THE IMMIGRATION APPEAL TRIBUNAL

(Case No: 10 of 2014)

IN THE MATTER OF AN APPEAL OF THE DECISION MADE BY THE MINISTER OF HOME AFFAIRS ON OR ABOUT 8 JULY 2013, REFUSING AN APPLICATION FOR THE GRANT OF BERMUDIAN STATUS UNDER SECTION 19 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

BETWEEN:

APPELLANT N

Appellant

-and-

THE MINISTER OF HOME AFFAIRS

Respondent

APPEAL R U L I N G

Hearing Date: Friday, 23 April 2014 and resumed on Friday, 9 May 2014

Appellant represented herself

Counsel who appeared:

Mr Philip Perinchief, representative for the Respondent

HISTORY

1. The Appellant made an application for Bermudian status under section 19 (1) of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act") which is headed "Right of persons with Bermudian connection to Bermudian status". Under the section the applicant must meet the following requirements:

   (a) must be a Commonwealth citizen of not less than eighteen years of age;
   (b) must have been ordinarily resident in Bermuda for the period of ten years immediately preceding the application for Bermudian status; and
   (c) must have a qualifying Bermuda connection.

2. Section 19 (2) of the 1956 Act states that First Schedule A shall have effect for the purpose of determining whether a person has a qualifying Bermudian connection. The Schedule sets out a short list of significant and enduring ties or connections; one of which must be met by the applicant if he or she is to qualify for status. The connection that features in this appeal and which the Appellant contends she met is the requirement under paragraph 2 sub-paragraph C that the applicant must *"be a person who at any time had been deemed to be domiciled in Bermuda under the Immigration Act 1937 by reason of residence in Bermuda for a number of years."*

3. The Appellant completed her application form and provided all the necessary information for the application to be considered. The application form is dated 8 February 2013.

4. By letter dated 8 July 2013 the Department of Immigration informed the Appellant that the Minister had refused her application because the Department's records indicated that she did not meet any of the requirements of section 19 (1) and (2) of the Act as read with First Schedule A. The Department set out the entirety of sections 19 (1) and (2) and paragraph 2 sub-paragraph A of First Schedule A but unhelpfully, the letter does not specify in what way the Appellant did not meet the requirements. The only way to read the letter is that the Minister has concluded that the Appellant is not a Commonwealth citizen, does not meet the ordinary residency requirement of 10 years and has no qualifying Bermudian connection.

GROUNDS OF APPEAL

5. By notice dated 12 July 2013 the Appellant appealed the decision to the Immigration Appeal Tribunal ("IAT") and subsequently in a Notice of Grounds of Appeal dated 26 July 2013 she advanced three grounds of appeal:

   (i) the Appellant qualifies for the grant of Bermudian status under the 1956 Act by virtue of the fact that she meets all of the criteria set out in section 19 of the 1956 Act.

(ii) The Minister based his refusal on paragraph 2 sub–paragraph A of First Schedule A of the 1956 Act which is a different provision from that on which the Appellant seeks to rely; and

(iii) The Appellant meets the requirements of paragraph 2 sub-paragraph C of First Schedule A of the 1956 Act, namely that she is a person who at any time would be deemed to be domiciled in Bermuda under the Immigration Act 1937 ("the 1937 Act"), by reason of her residence in Bermuda for a number of years, and such requirement has been satisfied throughout the ten year period immediately preceding her application in accordance with section 19 (1) (b) of the 1956 Act.

RESPONSE

6. The Minister filed his Reply or Response on 5 February 2014 and strangely was not aware of the Grounds of Appeal as the Response mistakenly states that save for correspondence dated 8 February 2013 that was submitted with the application, no added or formal or separately defined Grounds of Appeal have been proffered to date by the Appellant. The Minister repeats that the Appellant does not qualify for the grant of Bermudian status under sections 19 (1) and (2) of the 1956 Act. He asserts that the IAT has no power under section 124 of the 1956 Act to rewrite section 19 and finally he maintains that no rights of the Appellant have been violated.

JURISDICTION OF THE IAT

7. Under the provisions of section 19 (8) of the 1956 Act, the Appellant has a right to appeal the Minister's decision to the IAT.

HEARING

8. On 23 April 2014 the parties appeared before the IAT. The Appellant skillfully outlined her argument which was set out in written submissions presented to the IAT that morning. On the application of Mr Perinchief, an adjournment was granted to give him an opportunity to consider the written submissions.

The argument presented by the Appellant

9. The Appellant was born in Port of Spain, Trinidad and Tobago on 31 May 1970 and as such is a Commonwealth citizen who is not less than eighteen years of age. This status and age is not challenged by the Minister and as such the first requirement of section 19 (1) of the 1956 Act is met and is not an issue in this appeal.

