**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**

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# COST RULING

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**Counsel who appeared:**
Mr Peter Sanderson (Wakefield Quin Limited for the Appellant)
Mr Philip Perinchief (representative for the Respondent)

1. The Appellant was awarded the costs of his successful appeal. The parties could not resolve the extent or basis upon which those costs should be recovered and they asked me to give a ruling.

2. Counsel agreed to present their arguments by written submissions. I have read the helpful submissions of Mr Sanderson and Mr Perinchief, both dated 9 July 2014.

3. Set out below are the applicable provisions of the Bermuda Immigration & Protection Act 1956 ("the 1956 Act"), the Bermuda Immigration & Protection Rules ("the Immigration Rules") and the Rules of Supreme Court ("RSC").

***Relevant provisions from the 1956 Act***

*Section 13F*

> *(1) The Immigration Appeal Tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal.*
>
> *(2) The Immigration Appeal Tribunal may make rules governing the practice and procedure to be followed in relation to its proceedings, including rules: ...*
>
> > *(f) For taxing or otherwise settling any costs or expenses which the Immigration Appeal Tribunal directs to be paid and for the enforcement of a direction.*

***Relevant provision from the Immigration Rules***

*Rule 16*

> *Any costs or expenses which the Tribunal directs to be paid under s.13F(1) of the Act and required to be taxed shall be taxed by the Registrar of the Supreme Court.*

***Relevant provisions from the RSC, Order 62***

*Rule 1*

> *(1) Except where it is otherwise expressly provided, or the context otherwise requires, the following provisions of this rule shall apply for the interpretation of this Order...*
>
> > *"the standard basis" and the "indemnity basis" have the meaning assigned to them by rule 12(1) and (2) respectively;...*

*Rule 2*

> *(2) This Order [Order 62] shall have effect, with such modifications as may be necessary, where by virtue of any Act the costs of any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Act, not being proceedings in the Court, are taxable in the Court.*

*Rule 3*

> *(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis...*

*Rule 12*

> *(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.*
>
> *(3) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on a basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis.*

4. The first observation is that whether costs are ordered or not in any particular case before the IAT is a matter for the Panel's discretion that heard the case.

5. Normally, costs will follow the event, meaning the party whose position has been upheld on appeal by the IAT should have their costs paid by the party who did not succeed. There of course will be exceptions, such as when the pivotal evidence that persuaded the IAT of a particular position, is presented late in the appeal process. In those circumstances, the successful party should not normally expect to have his or her costs paid by the other side.

6. Jurisdictions deal with the issue of costs in a variety of ways, and generally it is driven by the particular country's view on access to justice and fairness. Many U.S. States for instance require each party to pay their own legal costs regardless of the outcome of the proceedings. The rationale is that this better promotes access to justice. In the commonwealth, many countries make provision for the payment of some or all of the reasonable costs of the winning party to be paid by the loser, with the rationale being that access to justice should make the successful party reasonably whole. The percentage or degree of recovery allowed by law depends on the legislature's view of the subject matter and these competing views on access to justice. For instance, in Magistrates' Court the successful litigant can only recover a small percentage of his or her actual legal costs. The overriding goal in that forum is to encourage people who have small claim disputes to have their cases heard and determined without the

formality and associated expenses of the Supreme Court. Access to justice in that forum should not necessitate hiring an attorney. Access to Magistrate's Court should not be hampered by paying out legal costs that will oftentimes be more than what was being claimed. The Supreme Court, however, provides for greater recovery of costs but again it normally is not on a full recovery basis but rather what is known as the "standard basis" (defined as a reasonable amount in respect of costs reasonably incurred – Order 62 Rule 12 (1)).

7. Mr Sanderson argues that a party that has been successful before the IAT should recover his or her costs on the same basis as is provided for in the Supreme Court, namely the standard basis. The RSC pertaining to assessing costs on this basis should apply. Mr Sanderson asserts that the subject matter before the IAT is significant and has an enormous impact on the Appellant and his or her family. It is comparable to judicial review proceedings (appeals from Ministerial decisions to the Supreme Court where there is no specific right of appeal set out in the legislation).

8. Mr Perinchief argues that the IAT should adopt a hybrid approach and fall somewhere between what is allowed in Magistrate's Court and what is allowed in the Supreme Court, with the landing point being dictated by such matters as the complexity of the particular case, the public interest and the type of case (a status case arguably having greater implications than someone perhaps who is seeking permission to reside in Bermuda).

