

***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**

THE IMMIGRATION APPEAL TRIBUNAL

(Case No: 2 of 2014)

IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

BETWEEN

Appellant E

Appellant

and

THE MINISTER OF HOME AFFAIRS

Respondent

APPEAL RULING

Hearing Date: Friday, 4 October 2013

Counsel who appeared:

Mr Peter Sanderson (Wakefield Quin Limited for the Appellant)

Mr Philip Perinchief, representative for the Respondent

HISTORY

1. The Appellant ("Mr E") is an American national who is separated from his Bermudian wife, Mrs E. He has lived in Bermuda for 15 years and prior to the breakdown of the marriage he was always gainfully employed because he enjoyed the benefits of a spousal rights certificate that allowed him to pursue any opportunity that presented itself to him. Mr E's passion is music and he was able to pursue that interest without restrictions but it was not enough to sustain his family so that interest was supplemented with fulltime employment working in a warehouse.
2. After the separation, Mr E began to spend time with his Bermudian friend Ms [XXX] and one thing led to another. On 18 September 2008 their Bermudian child, [YYY], was born. While Mr E's relationship with Ms [XXX] did not progress, from all accounts he is a good and supportive father, and takes an active part the child's upbringing. The quality of the relationship was not challenged by Mr Perinchief.
3. As a result of Mr E's separation with his wife, he was no longer able to enjoy the benefits of a spousal rights certificate which meant that he and his employer had to comply with all of the Immigration requirements for hiring a guest worker. The jobs that Mr E has traditionally held and for which he is qualified are in high demand by Bermudians and as such he has moved from holding down a steady job to being unemployed. He gets by with the assistance of a close network of friends and loved ones. Why doesn't Mr E leave Bermuda and go back to the States? Well, he loves his child and like any other parent, wishes to be with him and participate in his upbringing.
4. Mr E's residence in Bermuda has been lawful. In 2008 he made application to reside and seek employment in Bermuda and that application was granted as were a number of extension applications. The Minister and his predecessors have been sympathetic to Mr E's circumstances but by 2013 the Minister reached the conclusion that it was time for Mr E to leave Bermuda because Mr E had not been able to secure a job.
5. On 24 June 2013 Mr E was refused permission to continue residing in Bermuda and he appealed this refusal. On 23 July 2013 the Minister provided reasons for the refusal, namely that Mr E had not been successful in securing employment in the entertainment industry; had been challenged in sustaining himself in Bermuda; and had received above the norm for extensions of permission to reside and seek work.

GROUND OF APPEAL

6. Mr E's Notice of Grounds of Appeal is dated 9 July 2013 and was duly filed with the Immigration Appeal Tribunal ("IAT"). It set out four grounds:

- (i) The Minister's decision to refuse permission to continue to reside and seek employment did not set out any reasons. As stated above, the Minister subsequently gave reasons on 23 July 2013 and as such this ground has been answered.
- (ii) The Appellant has resided in Bermuda for fifteen years and seeks to continue to live in Bermuda in order to maintain his family life with his four –year old Bermudian son whom he has cared for and nurtured since birth.
- (iii) Mr E is expecting another Bermudian child by a Ms [ZZZ]. This ground was not pressed by Mr Sanderson at the hearing as it is a circumstance that post-dates the Minister's decision.
- (iv) Mr E is a talented singer and has performed as a backup singer for [an international singer] and as an opening act for international stars at Bermuda Summer Festivals. He seeks to remain in Bermuda to share his talent. This ground was not seriously pursued by Mr Sanderson at the hearing.

At the hearing Mr Sanderson concentrated on the second ground of appeal and argued that the value or right to family life under Article 8 of the European Convention on Human Rights ("ECHR") ought to have been given greater weight. Mr E gave evidence of the close relationship he has with his son and how he has actively participated in his upbringing. He also gave evidence about the efforts he has made to secure employment.

