THE IMMIGRATION APPEAL TRIBUNAL

(Case No: 6 of 2014)

IN THE MATTER OF AN APPEAL OF THE DECISION MADE BY THE MINISTER OF HOME AFFAIRS ON OR ABOUT 30th MAY, 2011, REFUSING AN APPLICATION BY THE APPELLANT UNDER SECTION 31A OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956 (AND AMENDMENTS)

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

***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**

BETWEEN:

APPELLANT I

Appellant

-and-

THE MINISTER OF HOME AFFAIRS

Respondent

APPEAL R U L I N G

Hearing Date: Friday, 13 December 2013

Counsel who appeared:

Mr Henry Tucker (Appleby (Bermuda) Limited, attorneys for the Appellant)
Mr Philip Perinchief, representative for the Respondent

HISTORY

1. The Appellant made an application for a Permanent Resident's Certificate ("PRC") under the provisions of section 31A of the Bermuda Immigration and Protection Act 1956 ("the Act"). Under the section the applicant must meet the following requirements:
   (a) was ordinarily resident in Bermuda on or before 31 July 1989;
   (b) has been ordinarily resident in Bermuda for a period of twenty years;
   (c) was ordinarily resident in Bermuda for a period of two years immediately preceding the application;
   (d) is, on the date of application, not less than forty years of age;
   (e) makes his/her application before 1 August 2010.

2. This provision (which was subsequently repealed) was brought into force to bestow rights of residency and employment to those long terms residents of Bermuda who met the requirements.

3. The Appellant was an exceptional applicant and has all the attributes that a society should ordinarily welcome with open arms. She arrived with her parents when she was 11 years of age in August 1983 and Bermuda has been her home ever since or put another way her place of ordinary residence for over 20 years. The Appellant excelled in school and through hard work and determination eventually qualified as a Chartered Accountant (no easy feat). Her entire professional career has been spent in Bermuda. After working for many years with XXX, she joined YYY and is now the company's Head of Operations (VP Operations). The Appellant has devoted substantial time to the Institute of Chartered Accountants of Bermuda and to training students. She is fully engaged in her community. Her application was enthusiastically supported by her employers and colleagues. Sounds like the perfect applicant.

4. The Appellant met all of the requirements of section 31A except, unfortunately, she at the time of her application was 38 years of age and therefore did not meet the minimum age requirement of 40 years. She asked the Minister to make a special exception to this particular qualifying condition.

5. By letter dated 30 May 2011 the Appellant was notified that the Minister had refused her application for PRC because she did not meet the minimum age requirement.

6. Legislation that provides for an application process to acquire rights or privileges often times sets deadlines and age restrictions. When there is only one shot at securing those rights or privileges it is always heart wrenching when an ideal candidate falls just short of a qualifying requirement. The Appellant's disappointment is readily understood.

7. By letter dated 13 June 2011 ("the Appeal letter") Appleby's filed an appeal on behalf of the Appellant.

JURISDICTION OF THE IAT

8. Under the provisions of section 31A (6) of the Act, as read with section 19 (8), the Appellant has a right to appeal the Minister's decision to the Immigration Appeal Tribunal ("IAT").

GROUNDS OF APPEAL

9. Appleby in the Appeal letter acknowledges that the Appellant was 38 years of age at the time of the application but argues that she should receive special dispensation as it is just fair and equitable and the right thing to do. It is argued that to do so creates no floodgate arguments as the time for applying for PRC has expired long ago and in any event it is unlikely that any other applicant of a similar age would have the Appellant's exceptional qualities. Referencing the White Paper that gave rise to this particular PRC program, it was furthered argued that the intended purpose of the legislation was to recognize the rights and dignity of long term residents, and to fail to give the dispensation would be unjust to the Appellant, discriminatory on the grounds of her nationality and her age.

RESPONSE

10. The Minister filed a very brief Response to the grounds of appeal. The Appellant was in fact and in law 38 years of age at the time of the application and therefore less than forty years of age. She did not meet the 40 year age requirement of section 31A (c) of the Act, and as such the Minister refused the grant of a PRC. While not stated with clarity, it appears that the Minister's position was that the Act says what it says and he has no discretion or power to relax the law.

