

THE IMMIGRATION APPEAL TRIBUNAL

(Case No. 5 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 21 SEPTEMBER 2011**

**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 H

Appellant

-and-

THE MINISTER FOR HOME AFFAIRS

Respondent

APPEAL RULING

Hearing Date: Friday, 21 February 2014

Appellant Represented by:

Appellant represented in person accompanied by her husband

v

Respondent Represented by:

Mr. Philip Perinchief, for A-G's Chambers;

HISTORY

1. The Appellant is appealing to the Tribunal from a decision of the Minister refusing her application for a Permanent Resident's Certificate ("PRC") pursuant to section 31B of the Bermuda Immigration and Protection Act 1956 ("the Act"). The Minister refused the Appellant's application for a PRC because the Appellant did not meet the statutory requirements of section 31B as she is not the spouse of a person who has been granted a PRC pursuant to section 31A of the Act. Section 31B(4) as read with section 19(8) provides the Immigration Appeals Tribunal ("Tribunal") with the jurisdiction to determine any appeal against such decision.
2. It is common ground that the Appellant is the wife of a person who was granted a PRC under section 31B of the Act, not section 31A.
3. However, that is not the end of the matter. The question for the TRIBUNAL is not simply whether or not the Appellant meets or does not meet the statutory requirements of section 31B, but whether, in 2008, following her application for a section 31B PRC on 8 February 2008, she was advised by the Department of Immigration ("the Department") that she would be eligible for a PRC under section 31B once she had been married to her husband for ten years.

4. Chronology

- a) August 1989 and thereafter – the Appellant, a physician, starts doing locum work for a Bermudian doctor and does so for at least 10 visits until 1994.
- b) 5 July 1994 – the Appellant arrives in Bermuda to work full time as a physician.
- c) 5 February 2001 – the Appellant marries her husband.
- d) 2002 – the Bermuda Government amends the Act to provide for long term residents to obtain rights of long term residency known as a "Permanent Resident's Certificate" inserting new provisions – sections 31A and 31B.
- e) 2006 – the Appellant's husband having satisfied the 10 year requirement obtains his PRC under section 31B of the Act. The Appellant's husband had one surviving Bermudian sibling.
- f) 8 February 2008 the Appellant applies for a PRC under section 31B of the Act.
- g) 20 February 2008 – the Department of Immigration writes to the Appellant and advises *"Even though you have been in Bermuda since 1 July 1994 for the purposes of this application your ordinary residence does not begin*

until the date of your marriage to [husband] which was 5 February 2001. Based on these facts you will not become eligible to apply under this section until 5 February 2011 when you will have met all the necessary requirements”.

- h) 10 February 2011 – the Appellant submits her application for a PRC.
- i) 21 September 2011 – the Minister refuses the application on the grounds that the Appellant is not a spouse of a person who has been granted a PRC under section 31A where that spouse does not qualify for the grant of Bermudian status.

The Evidence

- 5. The evidence of the Appellant, and her husband, which was given to the Tribunal and accepted by the Tribunal, was that had the Appellant been told by the Department in 2008 that she would not qualify for a PRC under the Act that she would have taken a different course. In particular, the Appellant, if she had known that she would have had no job security would not have continued to build a successful medical practice which is now tied to her and her reputation alone. The Bermudian practitioner who holds the Appellant's work permit has for many years been semi-retired - is clear that the Appellant for all intents and purposes is the practice which employs three Bermudians.
- 6. The Appellant was also compelling in her evidence when she stated that she believed that she would be entitled to a PRC and neither she nor her husband had appreciated the differences between a PRC granted under section 31A of the Act to a PRC granted under section 31B.
- 7. For this reason, when she received the letter from the Department in 2008 telling her that she would be eligible for PRC in 2011 she believed it and carried on working to build her practice and her life, and that of her children's and husband's lives, in Bermuda. Her children have four Bermudian cousins and extended family who are Bermudian and live in Bermuda.

The Act – sections 31A and 31B

- 8. At the time of the 2002 amendments a person could apply and receive a section 31A PRC if that person was:
 - a) ordinarily resident in Bermuda on or before 31 July 1989;
 - b) ordinarily resident in Bermuda for a period of 20 years;
 - c) ordinarily resident in Bermuda for the two years immediately preceding the application;

- d) on the date of the application is not less than 40 years of age;
 - e) applied before 1 August 2010.
9. 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).
10. Section 31B(2) sets out the qualifying connections to Bermuda which enable a person to apply for a PRC 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.
11. 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)”*.
12. Subsection (f) applies to a spouse of a section 31A PRC holder.
13. It is apparent from the facts of this case there is confusion about the different ‘type’ of PRC, the interplay between the two types and the eligibility for same – and this confusion has not been limited to members of the public like the Appellant. In this instance even the Department had difficulties construing the provisions and determining the entitlement to a PRC- hence the misrepresentation made to the Appellant about her eligibility to apply for a PRC in 2011.

THE TRIBUNAL’S RULING AND REASONS

14. It is common ground that the Tribunal has the discretion under section 124 to determine any appeals against decisions of the Minister under section 31B *“and may make such order as appears to [the Tribunal] to be just and the Minister shall govern himself accordingly”*. It is common ground that the Tribunal may take into account matters which were not before the Minister and has a discretion broader in scope than the Minister to do what is ‘just’.

15. In this instance, the Tribunal exercises its discretion in favour of the Appellant and grants the Appeal, on the basis it is just to do so.
16. The Tribunal, in considering the question of what is just, finds that the 2008 letter from the Department clearly advised the Appellant on her first application for a PRC that she would qualify under the provisions of section 31B once she had been married to her husband for 10 years. Notably, the Appellant applied for her PRC within days of the relevant date threshold being met.
17. The Tribunal finds that the Appellant relied on this representation from the Department in good faith and had an expectation of receiving her PRC in 2011, conducting herself accordingly.
18. Furthermore, in exercising its discretion, the Tribunal takes into account the fact that the Appellant has many substantial connections to this jurisdiction having now resided in Bermuda for 20 years. The Appellant has invested herself and her skills in the community building a medical practice (which employs Bermudians), she has an extended Bermudian family. Her children have Bermudian cousins, aunts and uncles. Her husband is a PRC holder. She and her family contribute to the community in many ways with her husband being engaged in a number of philanthropic efforts while she is the family's primary breadwinner.
19. In the premises, the appeal is granted and the Minister is directed to issue the Appellant with a PRC under section 31B.

DATED this 18th day of April 2014



Ms Kiernan J Bell
Immigration Appeals Tribunal Deputy Chairman



Ms J E Belinda Wright, Panel Member



Major Kenneth Dill, Panel Member

IMPORTANT NOTICE: Where a person is aggrieved by a decision of the Tribunal, 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.