RESPONSE

- 7. The Minister filed a Response dated 19 September 2013. The position put forward is that Mr E's original right to reside in Bermuda was governed by section 25 as read with section 27A of the Bermuda Immigration and Protection Act 1956 ("the Act") and that right is conditional on Mr E being with his wife in accordance with section 27A (2)(e) of the Act. Mr E's right to work without immigration control is governed by section 60 of the Act and is conditional on Mr E living with his Bermudian wife in accordance with section 60(1)(3)(b) of the Act. The argument goes that once Mr and Mrs E separated, any application to remain in Bermuda is still governed by section 27A. Section 27A (4) states that *"if a condition specified in subsection (2) is not fulfilled in relation to a special status husband, his landing or remaining or residing in Bermuda shall be deemed to be, or, as the case may require, to become unlawful except with the specific permission of the Minister."*
- 8. The Minister filed Reply Submissions in which he argues that ECHR is subordinate to the relevant sections of the Act as ECHR must give way to domestic law. If the ECHR is applicable, under Article 8 the right to respect for family life is not absolute but can be tempered by laws that are necessary in a democratic society in the interests of national security, public safety or economic well- being of the country, for

the prevention of disorder or crime, for the protection of health or morals or the protection of the rights and freedoms of others. The protection of the rights of others (Bermudians in particular) was emphasized.

JURISDICTION OF THE IAT

9. Mr E sought permission to continue to reside and seek work in Bermuda. Section 25 of the Act governs such applications. Any person who is not a Bermudian, a special category person, a *bona fide* visitor or a permanent resident must seek the permission of the Minister to reside in Bermuda. Mr E falls into none of the exemptions, although under section 27A of the Act he falls within the definition of “*special status husband*”, namely the husband of a Bermudian. Section 25 (2) of the Act allows any person who is aggrieved by any decision of the Minister with respect to a refusal to grant any permission under section 25 (1) to appeal to the IAT.

RULING AND REASONS

10. Mr E has had a long and enduring connection to Bermuda. He came here as the spouse of a Bermudian and remains married to her, although the marriage has now broken down and they live separate lives. During the happier years of the relationship Mr E was gainfully employed and contributed to his household and the community. He enjoyed a spousal rights certificate which allowed him to pursue any employment opportunity that was within his capabilities. An employer was free to offer him any position without having to advertise the position.
11. With the breakdown of his marriage, Mr E lost the right to freely work in Bermuda as the spousal rights certificate abruptly comes to an end when the relationship hits the rocks. Mr E’s employment became a casualty as his employer could no longer employ him without going through the work permit process which process is stacked against someone who has non- traditional skills and experience. Had Mr E’s marriage produced in children, he would have been able to remain in Bermuda and enjoy life with his child or children, as he would have been eligible to apply for an Extension of the Spousal Rights Certificate.
12. The experience of not finding employment is often for a non-Bermudian a motivating factor for leaving Bermuda particularly where there are no compelling ties or reasons to remain in Bermuda. However, in this case Mr E entered into a new relationship with a Bermudian and that relationship resulted in the birth of his son, [YYY]. While the relationship with the mother did not progress, Mr E’s relationship with his son has and from the evidence Mr E plays an important and positive role in his son’s life and from all indications is a good father. That evidence was not challenged.
13. The Department of Immigration has always been aware that Mr E has a Bermudian son, and it is the father and son relationship that, from all indications, has resulted in the successive Ministers sympathetically giving Mr E extension after extension to

reside and seek employment in Bermuda. And with each extension the relationship between Mr E and his Bermudian child has grown and strengthened.

