

THE IMMIGRATION APPEAL TRIBUNAL

(CASE NO: 3 OF 2013)

**IN THE MATTER OF DECISIONS MADE ON OR ABOUT THE 5
JULY 2013 TO REFUSE BERMUDIAN STATUS (as Consolidated
by Order of the IAT on 14 August 2013)**

BETWEEN:

APPELLANT B

APPELLANT C

Appellants

- and -

THE MINISTER FOR HOME AFFAIRS

Respondent

APPEAL RULING

Hearing Date:Friday, 25 October 2013

Counsel who appeared:

Mr. Peter Sanderson, Wakefield Quin, Attorneys for the Appellants

Mr. Philip Perinchief, Representative for the Respondent

HISTORY

1. These appeals are brought against the decisions of the Minister delivered in both cases on 5 July 2013 rejecting the applications for Bermudian status on the grounds that the requirements of section 20B of the Bermuda Immigration and Protection Act 1956 ("the Act") had not been satisfied. In particular, the Minister refused both applications for Bermuda status on the basis that the applicants did not satisfy the provisions of section 20B(2)(b), neither individual having been approved for the grant of Bermudian status because they had not become a British Overseas Territory citizen "*having been approved for a grant of Bermudian status*".
2. The facts are not in dispute and so far as material are the same for both appellants. Both Appellants obtained Bermuda permanent residency certificates, one in 2007 and the other in 2009. They both became naturalized as British Overseas Territory ("BOT") citizens in 2012. They made applications for Bermudian status under section 20B and the Minister denied their applications relying upon the language set out in section 20B(2)(b) of the Act.
3. Counsel for the Appellants and the Respondent agree that the sole issue for determination by the IAT in this appeal is one of statutory construction, and, in particular, the effect and construction of section 20B(2)(b) which requires an applicant to be a BOT citizen by virtue of the grant to him by the Governor of a certificate of naturalization "*having been approved for the grant of Bermudian status*".
4. It is not in dispute that the IAT has the jurisdiction to determine these appeals. Section 20B(4) incorporates by reference the appeal rights set out in section 19 (8) of the Act. Section 19 (8) gives an express right of appeal to the applicants providing: "*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.*"

SECTION 20B OF THE ACT

5. Section 20B of the Act provides as follows (emphasis added):

20B

- (1) A person may apply to the Minister under this section for the grant to him of Bermudian status.

(2) This section applies to a person who is a Commonwealth citizen **not possessing Bermudian status**, was ordinarily resident in Bermuda on 31 July 1989 and either:

(a) (i) is a person at least one of whose parents possessed Bermudian status at the time of his birth; and

(ii) was born in Bermuda or first arrived in Bermuda before his sixth birthday; or

(b) is a **British Dependent Territories citizen by virtue of the grant to him by the Governor of a certificate of naturalization under the British Nationality and Status of Aliens Act 1914 (UK) or the British Nationality Act 1948 (UK) or the British Nationality Act 1981 (UK) having been approved for the grant of Bermudian status**; or

(c) being a woman, is a British Dependent Territories citizen by virtue of the grant to her by the Governor of registration under section 6(2) of the British Nationality Act 1948 (UK) with the result that she thereby acquired rights under section 4(2) of the Bermuda Immigration and Protection Amendment Act 1980.

and in relation to whom in addition the requirements of subsection (3) are fulfilled.

(3) The requirements referred to in subsection (2), in relation to an applicant for the grant of Bermudian status under this section, are as follows:

(a) **the applicant must have reached the age of eighteen years before the application was made;**

(b) **the applicant must have been ordinarily resident in Bermuda for the period of ten years immediately preceding the application.**

(4) Subsections (3) to (9) of section 19 shall have effect mutatis mutandis in relation to applications under this section as those subsections have effect in relation to applications under section 19.

6. It is not in dispute that the Appellants meet all the substantive requirements for the grant of Bermudian status under section 20B (section 19 will be addressed subsequently). Each are or were:

- a. Commonwealth citizens;
- b. Ordinarily resident in Bermuda on 31 July 1989;

- c. BOT citizens having received the grant of a certificate of naturalization from the Governor;
 - d. At least 18 years of age; and
 - e. Ordinarily resident in Bermuda for the period of ten years immediately preceding their application for the grant of Bermudian status.
7. The Minister decided to reject the applications for Bermudian status on the grounds that the applicants "[do] not meet any of the provisions above [section 20B] as [she/he] holds a permanent resident certificate and has acquired British Overseas Territory citizenship but has never been approved for Bermudian status outlined in subsection 2(b) above". (Decision letter of 5 July 3013)

