife and should be granted status. He was adamant that during the two years prior to the status application that he was not separated from his wife. He readily accepted that he comes and goes as he pleases.

### *Daughter's evidence*

18. Mrs. A's daughter, [XXX], gave evidence. She confirmed that she wrote the Appeal Letter which her mother signed. Ms. [XXX] was a student at the Bermuda College at the time. She says she did not fully appreciate what the process was all about. She contended that she reached out to the Department of Immigration for clarification but received no response. Ms. [XXX] provided her perspective of the relationship between her mother and Mr. A. They all lived under the same roof but Mr. A came and went as he pleased and that was how they lived. Sometimes her mother would arrive home from work and Mr. A would go out. She was questioned by Mr. Elkinson about the period of separation referred to in the letter, and Ms. [XXX] said it occurred when her grandfather (Mrs. A's father) died. Ms. [XXX] is a bright, young lady but it was quite clear that she was not experienced in the Immigration application process or the appeal process. On cross examination Mr. Perinchief explored the living arrangements. There are three bedrooms at the aforementioned [particulars of address deleted] address, her mom and Mr. A share

one bedroom, she had her own bedroom and the third room was rented out to a lady (unidentified to the IAT). The Appeal Letter was explored and Ms. [XXX] says she had asked her mother if she understood the letter from the Minister and her mother replied no. Ms. [XXX] told her mother what she thought the letter was about. Ms. [XXX] wrote the Appeal Letter for her mother and said that the two and half month separation related to events in 2001 but that in her mind it really was not a separation. Ms. [XXX] acknowledges that there were arguments in the two year relevant period but nothing like what occurred in 2001. Ms. [XXX] says that Mr. A is very stubborn. She said she rushed writing the letter because there was a tight deadline.

19. After Mr. Elkinson called his witnesses, Mr. Perinchief informed the IAT that he would not be calling Officer Daniels to give evidence. Mr. Perinchief was in a difficult position because the Minister had based the refusal on the statutory ground of estrangement, not sham marriage. Officer Daniels' report to the Minister was not directed towards estrangement but rather that the marriage was a sham marriage. It may have been open to the Minister to view the sham marriage material as evidence that arguably offended the prerequisite requirement of marriage, but he did not make his decision on that basis.

**SUMMARY OF COUNSELS' CLOSING SUBMISSIONS**

20. Mr. Elkinson in his submissions summarized the evidence of the witnesses that were called and argued that the Appeal Letter should be read in light of that evidence. It was written by a daughter attending Bermuda College and there was only a short period of time to appeal and while guidance was sought from the Department of Immigration no response was forthcoming. The IAT should have regard to these circumstances. If the IAT accepts the evidence then there can be no basis for upholding the Minister's decision. Mr. Elkinson observes that the marriage significantly exceeds the minimum 10 year requirement and they remain together as husband and wife.

21. Mr. Perinchief in his submissions concentrated on the language of the Appeal Letter and urged the IAT to conclude that it means what it says. He contended that once Mrs. A came to realize the fatal admission that was being made in the letter she sought through her evidence to rewrite the letter to fit the requirements of the Act. He countered that you do not need an education to understand that if there is estrangement within the two years leading up to the application the application must be refused. The Minister's letter was clear and anybody reading or

responding to it would or should understand that. Mr. Perinchief says that the Appeal Letter is in the form of mitigation and thus an acknowledgement of estrangement. He argued that while there may be some debate on what is meant by estrangement, a two and half month separation fits within the definition of the term.

**THE IAT'S RULING AND REASONS**

22. In this case, the main and perhaps the only issue for the IAT to consider is whether the Minister's opinion of estrangement can be upheld. Section 124(1) of the Act gives the IAT the power to determine an appeal and "make such order as appears to him just". This is a very wide power and it must have been enacted in such terms by the legislature so as to ensure that an appeal should receive the fullest possible consideration. *(See: Haldane v Haldane [1977] AC 673 and Drummond v Council of Peebles, 1937 SC 36)*. In exercising its broad powers, the IAT must, however, take into account that an appeal that arises from a refusal under section 19A (4) of the Act is inextricably linked to reviewing the Minister's opinion as the section requires the Minister to have arrived at an opinion that supports the refusal. An appellate body such as the IAT should give careful consideration to the Minister's opinion and examine it to see whether in all the circumstances (including any additional evidence that may be allowed) it accords with the IAT's considered view of what is just. If the opinion does not, then the decision must be reversed. If it does, then it must be upheld.

