

THE IMMIGRATION APPEAL TRIBUNAL

(Case No. 4 of 2014)

**IN THE MATTER OF A REFUSAL OF AN APPLICATION FOR A 31B PRC
IN RESPECT OF THE APPELLANT BY THE MINISTER OF HOME
AFFAIRS DATED ON OR ABOUT 4 MARCH, 2013**

**AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND
PROTECTION ACT 1956 (AND AMENDMENTS)**

**AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND
PROTECTION (APPEAL) RULES 2013**

BETWEEN:

APPELLANT G

Appellant

v

THE MINISTER FOR HOME AFFAIRS

Respondent

APPEAL RULING

Hearing Date: Wednesday, 11 December 2013

For the Appellant:

Appellant appeared in person, accompanied by his uncle,
(present with the consent of counsel for the Respondent)

For the Respondent:

Mr. Philip Perinchief, A-G's Chambers

HISTORY

1. The Appellant has appealed to the Tribunal from a decision of the Minister refusing his application for a Permanent Resident's Certificate ("PRC") under section 31B of the Bermuda Immigration and Protection Act 1956 ("the Act").
2. The Appellant filed his application for a PRC on 29 May 2012 and was notified by the Department of Immigration ("the Department") on 4 March 2013 that his application was unsuccessful. The reason for the refusal set out in the letter of 4 March 2013 was that the Appellant had not met the necessary criteria as the Appellant's father had not acquired his PRC under the provisions of section 31B of the Act.
3. The Tribunal, pursuant to a Directions Order, directed the disclosure of all documents connected to the Appellant's application under section 31B as well as all documents connected with the Appellant's father's earlier application for a PRC.

BACKGROUND

4. The Appellant's father made his application for a PRC under section 31B of the Act in 2003. At the time the father was 37 years of age and he had been in Bermuda since the 29 June 1988. He did not, therefore, satisfy the criteria necessary to apply for a PRC under section 31A of the Act, which at the material time required that an applicant:
 - (a) be ordinarily resident in Bermuda on or before 31 July 1989;
 - (b) be ordinarily resident in Bermuda for a period of 20 years;
 - (c) be ordinarily resident in Bermuda for the two years immediately preceding the application;
 - (d) on the date of the application be not less than 40 years of age;
 - (e) make the application **before 1 August 2010**. (Emphasis added)
5. In 2003, the Appellant's father obtained his PRC pursuant to the provisions of section 31B of the Act. However, and this is important, as soon as he turned 40 on the 21 November 2005 the father was eligible to apply for a section 31A PRC.
6. It is not in dispute that he did not do so – and so it was that at the time that his son, the Appellant, was seeking his PRC under section 31B of the Act that the Appellant did not qualify for his PRC on the basis that he did not fall within one of the categories enabling him to apply after 1 August 2010 (namely being the son of a section 31A PRC holder).

7. Section 31B(1) enables a person to whom section 31B(2) applies to apply to the Minister for the grant of a PRC when that person is:
 - (a) at least 18 years of age;
 - (b) has been ordinarily resident for a period of ten years immediately preceding the application; and
 - (c) subject to subsection (6) he makes his application **before 1 August 2010**. (emphasis added).
8. Section 31B(2) sets out the qualifying connections to Bermuda which enable a person to apply under section 31B – for example – if the person is a brother or sister of a person with Bermudian status, the spouse of a section 31A PRC holder or the natural parent of a Bermudian, and so on.
9. Section 31B(6) sets out the only circumstances where the time bar of 1 August 2010 does not apply – providing that “subsection (1)(c) *does not apply to a person referred to in subsection 2(e) or (f)*”.
10. Subsection (f) is a spouse of a section 31A PRC holder and therefore not relevant. However, subsection (e) provides for “*the son or daughter of a person who has been granted a PRC under section 31A where that son or daughter is above the upper limit of compulsory school age*”.
11. As set out above, it was not in dispute that the Appellant’s father would have obtained a section 31A PRC had he applied for one at any time after he turned 40 in 2005.
12. Unfortunately the Appellant’s father had recently passed away and was not available to give evidence. However, the Appellant was compelling in his evidence that had his father known that he should have “upgraded” his PRC to a section 31A PRC to protect his son, who lived in Bermuda since he was an infant, he would most certainly have done so.
13. Counsel for the Respondent, with the consent of the Appellant, filed supplemental submissions in January on the information made available to the public at the material time. Notably, the document entitled “*Information for Long Term Residents who wish to apply for Bermudian Status or a Permanent Residents Certificate*” does not in a clear and express way highlight the distinction between a section 31A and a section 31B PRC. In fact, the very first question addressed in the pamphlet on PRCs asks: “*Who is eligible for a Permanent Residents Certificate*” and does not at that point state that there are two different types of PRC with different eligibility requirements. Instead, the document in substance focusses on giving information to potential section 31A applicants and not section 31B applicants.