PART III OF THE ACT

8. The statutory scheme providing for the acquisition and grant of Bermudian status is set out in full in Part III of the Act. Counsel for all parties agree that Part III is a complete statutory code for the grant of Bermudian status and it is not possible for any person to be approved for the grant of Bermudian status save for satisfying the Minister that they fall into one of the prescribed categories of person set out in Part III of the Act. Part III of the Act makes provision for the particular circumstances in which it is possible to acquire Bermuda status whether by birth, marriage, qualifying Bermudian connections, or, in the case of section 20B, long term residency.
9. Section 20B first appeared in the Act pursuant to the provisions of the Bermuda Immigration and Protection Amendment Act 1989. Section 20B was concerned, inter alia, to make specific provision for a particular class of non-Bermudian long term residents: namely long term residents present on the island as at the date of 31 July 1989.
10. It is not in dispute that the substantive characteristics that Parliament determined needed to be met prior to approval of any grant of Bermudian status pursuant to section 20B has been met by these Appellants. The only material issue is the statutory force and implication of the language in section 20B(2)(b) where BOT citizenship is to be obtained "*having been approved for the grant of Bermuda status*".
11. The parties agree that neither appellant made any application for the grant of Bermudian status in advance of their application for the grant of Bermudian status under section 20B, nor did they make any application for pre-approval for

Bermudian status prior to their application to the Governor to become a BOT citizen.

12. It was not in dispute, and was specifically conceded by counsel for the Minister that there is no process by which any applicant under section 20B can seek pre-approval in advance of any application to the Governor for BOT citizenship so as to satisfy the purported procedural criteria provided in section 20B (2)(b) - if that be the intent of the subject language.
13. It was conceded by counsel for the Minister that section 20B(2)(b) is unclear and ambiguous – the section refers to a process which is neither defined nor included in the statutory code for applications for the grant of Bermudian status.
14. Both counsel for Appellants and counsel for the Minister indicated that they were unable to locate any Hansard material of any Parliamentary debate which might assist the panel in understanding the purpose of this additional undefined approval requirement in the section providing for the naturalization (BOT) criteria. Counsel for the parties confirmed that the explanatory memorandum relating the amendments addressing residents of Bermuda as at 31 July 1989 did not contain any explanatory material on the subject language in section 20B(2)(b).
15. Ultimately, neither counsel for the Minister nor counsel for the Appellants were able to shed any light on the purpose of the procedural requirement in section 20(B)(2)(b) in the context of any earlier iterations of the legislation and despite questions from the panel. Accordingly, these provisions having survived in the Act in its current form, and with Part III of the Act being the complete statutory code for the acquisition of Bermudian status, the IAT interpret this provision in that context.

THE HEARING

16. Counsel for the Appellants presented a short but compelling argument. The position is that there are, in 2013, two different mechanisms by which a person can have permanent rights to reside in Bermuda. The grant of Bermuda status (under one of the provisions of Part III of the Act) and the grant of a "permanent resident's certificate" ("PRC") under Part IV of the Act. The former gives rise to full rights associated with citizenship – the right to vote, own property, run for public office, and so on. The latter category of PRC is more limited and carries no right to vote and qualified rights to own property.

17. It is contended that when there is any ambiguity regarding the interpretation of a statute which gives any franchise or voting rights that the ambiguity must be interpreted to confer the franchise. The Appellants relied on *Piercy v. MacLean* (1870) LR 5 CP 252.
18. Counsel for the Appellants further relies upon Article 25 of the International Covenant on Civil and Political Rights (ICCPR) (made applicable to Bermuda on 20 May 1976) . Article 25 states (paraphrasing) that every citizen shall have the right and the opportunity without unreasonable restrictions to take part in the conduct of public affairs, to vote and to have access on general terms to equality to public service in the country.¹
19. Counsel for the Appellants relies heavily on Article 25, referring to the Privy Council case of *Boyce v. R* (a case concerned with mandatory death sentence from the Barbadian courts). In *Boyce*, the majority of the Privy Council referred to the:

“well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the state’s international obligations. ‘So far as possible’ means that if the legislation is ambiguous (in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty] ... the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty”.
20. Counsel for the Appellants contends that the Appellants are naturalized BOT citizens who are recognised as belonging to Bermuda under the Constitution (article 11(5)(b) of the Bermuda Constitution Order 1968). It is a breach of Article 25 to deny a citizen the right to vote in the territory of their citizenship or to place unreasonable restrictions on the ability to obtain such a right. The reliance by the Minister on the language in section 20B(2)(b) to deny status being such an unreasonable restriction.
21. Counsel for the Minister did not address the issue of Article 25 of the ICCPR or the authorities relied upon by the Appellants. Counsel for the Minister relied on the strict words in section 20B(2)(b) stating that the applications for status were deficient having not met this criteria.