14. Unfortunately, Mr E has not been able to secure an employment opportunity and it does appear from the evidence that the work permit process discourages prospective employees from offering a position to him. Through a network of supportive friends, Mr E is supported and has the necessities of life to maintain a frugal existence in Bermuda. There is no evidence that his residency in Bermuda has caused any harm or burden to Bermuda society. No one has any issue with his character.
15. The Minister believes it is time for Mr E to leave Bermuda because no job opportunity has materialized. The relationship between Mr E and his son is acknowledged but it is argued by Mr Perinchief that through modern technology (Skype) and the ability for Mr E and his son to travel that a healthy father and son relationship can be maintained. Family members are often separated by circumstances of life and the relationship endures.
16. Ideally, a relationship between a parent and a child is enhanced when they are together living in the same community and where the parent regularly contributes to the upbringing and nurturing of the child. Money from a job provides certain advantages in raising children but what matters most is the time that is spent with the child and the opportunity to love, teach, play and encourage. This view was put forth by Mr Sanderson and it is one which the IAT endorses.
17. What in this case is the public interest that justifies the Minister to separate a father from his Bermudian son? The IAT has found no compelling public interest other than a sense of frustration (which is not a compelling public interest) that Mr E has not been able to secure employment. Apparently, even though the odds have always been heavily stacked up against Mr E, there would have been no objection at all for Mr E to remain in Bermuda if he somehow managed to navigate through the work permit process and secure employment. There is no issue with his character. The only issue is that Mr E has not been able to secure a job, although the sole impediment to securing employment (including sharing his talents in music) is the current work permit policy. While the status of employment is important, the inability to readily secure employment is not a sufficiently good reason or exercise of Ministerial discretion when the competing public interest is to respect, encourage and foster the family and the relationship between Bermudian children and their parents, particularly when the lack of employment has not resulted in any adverse consequences to Bermuda.
18. This is not a case where a non-Bermudian was gaming or perverting our Immigration laws by selfishly seeking out a residential life line by fathering a Bermudian child. If it was, he would never have been permitted to remain in Bermuda when he first made the request to continue his residency in Bermuda and seek employment. This was a man who already had significant ties to Bermuda and rightly or wrongly he was allowed to extend, solidify and make those ties stronger in different but significant ways. If we invite people to our shores, then we must recognize that some will forge enduring ties to Bermuda and its people, and sometimes those ties will entangle

themselves in our Immigration laws and policies in a way that requires a fair and just approach.

19. Mr Sanderson helpfully brought to our attention the provisions of the Children Act 1998 and the ECHR.
20. He points out that under section 36C (2) of the Children Act 1998 a person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child including the right to care and control of the child. Section 5 of the Children's Act states that one of the purposes of the Act is "*to promote the integrity of the family and to ensure the welfare of children*". As a society we place significant value on the family and provide legislation to promote the family unit.
21. The ECHR protects family life. Under Article 8 "*everyone has the right to respect for his private and **family life**, his home and his correspondence.*" The ECHR applies in Bermuda (see the Declaration contained in a letter from the Permanent Representative of the United Kingdom dated 19 November 2010 and Article 63 of the ECHR). Bermuda being a party to the Convention gives rise to a legitimate expectation that decision makers such as Ministers responsible for Immigration will give considerable weight to the fundamental values contained therein and give effect to those rights unless a limitation is permitted by law and justified by the circumstances of the case. In this particular case, no compelling justification for interfering with the family life of Mr E and his son has been identified. There was no evidence in this case of any national security issue, adverse impact on the economic well-being of the country, disorder or crime prevention concern or that the rights and freedoms of others needed to be protected at the expense of family life. No Bermudian is being disadvantaged by Mr E's residency. In fact, in this case the life of a Bermudian, namely his son is being enhanced and the life of the Bermudian mother made easier by the support that Mr E provides.
22. There was an understandable concern raised about whether fathering or mothering Bermudian children would be viewed as a ticket to residency; the flood gate argument. Each case will turn on its facts and without prejudging any case, the birth of a Bermudian child in of itself is not a sufficient tie to Bermuda to overturn the Minister's decision to refuse an application to reside and seek employment in Bermuda. Such factors as character of the non-Bermudian; length and type of residency in Bermuda; ability for the non-Bermudian to support himself; quality and type of relationship with the other parent; the quality of the relationship between the non-Bermudian parent and the child; the needs and welfare of the child; the surrounding circumstances of the relationship that gave rise to the birth of the child; and duration of the relationship between the child and the non-Bermudian, are non-exhaustive examples of what will need to be considered. The stronger the ties, the greater onus there will be on the Minister to justify ending the non-Bermudian's residency and further opportunities to seek employment. The weaker the ties the greater will be the onus on the non-Bermudian to establish that it is just and fair that he or she be permitted to remain in Bermuda.
23. In regard to the Minister's argument that Mr E's application to remain in Bermuda is entirely governed by section 27A and that Mr E is estopped or prevented from