10. The Appellant took up residence in Bermuda in November 2001 after having obtained a work permit. She has lived in Bermuda ever since save for a temporary, six month posting in the British Virgin Islands to set up an office for her Bermuda employer. The Appellant no longer works but resides in Bermuda as a spouse of a work permit holder. She considers Bermuda to be her home and has strong family connections, such as her father (who now has Bermudian status), her Bermudian stepmother and her Bermudian stepbrother. While nothing turns on it for the purpose of this appeal, her father married the Bermudian later in life when the Appellant was an adult. By virtue of making Bermuda her home since 2001, the Appellant says that the second requirement under section 19 (1) of the Act of being ordinarily resident in Bermuda for a period of ten years immediately preceding the application for status has been met. The Appellant made her application on 8 February 2013 and it was received by the Department of Immigration on 11 February 2013.

11. Mr Perinchief informed the IAT that the Minister does not necessarily accept that the Appellant has been ordinarily resident in Bermuda, however, his opposition to the grant of Bermudian status is based on a more fundamental objection (which we will come to).

12. As for the third requirement of section 19 (1) of the 1956 Act, the Appellant asserts that she has a qualifying Bermudian connection. She relies on paragraph 2 sub-paragraph C of First Schedule A and asserts she is *"a person who at any time had been deemed to be domiciled in Bermuda under the Immigration Act 1937 by reason of residence in Bermuda for a number of years"*.

13. The applicable provision from the 1937 Act is section 5 (1) (b) which states:

"Subject to the provisions of this section, a person shall be deemed to be domiciled for the purposes of this Act in these Islands who is a British subject, and who has been ordinarily resident in these Islands for a period seven years or more, and since the completion of such period of residence has not been ordinarily resident in any other part of His Majesty's dominions or any territory under His Majesty's protection continuously for a period of seven years or more".

14. The word domicile generally means the place at which a person has been physically present and regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere, to which that person intends to return (Black's Law Dictionary, 8th ed). As can be seen, the 1937 Act judges one's domicile by reference to ordinary residence.

15. To be deemed domiciled in Bermuda under the 1937 Act two requirements must be met. The first requirement of section 5 is that the person is British. The Appellant asserts that she is British by virtue of section 51 of the British Nationality Act 1981 which states that in any enactment or instrument whatever passed or made before commencement the terms "British subject" and "Commonwealth citizen" have the same meaning. As the 1937 Act was passed before the commencement of the British Nationality Act, she is to be considered a British subject. The Minister does not argue with that contention.

16. The second requirement is that the person must be ordinarily resident in Bermuda for a period of seven years or more, and since the completion of such period of residence has not been ordinarily resident in any other part of her Majesty's dominions or any territory under her Majesty's protection continuously for a period of seven years or more. The Appellant's position is that she has already established that she has been ordinarily resident in Bermuda since November 2001 and therefore she meets the seven year requirement under the 1937 Act.

17. Paragraph 3 of First Schedule A creates a final hoop that must be jumped by an applicant. The applicant must satisfy the Minister that the applicable requirement specified in paragraph 2 must have been satisfied throughout the 10 year ordinary residency period required under section 19 (1) (b) of the 1956 Act. The Appellant asserts that domicile and ordinary residence being one and the same, she meets this requirement. Throughout her 10 years of being ordinarily resident in Bermuda she has been domiciled in Bermuda.

18. Having jumped through all the hoops of section 19 (1) of the 1956 Act, First Schedule A and section 5 of the 1937 Act, the Appellant contends that the Minister ought to have granted her Bermudian status. The Minister disagrees and argues that the requirements of paragraph 2 C of First Schedule A are not met.

19. The Appellant buttresses her argument with a constitutional argument that the right to private life and family life cannot be ignored and that immigration laws and policy must be proportionate. The Appellant acknowledges that this is very much a secondary argument.

The argument presented by Mr Perinchief on behalf of the Minister

20. The hearing on 23 April 2014 was adjourned to give Mr Perinchief an opportunity to consider the written submissions of the Appellant and to file written submissions in reply. The Appellant was also given an opportunity to file a response to those submissions. Those submissions are part of the record.