¹ Article 25 Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.

22. Counsel for the Minister in further submissions suggested that the Appellants' applications were further deficient, suggesting that sections 19(3) and (4) of the Act had not been met. It was suggested that the Appellants should have made a "fulsome application under section 20B including all of the information (police security clearances etc) that would cause the Minister to approve the Applicants/Appellants under section 19(3) and 19(4)".
23. However, given the fact that the Minister, in reaching his decision, was clearly relying upon (and cited) section 20B(2)(b) and did not cite nor rely upon sections 19(3) or (4) counsel for the Minister sensibly abandoned this submission and conceded that the Appellants had met all the substantive requirements for the grant of Bermuda status under section 20B save for the question of the pre-approval for Bermudian status in section 20B(2)(b) relating to the naturalization as a BOT citizen.
24. In addition, counsel for the Minister in his written submissions referred the IAT to an extract of the opinion of the Attorney-General's chambers dated 23 May 2013. It is notable that this Opinion which is solely concerned with opining on the narrow issue of the meaning of the phrase "*having been approved for the grant of Bermudian status*" in section 20B(2)(b), extends to some 105 paragraphs, cites numerous difficulty with interpretation and comes to no firm conclusion on the meaning of the phrase. In the event, counsel for the Minister relied only on an extract of that opinion (paragraphs 22-53) and not the ultimate conclusions on construction which were not argued nor relied upon.
25. Most significantly, however, as stated above, counsel for the Minister conceded that there was no pre-approval process available for applicants for Bermuda status under section 20B(2)(b). He further conceded that the statutory provision was clearly ambiguous in its application.

THE IAT'S RULING AND REASONS

26. The IAT has considered section 20B(2)(b) and its possible meaning against the background of the entirety of Part III of the Act which sets out the complete statutory code for the acquisition and enjoyment of Bermudian status. The IAT struggled to give any sensible meaning to the phrase "*having been approved for Bermuda status*" in a subsection of a statutory provision which is itself concerned with the grant of Bermudian status. While this language in section 20B(2)(b) may have had an ancillary purpose at some point in its legislative history, it has no demonstrable relevance today.

27. The IAT find that the Appellants having met all the substantive requirements for the grant of Bermudian status under section 20B (including the requirements of sections 19(3)-(4)), should have their appeals allowed. The Appellants should not be denied Bermudian status in reliance on a failure to meet a procedural requirement which neither exists nor as a matter of common sense can be applied, being hopelessly circular in its application (requiring an applicant for the grant of status to first obtain approval for status).
28. The IAT therefore disregards the language in section 20B(2)(b) "*having been approved for Bermudian status*" as a phrase to which no sensible meaning can be given. The IAT rely upon Bennion on Statutory Interpretation which was referred to in the Attorney General's Chambers opinion cited by counsel for the Minister (paragraph 86):
- "it may happen however, that no sensible meaning can be given to some word or phrase. It must then be disregarded. As Brett J said: "it is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated" (Bennion on Statutory Interpretation, Fifth Edition, page 1157)."
29. The IAT further finds that when interpreting statutory provisions connected to Bermudian status and citizenship it is appropriate and consistent with public policy as well as the aforementioned international treaty obligations to interpret such provisions broadly, and in the event of ambiguity, in favour of the applicant for Bermudian status. It is for Parliament to be clear and purposive in its drafting of legislation connected to citizenship. On any basis this language is unclear and ambiguous in its application. Therefore, the ambiguity in section 20B(2)(b) should be construed as far as possible so as to avoid domestic law creating a breach of Article 25 of the ICCPR. As the primary purpose of section 20B(2)(b) so far as the requirement of BOT citizenship has been met, and with the Appellants now meeting all the substantive requirements of section 20B, the Appellants should be granted Bermudian status so as to confer the full rights available to them as citizens of Bermuda.
30. Finally, the IAT, in accordance with its statutory power and authority granted under section 124 of the Act, has determined that for the reasons cited in paragraphs 27-29 above that it is just that the Appellants be granted Bermudian status.

31. For the foregoing reasons, the appeals are allowed and pursuant to section 13D (1)(b) of the Act the decision of the Minister dated 5 July 2013 is quashed and the Minister is directed to issue certificates of Bermudian Status under section 21(1) to the Appellants.

DATED this 25 day of October 2013



Ms Kiernan J Bell, Deputy Chairman, IAT



Ms J E Belinda Wright, IAT Member



Mr Clement Talbot, 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.