THE IMMIGRATION APPEAL TRIBUNAL

(Case No. 13 of 2014)

IN THE MATTER OF AN APPEAL OF THE DECISION MADE BY THE MINISTER OF HOME AFFAIRS ON OR ABOUT 25 JANUARY 2012, REFUSING AN APPLICATION FOR THE GRANT OF PERMANENT RESIDENTS CERTIFICATE UNDER SECTION 31B 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 Q

Appellant

-and-

THE MINISTER OF HOME AFFAIRS

Respondent

APPEAL RULING

Hearing Date: Wednesday, 12 March 2014

Counsel who appeared:

Mr Peter Sanderson (Wakefield Quin Limited), attorney for the Appellant

Mr Philip Perinchief, representative for the Respondent

HISTORY

1. The Appellant made an application for a Permanent Resident's Certificate under section 31B of the Bermuda Immigration and Protection Act 1956 ("the Act") which is headed "Right of certain other persons to permanent resident's certificate." Under the section the applicable requirements that the applicant must meet are as follows:

   Section 31B subsection (1), (2) (a) and (e) of the Act sets out the applicable requirements:

   (1) Subject to the provisions of this section, a person referred to in subsection (2) may apply to the Minister under this section for the grant of a permanent resident's certificate if -

   (a) he must be at least 18 years of age;
   (b) he has been ordinarily resident in Bermuda for a period of ten years immediately preceding the application; and
   (c) subject to subsection (6), he must make his application before 1 August 2010;

   (2) The person referred to in subsection (1) is-

   (e) the son of a person who has been granted a permanent resident's certificate under section 31A where that son is above the upper limit of compulsory school age.

   (6) Subsection (1) (c) does not apply to a person referred to in subsection (2) (e).

2. The Appellant completed his application form and submitted it on 7 September 2011, some 13 months and two weeks after the cutoff date of 1 August 2010.

3. The facts submitted indicate that the Appellant was born in Bermuda on 10 September 1993 to parents, both of whom acquired permanent resident certificates under the provisions of 31B of the Act, which is a different section than what section 31B (2) (e) requires, namely a grant under section 31A. The Appellant turned 18 on 10 September 2011. He has lived his whole life in Bermuda and all family members save for him are able to freely live and work in Bermuda. His younger sister was granted Bermudian status earlier on in 2003.

4. By letter dated 16 January 2012 the Department of Immigration advised the Minister that the Appellant did not meet the requirements of the provision because:

   (i) The application was received out of time.

   (ii) The Appellant's parents acquired their permanent resident certificates under section 31B and not under section 31A.

(iii) The Appellant's sibling acquired her Bermudian status under the provisions of section 20A of the Act. The grant was made in 2003.

5. On 19 January 2012 the Minister endorsed the letter with his one word decision: "NO".

6. By letter dated 25 January 2012, the Department of Immigration informed the Appellant of the refusal and reiterated the reasons set out in their letter of 19 January save that no reference was made to the status of the Appellant's sister.

GROUNDS OF APPEAL

7. By letter dated 14 February 2012 the Appellant's attorneys appealed the decision to the Immigration Appeal Tribunal ("IAT") and advanced the following grounds of appeal:

(i) the Appellant qualifies for Bermudian status under section 19 of the Act as he is a Commonwealth citizen of not less than 18 years, he has been ordinarily resident in Bermuda for 10 years immediately preceding his application and he has a qualifying Bermuda Connection. This ground was not pursued at the IAT hearing.

(ii) The Appellant has spent his entire life in Bermuda, this is where his family resides, this is his only home. He finds himself entirely reliant on his parents as he is not permitted to seek employment in Bermuda. If he were forced to leave Bermuda, undue hardship would be caused as he would leave behind his entire family who has the right to live and work in Bermuda. The Minister's refusal was based on technical grounds and in substance the requirements were met. The Appellant made his application as soon as he met the age requirement and this is the reason why the application was not submitted prior to 1 August 2010. While not clearly expressed in the grounds of appeal, the point is made that there is no legitimate reason why the child of a parent who obtained a PRC under section 31A of the Act should have a greater right to a PRC than a child whose parent qualified under section 31B. Section 31A of the Act provided PRC to senior executives who were seen to be instrumental in maintaining continuing a corporate presence in Bermuda. If you were an influential senior executive who received a PRC under section 31A, then your child qualified for a PRC under section 31B. However, the Appellant's parents were of humbler means and received their PRCs under 31B and if the Minister is right then their children should be denied a certificate. This ground of appeal was modified by new counsel, Mr Sanderson, who relied on section 31A as it existed in 2008 at a time when the provision was not directed with such precision at the corporate elite but rather to anybody who was ordinarily resident in Bermuda on or before 31 July 1989 and for a period of twenty years. The Appellant's mother met these requirements.