making application under section 25 of the Act, the IAT is not persuaded and in any event does not believe such an argument provides a basis for upholding or supporting the Minister's decision. Section 25 is the overarching provision in Part IV of the Act (Control of Entry and Residence in Bermuda) that governs entry into Bermuda. It applies to all cases where permission to remain or reside in Bermuda is sought. Yes, within Part IV there are specific sections that one must have regard to and which may be relevant. Section 27A was clearly a relevant provision as that quite rightly gives a husband married to a Bermuda, the right to remain and reside in Bermuda as if he were deemed to possess Bermudian status provided conditions are met including a marriage where the parties are not estranged. In this case, the marriage broke down. Where did that put Mr E? Well, he could no longer claim the benefits of section 27A and in the absence of permission from the Minister; his residency in Bermuda becomes automatically unlawful. Section 27A (4) required Mr E to seek the specific permission of the Minister to remain in Bermuda. Once any of the conditions are not fulfilled or maintained, he is no longer to be treated for residency purposes as if he were deemed to possess Bermudian status and it is that special status which section 27A speaks to. Section 27A is not a section under which the spouse is seeking permission from the Minister. The point of the section is to say permission is not required if the conditions are adhered to. Given Mr E's change in circumstances, Mr E must seek permission to reside in Bermuda in the same way as a person who is not married to a Bermudian. This takes us back to the overarching or general provision of section 25 which allows the Minister to consider, grant or deny applications to remain or reside in Bermuda. Even if the IAT were wrong on this analysis, any consideration of permission ought to have given far greater weight to the importance of fathers (and mothers) maintaining a positive relationship with their children.

24. In the circumstances of this particular case, the IAT has reached the conclusion that it is fair and just to quash the Minister's decision under section 13D (1) (b) of the Act.
25. Mr Sanderson advances the argument that the IAT should grant Mr E an open ended right of residency until the child reaches the age of 18 or 25 if the child goes on to education. The IAT believes that if it were to make such an Order that it is entering the legislative and policy arena by extending the scope of the current ESERC program that pertains to non-Bermudians who have Bermudian children as a result of a marriage that has subsequently broken down. The certificate permits the non-Bermudian to remain in Bermuda until the Bermudian child reaches a certain age. There may be good reasons for extending the program or policy to non- traditional relationships but that debate is better left for another forum. This appeal was about an application to reside and seek work under the existing laws and policies. It was not about whether ESERC should be extended which is a broader social question.
26. The IAT has concluded that permission to reside in Bermuda and seek employment for a reasonable period of time is the appropriate directive. Such a directive allows the father and son relationship to continue and it appropriately permits the Minister an opportunity in the future to assess whether circumstances are such that the permission should be extended or not. **The IAT therefore directs the Minister under section 13D (1) (b) (ii) of the Act to grant Mr E permission to reside and**

seek work in Bermuda for a further three year period which period should run from the date that his last residency permission expired.

27. Any application made by Mr E for a renewal or extension should be considered by the Minister in the light of this Ruling and he or she should be guided by the factors and considerations enunciated herein. This directive should not be viewed by Mr E as some form of immunity for the next three years from the requirements of the Bermuda Immigration and Protection Act. It is far from it. The Minister continues to have the authority under the Act to revoke the permission should new circumstances emerge which outweigh the family life value.

DATED this 22nd day of January 2014



Timothy Z Marshall, Chairman

JD Massa, Panel member

Major Kenneth Dill, Panel 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.