14. While it is fair to say that the careful reader might, on a thorough reading of the document, appreciate that there is more than one type of "PRC" and that not all PRC's are created equal – it is not spelled out. In fact, the only discussion of the 'other' type of PRC comes under the heading "*Dependants*" and in particular question 25 which asks: "*Which persons can apply for the PRC besides those already discussed in paragraph 14*" and the answer states (without specifically referencing section 31 B of the Act) "*the following dependants of Bermudians, or "primary" PRC holders may apply for a PRC*". The answer then simply lists the categories of person set out in section 31B of the Act – which to confuse matters further despite the heading "*dependants*" includes non 'dependants' – for example – including the natural parent of a Bermudian where the parent does not qualify for the grant of Bermudian status. It then states "*a "primary" PRC holder is a person who obtained the certificate in his or her own right by fulfilling the requirements listed in paragraph 14 above*".
15. What is not stated anywhere in this information pamphlet is that one could both be a PRC holder under section 31B – (in this instance, the Appellant's father was the father of a Bermudian child) and then ALSO before the necessary date of August 2010 become qualified to be the so called "primary" PRC holder and that in that event, one should upgrade to a section 31A PRC. Put simply, members of the public may not have known the significant differences between a PRC under section 31A and that granted under section 31B and, that they should – if eligible – upgrade from a 31B to a 31A PRC.
16. In this instance, the failure of his father to appreciate the difference between a section 31A PRC and a section 31B PRC means the world to a young man who was a minor at the relevant time and whose life now hangs very much in the balance.

THE HEARING

17. On the date of the hearing, 11 December 2013, the Appellant spoke very eloquently on his own behalf and he is to be commended for his poise and conduct during the hearing. His essential point was that in principle he meets all the substantive criteria laid out by statute for a section 31B PRC save for a very technical defect – namely that his father - who no one disputes was eligible under the Act for a section 31A PRC never 'upgraded' his PRC from a section 31B to a section 31A prior to 1 August 2010.
18. Counsel for the Minister and the Appellant assisted the IAT by providing us with the background to this matter set out above. In addition, Counsel for the Minister confirmed that while the Minister had no discretion to override the express provisions of section 31B, that the Tribunal does have a broader discretion to make such order as appears "just" under section 124 of the Act.

THE TRIBUNAL'S RULING AND REASONS

19. The Tribunal, on the basis of the facts set out above, has determined that in this case it is appropriate and just for the Tribunal to exercise its discretion in favour of the Appellant. The Tribunal makes an order that the Appellant be granted a PRC pursuant to the provisions of section 31B on the basis of the following facts that are not disputed:
- (a) he meets the substantive criteria of section 31B – being the son of a father who met all the criteria to have a section 31A PRC (and who had already received a section 31B PRC);
 - (b) he has substantial other connections to the jurisdiction having a Bermudian sister and other family members in Bermuda; and
 - (c) he has spent the formative years of his life in Bermuda having resided in Bermuda since he was a baby.

DATED this 18th day of April 2014



Ms Kiernan J Bell, IAT Chairman



Mr Francis R Mussenden



Mr Jon Brunson

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.