RESPONSE

8. The Minister filed his short Reply or Response in September 2013 and repeated that the Appellant's application was received out of time by 13 months and two weeks (16 September 2011) contrary to the requirement of section 31B (1) (c) of the Act and the Appellant could not meet the requirement of being a child of parents who received their PRCs under section 31A of the Act.

JURISDICTION OF THE IAT

9. Under the provision of section 31B (7) of the Act as read with section 19 (8) of the Act, the Appellant has a right to appeal the Minister's decision to the IAT.

HEARING

10. On 12 March 2014 the parties appeared before the IAT. By then the Appellant had changed attorneys and was now represented by Mr Sanderson who helpfully provided written submissions dated 10 March 2014 and a witness statement made on 6 March 2014 from the Appellant's mother attesting to the fact that while she obtained her PRC under section 31B of the Act in 2003, by 2007 she met all of the requirements under section 31A (as it then was). Based on earlier advice received from Mr Joe Reis (a person who assisted the Portuguese community with Immigration applications) the mother attempted in 2008 to reapply under section 31A but was told by the Department of Immigration that she could not apply for it twice as she already had a PRC. The exhibits attached to her affidavit are reference letters dated 2008 which clearly indicate that she intended to make an application under section 31A. Had she been permitted to obtain her certificate or a new one or a validation of her old one under section 31A, there would be no obstacle to her son receiving a PRC under section 31B. The written submissions emphasize that the refusal was based on purely technical grounds and the IAT ought to, in the circumstances of this case, overturn the decision. Had the mother not been turned away by the Department in 2008, her application under section 31A would inevitably have been granted because she met all the requirements. If the mother's evidence is to be believed, the Department apparently thought that once a person has a PRC then there is no need or purpose in having another one or rather myopically, you cannot have two PRC certificates. That stance only makes sense if you treat all PRCs the same. If the mother had been permitted to receive a PRC under section 31A of the Act, then her son would have had a clear path to a PRC under section 31B as 31B (6) does not require the application to be submitted prior to 1 August 2010.

11. At the hearing, Mr Perinchief took no objection to the mother's witness statement being introduced into evidence. It is a credit to Mr Perinchief and the Minister that appellants are given a fair opportunity to present their cases even when the evidence may have been available at the time the application was made to the Minister but for whatever reason not presented. The approach is to let the IAT have all of the available evidence as this is likely to result in a just outcome.

12. The mother was sworn in at the hearing before the IAT and she confirmed the truthfulness of her witness statement. She added that at the time she attempted to make her application under section 31A she was told by the receptionist at the Immigration Department that her son would be eligible for PRC status because his sister had been granted Bermudian status. The receptionist also said that because the mother already had a PRC under 31B, she could not obtain one under section 31A. Mr Perinchief cross-examined the mother and explored with her the qualifications of Mr Reis (a person knowledgeable about immigration but not an attorney), whether she sought legal advice in regard to what she was told by Mr Reis and the receptionist (no she had not), whether she had spoken to Mr Reis's wife who worked in the Department of Immigration (no she had not) and why she waited until 2008 to pursue a section 31A application when she had been eligible in 2007 to apply (no specific reason and busy at work). Mr Perinchief was troubled by the mother's delay in making preparations for a section 31A application and her reliance on what a receptionist at the Department of Immigration had told her.

13. At the hearing Mr Perinchief and Mr Sanderson reiterated their main points. Mr Perinchief took a strict, black and white, view of the requirements of section 31B of the Act and acknowledged that while the situation is unfortunate, the Minister's decision cannot be faulted. He suggested that the situation could perhaps be addressed by the Minister granting an open ended residency certificate under section 32 (5) of the Act which would give the Appellant and his family the comfort of knowing that he is not being asked to leave Bermuda. Mr Sanderson reiterated the points raised in his written submissions and argued that the Appellant met all of the requirements, other than that his parents were granted a PRC under section 31B of the act rather than section 31A. He argued that this was very much a technical obstacle, particularly in circumstances where the mother would have equally qualified for a section 31A certificate but was prevented from making her application in 2008. Such obstacles should not be allowed to stand and be relied upon. Mr Sanderson cited *Haldane v Haldane* [1977} AC 673 and *Drummond v County Council of Peebles,* 1937 SC 36 as authorities for the position that the IAT's mandate under section 124 of the Act to do what it considers to be just is a very wide power and this is a case where the power should be exercised in favour of the Appellant.

RULING

14. In fairness to the then Minister, he received an application that on its face appeared not to meet two of the requirements of the Act. He did not have before him the evidence of the mother and had no knowledge of her attempt to have her PRC reaffirmed under the provisions of 31A of the Act. Had he known of these highly unusual circumstances, he may not have been so quick to dismiss the application.