21. Before the adjournment, Mr Perinchief gave a broad overview of the Minister's position and argued that the Minister's decision was balanced and did not infringe upon family life or any constitutional right. He did not accept that the Appellant was ordinarily resident in Bermuda or that the 1937 Act assisted her. On 9 May 2014 the hearing resumed and Mr Perinchief provided highlights of his written submissions. He argued that paragraph 2 C of First Schedule A pertains to a select group of persons who were domiciled in Bermuda during the operational period of the 1937 Act which period came to an end at midnight on 30 June 1956. He described these people as the Class of 30 June 1956. The 1937 Act therefore has no relevance to the Appellant who was not even born at the time. The Appellant argued that paragraph 2 C is of general application and is not restricted to a class. She argued that the reference in paragraph 2 C to the 1937 Act makes it plain that the provisions of the 1937 Act that set out the definition or test of domicile are to be taken as still being in force for the purpose of establishing a Bermudian connection. If she can show that she meets the definition of domicile as set out in the 1937 Act, then she has a qualifying Bermudian connection to Bermuda. The

Appellant argued that paragraph 3 of First Schedule A supports her position. The clause states that *"the requirements specified in paragraph 2 must have been satisfied throughout the period mentioned in paragraph (b) of section (1) of section 19 of the Act"*. Section 19 (1) (b) of the 1956 Act is a reference to being ordinarily resident for the period of ten years immediately preceding the application for Bermudian status. The Appellant says that this language makes it clear that the period of domicile that paragraph 2 C of First Schedule A is referring to must operate during this ten year period. Mr Perinchief must therefore be wrong when he argues that paragraph 2 C is referring to the Class of 30 June 1956 or that the 1937 Act has limited application.

RULING

22. On the information that was before the IAT, we are satisfied that the Appellant meets the ordinary residency requirement of section 19 (1) (b) of the 1956 Act. Since 2001 the Appellant has lived and worked Bermuda.

23. Bermuda is not a temporary stop off point for the Appellant and there is no evidence that she maintains residential ties with a place overseas. Bermuda is considered to be her home and the evidence is consistent with this intention. Her temporary absence from Bermuda of 6 months was at the behest of her Bermudian employer who wished to establish a branch office. This temporary posting did not change her place of ordinary residence. The fact that she is currently resident in Bermuda by virtue of her husband's work permit does not weaken her status as being ordinarily resident in Bermuda.

24. While each requirement of section 19 is important, including the need to establish at least 10 years of being ordinarily resident in Bermuda, the focus of the provision as emphasized by the heading of the section is the Bermudian connection. This road to Bermudian status under section 19 (1) of the 1956 Act was paved to recognise that there are persons in Bermuda who have significant and enduring ties to Bermuda which cannot be ignored. At the heart of this appeal is the qualifying connection that the Appellant asserts that she has and which the Minister asserts that she does not have. First Schedule A of the 1956 Act sets out only a few circumstances that qualify as a Bermudian connection:

    - a person who was deemed to possess Bermudian status under section 16 (2) of the 1956 Act;

    - a person was deemed to be domiciled in Bermuda under section 5 (1) (e) of the 1937 Act (deals with a British subject who was a child or a step –child or an adopted child under the age of 16 years who is able to satisfy at least one of the other domicile tests set out under section 5 of the 1937 Act);

    - a person who would have met the requirements of the above two qualifying Bermudian connections but for the fact that he was not a Commonwealth citizen;

- a person who at any time possessed Bermudian status under the 1956 Act except where the claim to possess status depends solely on his rights under section 16 (2) of the 1956 Act or under section 4 (2) of the Bermuda Immigration and Protection Amendment Act 1980;

- a person who at any time had been domiciled in Bermuda under the 1937 Act by reason of residence in Bermuda for a number of years;

- a person who has an honest belief that he is Bermudian and has conducted himself as such.

25. One can see that the categories are few in number; the requirements are designed to address very narrow and isolated circumstances; and in each case they are designed to recognise those who have a well-defined, enduring or long standing connection to Bermuda.

26. Where the Appellant's argument falls down is on her contention that she meets the requirement under paragraph 2 C of the First Schedule A of the Act, namely that she is *"a person who at any time had been deemed to be domiciled in Bermuda under the Immigration Act 1937 by reason of residence in Bermuda for a number of years"*. Her argument is unsustainable for the following reasons:

(i) The 1937 Act was repealed in whole (except for residual provisions such as paragraph 2 C of First Schedule A) by the 1956 Act which took legal effect on 1 July 1956. The 1937 Act has very limited effect, hence the qualifying period under the 1937 Act had to have been satisfied on or before 30 June 1956.

(ii) The reference to the 1937 Act in First Schedule A was not intended and cannot be properly construed as a provision that says "if the appellant can show that she would have met the domicile test under the 1937 Act, then the paragraph 2 C requirement of First Schedule A is satisfied". The reference to the 1937 Act as properly construed is to capture a group of persons who at any time "had been" deemed "under the 1937 Act" to have been domiciled in Bermuda by virtue of their residency. The language of the provision, particularly the words underlined in this Ruling for emphasis, presupposes that the 1937 Act was operational at the time that the domicile test had been satisfied. The language highlights and speaks to an historic event, something that occurred in the past, during a particular period of time. First Schedule A of the 1956 Act recognizes that historical connection as a qualifying Bermudian connection that would result in the grant of Bermudian status (assuming all other requirements are met). As Mr Perinchief elegantly and succinctly put it, paragraph 2 C of First Schedule A is a provision that accommodated the Class of 30 June 1956, that being the last day that the 1937 Act was operational. If a person on that date had been domiciled in Bermuda then he or she was a member of the class and that status gave those individuals a qualifying

Bermudian connection for the purpose of obtaining a grant of Bermudian status under the 1956 Act.