HEARING

11. The hearing proceeded on the record of documents that were previously submitted to the Minister, with no additional evidence being called. Appleby did, however, refine their arguments by submitting written submissions on the day of the hearing together with a bundle of authorities. Mr Perinchief graciously did not seek an adjournment but was content to consider the material there and then.

12. Appleby's did not pursue the nationality or age discrimination arguments but rather advanced two interesting arguments both of which attempt to address the central question: "how can the IAT relax a legislative requirement?"

13. Mr Tucker with considerable force offers two intersecting answers. His first answer is that there is a line of cases (set out in the Ex Tempore Ruling of the Chief Justice dated 21 June 2013 in Civil Case 2013 No 84, Tab 5 of the Appellant's bundle) that allow a Minister or a tribunal such as the IAT a degree of wiggle room in processing an application provided the legislative requirement is procedural in nature as opposed to a substantive requirement. An easy example of this might be where the legislation requires a certain form to be used but the applicant mistakenly uses a different form but the relevant information is still included. That would be a procedural mistake or oversight that really does not prejudice anyone. What form is used really does not go to the substance of the application and does not address whether the applicant has met the substantive requirements of the legislation. Another example is where a statutory or regulatory deadline for submitting a particular application is missed. The person may have been overseas and not aware of the deadline or the application may have been delivered to the wrong address or the applicant's agent made a mistake and missed the deadline. The Minister may if he or she considers it appropriate to nonetheless process the application on the basis that there is no prejudice to anyone and it is just to

determine or rule on the substance of the application. When there is an error in a procedural requirement, the common law sensibly gives Judges, Ministers and Tribunals discretion to forgive the oversight and deal with the substance of the matter. Mr Tucker invites the IAT to find that the age requirement of not being younger than 40 years of age at the time of the application is a procedural requirement that can be relaxed much in the same way that a form or deadline requirement could be relaxed.

14. The second answer presented by Mr Tucker is that section 124 of the Act gives the IAT broad powers to do what is just and if a requirement of the Act is not strictly met it can be relaxed if the overall requirements or spirit and intent of the provision (taken as a whole) is met. He argues that section 124 of the Act allows the IAT to do what is just rather than what is dictated by the provision.

15. Mr Perinchief from start to finish was sympathetic to the Appellant's circumstances. It is like the marathon runner who has done all that she can possibly do to train and qualify for a marathon but falls two minutes short of the qualifying time. Your heart goes out to her. The reality of this appeal is that everyone wanted to push The Appellant over the finish line. Mr Perinchief's position was that as much as the Minister may have wished to relax the age requirement, he could not. His duty was to follow the law and give effect to it. The legislature did not reserve for the Minister a power or discretion to rewrite the age qualification provision. He acknowledged that the IAT by virtue of section 124 does, however, have significant powers but he was somewhat hesitant to define the extent of those powers save to say the IAT can in certain cases do what a Minister cannot do. He reiterated that the Minister's hands were unfortunately tied.

16. In regard to whether the common law allows a Minister or Tribunal to relax a requirement in an Act depending on whether the requirement is substantive or procedural, Mr Perinchief accepted the authorities that were belatedly submitted by Mr Tucker but was of the view that the provision was substantive and that age requirements are often times a feature of rights or privileges bestowed by the legislature.

RULING

17. The Appellant is a good, productive member of our society. She has grown up in Bermuda and Bermuda is the only home she really knows. The Appellant has worked hard to achieve professional goals which benefits Bermuda in numerous ways. She consistently gives back to Bermuda. As much as the IAT would like to push the Appellant over the finish line and acknowledge her connection, commitment and contribution to Bermuda by directing the Minister to grant her a PRC, we too find that our hands are tied by the limitations of the law and our power.

18. The age requirement is not a procedural requirement but a substantive, qualifying requirement. The legislature gave it careful consideration. It is not an arbitrary line drawn in the sand but one that was done with some thought. The requirement is not in the nature of a procedural requirement such as using a particular form or submitting the application by a certain date. It is an attribute of the person that the legislature in its wisdom decided was important much in the same way as legislature decides at what age a person should be permitted to drive. People may disagree with the age that is selected or the rationale for the age but it is not merely a procedural requirement that can be relaxed by a tribunal.