23. Based on a review of the material that was before the Minister at the time he made his decision, the IAT have concluded that the Minister's refusal cannot stand as there was no factual or evidential foundation for his opinion that Mrs. A was estranged from her husband during the two year period leading up to the application. The evidence before him, even if it were to believed, went to the subject of sham marriage not estrangement.

24. Unfortunately, that does not end matters. This is a very unusual case, in that the Appeal Letter, on first blush, appears to be an admission of estrangement. The IAT can see that there may be a case where the conclusion reached by the Minister is without any proper foundation but new evidence comes to light between the decision and the hearing of the appeal that validates the decision; such as an admission by the appellant that the Minister's previously unsubstantiated finding of estrangement was correct. Without explanation, the Appeal Letter is capable of being such evidence and so it is appropriate for the IAT to consider the letter and

the evidence that was called surrounding the letter and the subject of estrangement.

25. This appeal comes down to whether the IAT believes that Mrs. A in her appeal notice was acknowledging a period of estrangement during the relevant two year period or whether she was acknowledging that during the course of the marriage there was a period of separation but not during the relevant two year period. The letter, without explanation, leans in favour of the former but once an explanation has been given, one can see that perhaps the second paragraph of the letter is only acknowledging that in the two year period there were marital issues but not ones that amounted to estrangement, and the third paragraph of the letter is not referring to the two year period but a period of separation that occurred earlier in the marriage. The sentence *"As I am the breadwinner of the family, there were stressful times within our marriage therefore; Allen and I separated for two and a half months",* certainly acknowledges a period of separation but does not state the time of the separation.

26. Mrs. A and her two witnesses have now explained the background behind writing the letter and what they should have conveyed much more clearly, namely that the separation occurred in 2001. This evidence was rigorously explored by Mr. Perinchief but all three witnesses maintained that there was no period of estrangement in the two years leading up to the application. In the course of giving their evidence, the state of their marriage during the relevant two year period was examined.

27. The A and her husband have a matrimonial relationship that is certainly challenged by the husband's addictions and chronic unemployment but the marriage has endured for a very long time. Throughout the marriage Mrs. A has worked hard, has been a productive member of the community and has kept a roof over her family's head. She has been and continues to be Mr. A's salvation. The fact that the relationship is stressful or is challenged from time to time does not mean that a state of estrangement exists between them. This long marriage really does not appear to have changed over the years. There is no evidence that it has gone from a good state to a bad state, characterized by a serious breakdown in the relationship. It has always been a tumultuous relationship but it does not follow from that that there was a period of estrangement in the relevant two year period. The IAT has to be alive to the fact that there are no set criteria for what amounts to a workable marriage. We should be careful not to impose our own cultural, economic and educational preconceptions or prejudices on what makes a marriage work. The focus of the IAT should be on whether there is evidence of a real and obvious fracture in the relationship during the relevant two year period. It has to be

more than the occasional fight; it has to be something that is serious and inconsistent with being in a union or committed relationship.

28. The IAT gave careful consideration to the evidence and accepts the explanation that was given in regard to the writing of the Appeal Letter and the evidence that the period of estrangement occurred in 2001. In evaluating the evidence the IAT has taken the following matters into account:

    (i) Mrs. A is a hard working woman but her skills are in carrying out physical work not writing appeal notices or letters. Mr. and Mrs. A are not financially well off by any means, they have not had the benefit of higher education, they are unsophisticated in every respect but none of these human conditions is a bar to a status application nor should they ever be. Mr. and Mrs. A gave their evidence in a manner that reflects the realities of their lives and in so doing it became understandable why Mrs. A may not have fully appreciated the import of each word that her daughter used when writing the letter of 14 November 2011 or the need to write with precision and clarity.

    (ii) The letter to the IAT was written by Mrs. A's daughter who at the time was a student at Bermuda College who did not appreciate the potential significance of the words she used or the status application process. She had tried to obtain guidance from the Department of Immigration but there was no response.