(iii) The construction set out above at paragraph (ii) is entirely compatible with clause 3 of First Schedule A which directs that the requirements specified in paragraph 2 (in this case 2 C) must have been satisfied throughout the 10 year period of being ordinarily resident under section 19 (1) (b). If a person had been deemed to be domiciled in Bermuda under the 1937 Act then that factual circumstance is a historic fact that does not change with time. Once that requirement has been established and satisfied, it goes without saying that it is a requirement that has been satisfied throughout the 10 year period of being ordinarily resident. It is a static, unchanging, met requirement. Paragraph 2 of course deals with other circumstances that are potentially more fluid and subject to change such as under the category of where a person has an honest but mistaken belief that he is Bermudian. The language of paragraph 3 covers both static and fluid circumstances.

(iv) The Appellant's construction leads to a nonsensical or at the very least improbable result. Section 19 (1) (b) requires a 10 year period of being ordinarily resident in Bermuda immediately preceding the application. Under section 5 (1) (b) of the 1937 Act the being domiciled in Bermuda is defined as having been *"ordinarily resident in Bermuda for a period of seven years or more"*. If this provision operates in the manner contended by the Appellant, then you would have the very strange result of having two conflicting periods of being ordinarily resident in Bermuda. Under section 19 (1) (b) of the 1956 Act you have the 10 year period and under paragraph 2 C of First Schedule you have by reference to the 1937 Act the lesser period of 7 years. This could not have been the intention of the legislature. The IAT is satisfied that paragraph 2 C of First Schedule A creates a Class of 30 June 1956 who must establish that they were ordinarily resident in Bermuda for at least 7 years during the operational period of the 1937 Act and that they were ordinarily resident for 10 years immediately preceding their application for the grant of Bermudian status.

(v) The IAT's ruling on this important point of construction is further supported by section 17 of the 1956 Act which recognises that the Class of 30 June 1956 possesses Bermudian status. Section 17 (1) of the 1956 Act states *"Any person who was, on 30 June 1956, deemed to be domiciled for purposes of the Immigration Act 1937.....shall, as from 1 July 1956, possess Bermudian status."* The language makes it crystal clear that this provision is not of general application but for the benefit of a select group of persons who on 30 June 1956 were deemed to be domiciled in Bermuda for the purposes of the 1937 Act. There are a number of other provisions in the 1956 Act where a person is recognised or deemed to possess Bermudian status if particular circumstances exist. Section 16 (2) of the 1956 Act for instance deems a child, step child or adopted child who is under the age of 22 years of age to possess Bermudian status if the parent has Bermudian status. It is somewhat

confusing and a bit contradictory but section 19 also allows people who possessed Bermudian status under the foregoing provisions to apply for a grant of Bermudian status. What is clear, however, is that the language used in both section 17 of the 1956 Act and paragraph 2 C of First Schedule A must be referring in both cases to the Class of 30 June 1956. It would make no sense as a matter of construction to limit the application of Bermudian status under section 17 of the 1956 Act to this narrow class of people but allow the very same circumstances that defined the class to be interpreted as being of general application under paragraph 2 C of First Schedule A.

The Family Life Argument

27. Very much as an admitted secondary argument, the Appellant asserts that Bermudian status should be granted to her because she has family members who enjoy the benefits of Bermudian status, namely her father, her stepmother and stepbrother. She argues that as a matter of civil and human rights a state should not intrude into the private sphere of life without strict justification. This right she says is recognised in section 11 of Bermuda's Constitution (protection of freedom of movement) and is part of family life rights under the European Convention on Human Rights. The Appellant made application for Bermudian status because she thought she could meet the requirements of section 19 of the 1956 Act. This is not a situation where the Appellant is appealing because she has been directed to leave Bermuda. The Minister has not given such a directive and there is no evidence before the IAT that his decision has interfered with any relationship that the Appellant has with family members who live in Bermuda. Any argument about family life and whether state action unduly interferes with family life is therefore premature.

28. For the reasons given, the appeal is dismissed.

29. Pursuant to section 13D (1) (a) of the 1956 Act, the IAT confirms the decision of the Minister.

DATED this 8th **day of July 2014**

Timothy Z Marshall, Chairman of the IAT

Belinda Wright, IAT Member

Michael-Jay Landy, 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.