19. It may be argued that in the case of a driver's licence, the age requirement is grounded in public safety concerns and from that perspective it is not arbitrary but in the case of a PRC application, age without more information seems arbitrary. Government's paper "Bermuda's Long –Term Residents: A Discussion Paper" (found in the Appellant's bundle at Tab 8) however explains at paragraph 5.03.04 why the legislature considered that an age qualification date was appropriate and while we might disagree with their view, the age requirement was grounded or connected to a policy that had been debated and passed by the legislature. It was not an arbitrary age plucked from thin air. Prior to the introduction of the Permanent Resident's Certificate there was the Working Resident's Certificate which required the applicant to establish 20 years of residency accompanied with 15 years of employment. The intent was that this Certificate was aimed at giving security of tenure to people who have worked and resided in Bermuda for a significant period of time. Lengthy Residency (20 years) was not considered enough; it needed to be accompanied by a tangible benefit to Bermuda and that benefit was pinned to the length of full time employment (15 years). The implementation of this Certificate brought forth valid criticisms. Spouses who raised children or worked part time or contributed their time to charities argued that their contribution was as much value to the community as being in full-time employment. Government listened and agreed that *"it is desirable to restrict the Permanent Resident's Certificate to those persons who have been economically and socially active in the economy for a significant portion of their lives".* No longer would the grant of the Certificate be restricted to those who maintained a fulltime job in the traditional sense. However, it was thought that there should be an age qualification to protect job opportunities for Bermudians and to ensure that Bermudians were not subjected to undue competition in the workplace. The Government thought that the best way to accomplish these objections was to impose the minimum age of 40 years. The history behind the age requirement, whether one agrees with the rationale for it or not, demonstrates that it is a substantive requirement that an applicant must satisfy and as such the law does not give the IAT the power to relax such a requirement.

20. Turning now to section 124 and the IAT's power to do what is just. The provision states that the IAT *"may make such order as appears to him just; and the Minister shall govern himself accordingly."* This is a very wide power and it must have been enacted in such terms by the legislature so as to ensure that an appeal should receive the fullest possible consideration. *(See: Haldane v Haldane [1977] AC 673 and Drummond v Council of Peebles, 1937 SC 36).* This wide power though is set in a legislative and legal framework which defines its boundaries. The legislature and the Act have not given the IAT a god-like power to rewrite the Act if our notion of what is just is at odds with the provisions contained therein. Some of the provisions may be archaic and unduly restrictive for the times we live in, but the IAT must take the law as it finds it, and be guided by it. The power to do what is just under section 124 of the Act is inseparable from doing what is lawful.

21. As much as the IAT would like to ignore or relax section 31A (1) (d) of the Act, it cannot do so. That substantive requirement is a statutory provision which the legislature duly enacted and which must be applied and followed. If it were otherwise, there would be no certainty in the law and its application would become arbitrary. Where would it stop? If we could amend the age requirement for the Appellant, should we then amend the 20 year ordinary residency requirement (section 31A (1) (c)) for the person who missed that requirement by a year or should we amend the requirement that an applicant must have been ordinarily resident in Bermuda on or before 31 July 1989 (section 31A (1) (a)) when

we are confronted with a person whose residency commenced in August 1989? The answer in each of these cases is no. One can see that the law would become very uncertain and arbitrary if the goal posts could be moved by the tide of understandable sympathy that accompanies those who fall short of meeting the requirements. Those posts can only be moved by the legislature and it is for the legislature to reflect upon whether it would have and should have passed legislation that casts a wider or more flexible net had it been aware of the Appellant's circumstances or others with similar long term ties to Bermuda.

22. In the event the Appellant decides to appeal this decision which, of course, is her right, it may be helpful for the Court and the parties to know that if the IAT had the power to rewrite or relax the age requirement, we would have unanimously and happily done so. In all other respects, the Appellant met the requirements of section 31A of the Act.

23. **Pursuant to section 13D (1) (a) of the Act, the IAT confirms the decision of the Minister.**

DATED this 22nd day of April 2014

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Timothy Z Marshall, Chairman of the IAT

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Francis Mussenden, IAT Member

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JD Massa, 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.