15. At the hearing before the IAT the mother gave her evidence in a straightforward manner and the IAT accepts that she was giving a truthful account of the events. As pointed out earlier, her attempt or her preparation to reapply or reaffirm her PRC under section 31A of the Act is supported by the reference letters that she obtained in 2008 and which are addressed to the Department of Immigration. One of the four letters specifically records that it is written to support the mother's *"long term residency"*. Another of the letters refers to her application for *"a Permanent Residence Certificate A"*. She of course already had a PRC, and as such the only sensible reason why she was seeking to reapply under section 31A would be to position her son for a successful application in his

own right for a PRC under section 31B. He was the last member of the family that was vulnerable in terms of his immigration status in Bermuda.

16. The technical and legal hoops in the Act that one has to navigate through are not easy. Who would have thought that not all PRCs are created equally and some PRC holders have greater rights than other PRC holders – how bizarre. Most people would believe, assume and have a reasonable expectation that a PRC is a PRC. Perhaps this is an example of why Immigration reform is needed. It does make sense that the Appellant's mother sought out the assistance of Mr Reis and received guidance on how to proceed. By 2008 Mr Reis had passed away and the mother was told by a receptionist at the Department of Immigration that a section 31A application could not be processed as she already had a PRC and her son would in due course receive his. Why the mother did not confirm this information with an attorney or immigration advisor or raise it later on with the Minister are fair comments by Mr Perinchief, particularly given the importance of the subject matter. However, she was not a woman of sophistication and the IAT is of the view that it is common for the general public to place reliance on what government departments tell them. This case does, however, highlight the importance of obtaining good legal advice and verifying the accuracy or correctness of information that dramatically can affect your life or that of your family members.

17. It is nonetheless quite clear from the evidence that the mother had decided to pursue a section 31A application in 2008 and that she abruptly stopped. Her account of why she stopped is believable and supported by the letters of support that were prepared for her intended 2008 application. Had the mother persisted, there is no reason to believe that the section 31A application would not have been granted. She met all of the requirements. It is of course easy for someone to assert that I was told this or that by the Department of Immigration. The IAT have to be alive to the possibility that such assertions can be made up to secure an advantage. The IAT, however, was moved by the totality of the mother's evidence.

18. The Appellant would therefore have met the requirements of section 31B but for his mother being steered (no doubt with good intentions) in a different direction by the Department of Immigration. She was told that her son had nothing to worry about and the IAT is satisfied that she acted in reliance on that information. It cannot be right, now that the full facts are known, to allow the Minister's decision to stand. That would be unjust.

19. In this case, we are faced with a situation where one child (in a family where every other member enjoys secure rights of residency and the ability to freely work) is left entirely out in the cold by the decision of the then Minister. Where is this young man to go, when his entire family is in Bermuda and this is where he was born? He has no other home. The IAT believes that we are a country that treats families with respect and dignity. Certainly, that is a cornerstone of our values, and enshrined in the European Convention on Human Rights (ECHR). The ECHR protects family life. Under Article 8 *"everyone has the right to respect for his private and family life...."*

20. Mr Perinchief presents one possible solution. He says the Minister can grant the Appellant with an unlimited duration certificate to reside in Bermuda under section 32 (5) of the Act. The Appellant would be receiving a certificate that allows him to stay but which does not afford him with the degree of security that comes with a PRC. Such a certificate can be revoked far easier than a PRC and no assurance is given that this

young man will have the same right to work as enjoyed by his contemporaries who have a PRC. He surely will feel like a second class citizen in his family and in Bermuda. The suggested avenue would perhaps be a useful interim measure in circumstances where it was accompanied with an assurance that an alternative path to acquiring a PRC will promptly be made available to the Appellant but no such assurance is given. Too often, the Immigration debate in Bermuda sadly creates a paralysis that prevents our country from dealing with unintended and unjust consequences of our existing laws and policies.

21. The IAT is satisfied that what is just in all the circumstances of this particular case, what is fair is to acknowledge that in substance all of the requirements of section 31B have been met by the Appellant and it cannot be right for the Department of Immigration to rely on the absence of a section 31A PRC when they derailed the mother's efforts at securing that type of certificate by leading her to believe that she either could not or need not make an application and then assured her that no adverse consequences would befall her son. As the IAT said earlier, the then Minister and the present Minister would not have been aware of these highly unusual circumstances. The Minister cannot be faulted for what occurred. The IAT also accepts that it is on the outer edge of its very broad powers under section 124 of the Act and there is a little discomfort as the boundary line of what the IAT can do and cannot do is close, but that discomfort pales in comparison to the sense of injustice if the Minister's decision is not reversed.

22. For the reasons given, the appeal is allowed.

23. Pursuant to section 13D (1) (b) (i) of the Act, the IAT directs the Minister to grant the Appellant a PRC to the Appellant.

DATED this 22nd day of August 2014

Timothy Z Marshall, Chairman of the IAT

JD Massa, 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.