    (iii) There was no evidence of estrangement before the Minister at the time he made his decision. The objection letters did suggest that Mr. A was residing from time to time at the Salvation Army (which may have been evidence of estrangement if true) but the Immigration Officer was told by the Salvation Army that there was no record of Mr. A taking shelter there.

    (iv) Mr. Perinchief understandably and rightly, in the IAT's view, did not object to the calling of evidence in this appeal (in fact he sought to rely on the Appeal Letter) and so the matter came down to whether the IAT believed what the A family had to say about the Appeal Letter and in particular when the period of separation had taken place. The Panel carefully considered the evidence and there was a raw consistency and honesty about what was said. No one tried to hide or sugar coat the day to day stresses of the marriage but none of the evidence amounted to a fracture in the relationship or a retreat from the relationship during the relevant two year period. The witnesses gave a

consistent account of a period of separation in 2001 but thereafter Mr. and Mrs. A continued to live as husband and wife in the way and manner that has always worked for them. (To the extent relevant, the panel also formed a view on the basis of the evidence of the parties that the marriage was a genuine, not a sham, marriage, from inception).

(v) While the Investigating Officer was at the hearing, a decision was made by Mr. Perinchief not to call any evidence. The only potential evidence of estrangement had to be gleaned from the contents of the Appeal Letter and what Mr. Perinchief could establish on cross examination. There were signs of difficulties or challenges in the relationship such as coming and going like two ships in the night but this evidence, against the background of the relationship as a whole and the explanation given in respect of the Appeal Letter did not satisfy the IAT that there was estrangement during the two year period.

29. In conclusion, the IAT accepts that the period of separation occurred in 2001 not in the relevant two year period. Further, no issues or challenges within the relevant two year period emerged that amounted to estrangement. The issues, mainly arising from Mr. A's personal challenges, have always been a feature of this marriage.

30. The IAT did give consideration as whether it could or should refer this matter back to the Minister for reconsideration, however, under section 13D (1) of the Act the IAT has no jurisdiction to refer a matter back to the Minister. Its jurisdiction is limited to confirming or quashing the Minister's decision. Had such a power existed, the IAT would not have made such a direction, in any event, as this matter has regrettably gone on long enough and justice favours finality.

**For the foregoing reasons, the appeal is allowed and pursuant to section 13D (1) (b) of the Act the decision of the Minister dated 7 November 2011 is quashed and the new Minister is directed to issue a certificate of Bermudian Status to Mrs. A.**

**DATED this 16th day of October 2013**

**Timothy Z Marshall, IAT Chairman**

**Kiernan Bell, IAT Deputy Chairman**

**Jean-Paul Dyer, 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.

#117371.

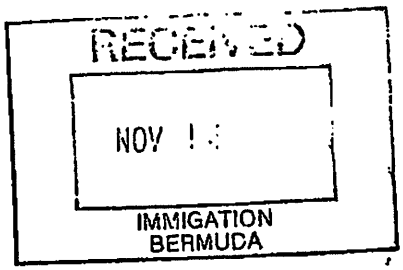
Mrs.

**Pembroke HM 10**

IMM 117371

14 November 2011

The Immigration Appeal Tribunal
The Department of Border Control
Government Administration Building
30 Parliament Street
Hamilton HM 12
Bermuda




To whom it May Concern,

**RE: Application for Bermudian Status under the provisions of section 19A of the Bermuda Immigration and Protection Act, 1956**

I am ; I recently applied for Bermudian status under the provisions of section 19A of the Bermuda Immigration and Protection Act, 1956 in which I was denied. This is a letter I am writing to appeal the Minister's decision.

In light of the Minister's decision to decline my application on the terms that I, was estranged from my spouse, within the period of two years immediately preceding my application for Bermudian status. In our defense, my husband and I were having some marital issues prior to my application. This was due to financial and personal issues.

As I am the breadwinner of the family, there were stressful times within our marriage therefore; and I separated for two and a half months. We both felt it was the right thing to do, as it was not healthy for both of us to be living together during this time. Since then, my husband and I have reconciled and we have been able to communicate through our issues and remain under the same household.

I hope this may explain the matter above regarding my appeal, and you may reconsider my application. If need be, you may contact us at 1441- or 1441-

Sincerely,