9. Both positions are informed by competing theories of access to justice. Both positions are worthy of consideration.

10. Having considered the competing arguments, I have determined that if costs are awarded by the IAT, those costs should be on the Supreme Court's standard basis for the following reasons:

    (i) The IAT is charged with resolving appeals from the Minister, the subject matter of which is of significant gravity: Bermuda status applications and revocations; PRC status applications and revocations; residency applications; revocation of work permits. At stake are potential benefits of or rights of residency, the ability to work and acquire property in Bermuda, and the right of the Minister to regulate these activities in accordance with the laws of Bermuda to ensure the interests of the public are protected. The gravity of the subject matter is considerable and the decisions of the IAT can have an enormous impact on both the Government (the public by extension) and the Appellant (his family by extension). The standard basis is appropriate for such matters.

    (ii) The 1956 Act is one of the more difficult pieces of legislation to grapple with as it incorporates a smorgasbord of immigration policies and nuances that are daunting even for experienced lawyers. Costs are inevitable and they ought to

be recoverable at a level that is commensurate with the complexity of the legislation.

(iii) The subject matter is consistent with the type of cases that the Supreme Court presides over. In fact, prior to the creation of the IAT, decisions of the Minister would be challenged by way of judicial review proceedings brought in the Supreme Court. If the Supreme Court made a cost order in favour of one of the parties it was on the standard basis.

(iv) It is to be expected that in most cases both parties will avail themselves of the right to legal counsel because of the importance and complexity of the subject matter and indeed this has been the experience of the IAT to date. The subject matter is not something that easily lends itself to self-representation and there is no underlying policy consideration (as exists in Magistrates' Court) which encourages self- representation. The stakes are often too high when it comes to appeals to the IAT. Reasonable provision needs to be made for the recovery of costs in favour of the successful party.

(v) While it is hoped that the parties will be able to resolve what amount the unsuccessful party must pay, the process for resolving any impasse must be predicable and result in consistent decisions. The Panel members that form the IAT are different from case to case and it is important that each Panel addresses the issue of costs in a consistent manner. This is unlikely to be achieved if the scale of costs to be applied is allowed to fluctuate (between the Magistrates Court scale and the Supreme Court basis) based on a particular Panel's view of the case before them.

(vi) It must be remembered that once the IAT has ordered that one party must pay the costs of the other, Rule 16 of the Immigration Rules requires the Registrar of the Supreme Court to assess the exact amount of the costs to be paid (what is known in the legal world as the taxation process). The Registrar (a judicial officer) is experienced in applying the methodology for the recovery of costs as provided for in the RSC, namely the standard basis. Absent the IAT coming up with its own scale of costs or method of cost recovery (which is permitted under section 13F (2) of the 1956 Act), it makes practical sense for the Registrar to apply the standard that she is familiar administering.

The fact that the Registrar is the designated judicial officer under Rule 16 of the Immigration Rules to oversee the taxation process does strongly suggest that it was intended that she would be applying the Supreme Court's standard basis for assessing cost recovery claims, at least until such time as the IAT considers it appropriate to adopt a different methodology.

(vii) Costs in Supreme Court proceedings are administered in accordance with Order 62. Order 62 Rule 2 (2) of the RSC extends or links the rules of this

particular Order to the IAT subject to such modification as may be necessary. Order 62 Rule 3 (4) states that the *"amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis"*. Order 62 Rule 1 as read with Rule 12 (1) explains what is meant by *"the standard basis"*: *"on a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party"*. Until such time as the IAT decides to depart from the Supreme Court's standard basis for assessing costs, Order 62 Rule 2 (2) as read with Order 62 Rule 3 (4) directs the Registrar to apply the standard basis.

(viii) The potential consequence of paying a cost order on the same basis as that of the Supreme Court serves as an additional encouragement for the thoughtful consideration of applications by the Minister and his advisors in the Department of Immigration, and a corresponding amount of thoughtful consideration on the part of the aggrieved applicant when an appeal is being contemplated from the Minister's decision.

11. Given the gravity and complexity of the subject matter and the need for predictability, costs should be assessed on the standard basis as provided for in the RSC.

12. The IAT is of course very much alive to the desirability of encouraging access to justice. As it is a relatively new appellate body, it intends to periodically monitor the implications of this cost Ruling and determine whether any adjustments need to be made or recommended. For instance, the IAT would not wish to see a situation where a person cannot have his day before the IAT because he truly cannot afford the possibility of being exposed to a cost order. In genuine cases of financial inability to withstand a cost order, the IAT should give significant weight to that factor before making a cost order.

13. For the avoidance of doubt and for future guidance, any legal costs incurred leading up to the Minister's decision in regard to a particular application are not recoverable by either party.

**DATED this 10th day of November 2014**

**Timothy Z Marshall, Chairman of the IAT**

**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.