THE IMMIGRATION APPEAL TRIBUNAL

(Case No: 14 of 2014)

IN THE MATTER OF A REFUSAL OF AN APPLICATION FOR A 31A PRC ON BEHALF OF THE APPELLANT BY THE MINISTER OF HOME AFFAIRS DATED ON OR ABOUT 22ND NOVEMBER, 2010

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

B E T W E E N:

APPELLANT R

Appellant

-and-

THE MINISTER FOR HOME AFFAIRS

Respondent

APPEAL RULING

Hearing Date: Friday, 23 May 2014

Appellant Represented by:
Mr Mark Diel, Marshall Diel & Myers

Respondent Represented by:
Mr Philip Perinchief, for A-G's Chambers;

History

1. The Appellant applied for a Permanent Resident's Certificate ("PRC") on 28 July 2010. The application for a PRC was accompanied by a letter from the Appellant's legal counsel setting out the facts and circumstances specific to the Appellant to support their contention that the Appellant was ordinarily resident in Bermuda on or before 31 July 1989.

2. The facts relied upon by the Appellant (and to which counsel for the Minister indicated there is no dispute) are as follows:

   a) The Appellant first came to Bermuda on a business trip on 3 June 1989 for three days;

   b) He was approached during that time by individuals who suggested there might be a job opportunity for him with a Bermuda based company;

   c) Discussions between the Appellant (in the UK) and his potential Bermuda based employer ensued regarding the details of the job opportunity and the potential terms of employment;

   d) On 22 June 1989 the Appellant returned to Bermuda with his spouse at the expense of the potential Bermuda based employer for another three day trip. The primary purpose of this was to see if his family would be prepared to move to Bermuda;

   e) The Appellant and his family were prepared to make a move to Bermuda and so a job offer (subject to immigration permission being granted) was made and accepted;

   f) The Appellant gave notice to his employer in the UK on 26 June 1989, put his family home in the UK on the market, purchased a rental property for investment and rental income, all arrangements in respect of which were substantially dealt with by the end of July 1989;

   g) The prospective Bermuda employer and the Appellant had completed the paperwork and submitted an application for a work permit with the Department of Immigration in the first week of July;

   h) The work permit was granted on 14 August;

   i) For family reasons and business reasons, including attending the Reinsurance Rendezvous Conference in Monte Carlo in September, the Appellant and his family did not arrive in Bermuda until 23 September 1989.

j) From September 1989 to date the Appellant has worked and lived in Bermuda.

3. The Appellant requested that the Minister consider his application for a PRC himself in particular referring the Minister to and relying on section 19(3) of the Bermuda Immigration and Protection Act 1993 ("the Act") which states:

> *"... where any question arises as to a person's ordinary residence in Bermuda, that question shall be decided by the Minister".*

4. This appeal is from a decision of the Minister refusing the Appellant's application for a PRC. There were two 'decision' letters – the first of 22 November 2010 whereby the Department of Immigration referred to the Appellant's application for a PRC under section 31 A and stated:

> *"Our records indicate that you first arrived in Bermuda on 23 September 1989 and as a result you were not ordinarily resident in Bermuda on or before 31 July 1989. Based on this fact, you are not eligible to apply under section 31A of the 1956 Act."*

5. On 3 December 2010 the Appellant, by legal counsel, wrote to the Department advising of a procedural irregularity in that he had not been told of his statutory right of appeal from the decision of 22 November. A subsequent appeal letter was sent on 16 December 2010 – although the Cabinet does not appear to have ever progressed the appeal.

6. There was then a subsequent decision letter dated 14 March 2011 which states:

> *"... The Minister of National Security has refused the application for a PRC. The reason for this refusal follows.*
>
> *The records of this department indicate that [the Appellant] arrived in Bermuda on 23 September, 1989. As a result he was not ordinarily resident in Bermuda on or before 31 July, 1989 therefore he does not meet the residency requirement necessary under section 31A of the 1956 Act."*

7. This letter set out the statutory right of appeal to the Cabinet. There was then some intervening correspondence between counsel for the Appellant and the Cabinet Office surrounding the jurisdiction of the Cabinet to hear the appeal. Finally, on 14 July 2011 following the tabling in the House of Assembly of the amending act establishing the Immigration Appeals Tribunal the Appellant was notified that "*all submitted immigration appeals will be considered and reviewed by the Appeals Tribunal which will be constituted and established following the passage of the 2011 Act.*"

8. So it is that three and a half years following the original November decision refusing the PRC application the appeal is being heard by the Immigration Appeals Tribunal (IAT).

The Procedural History

9. For the purposes of the record of appeal, the Notice and Grounds of Appeal is the appeal letter to the Cabinet Office dated 16 December 2010.

10. The Minister filed a Response under Rule 8 of the Immigration and Protection (Appeal) Rules 2013 to the appeal letter as well as the Appellant's letters of 18 March 2011 and 2 June 2012, on 19 October 2013.

11. The parties agreed the terms of a Consent Order on 5 March 2014, namely that the Minister was to supply the Appellant with all non-privileged documents at the time of the Minister's decision but not presently in the Appellant's possession within 7 days. The Appellant to file and serve reply submissions to the Minister's Reply/Response within 14 days.

12. The Appellant filed and served the Appellant's Reply Submissions on 21 March 2014. While these are referred to as "Reply Submissions" these are in effect the Appellant's skeleton argument and legal authorities in support of the Appellant's case and stood as the skeleton argument of the Appellant set out in Consent Order.

13. The parties did not seek in the Consent Order any direction that the Minister provide a written skeleton, or any authorities in advance of the hearing and counsel for the Minister did not submit any written legal submissions or skeleton arguments in advance or during the hearing of the appeal, relying solely on oral legal argument at the hearing. The parties tendered no witnesses; relying on the written record, and undisputed facts. (The IAT noted during the course of the hearing that the IAT is assisted by written skeleton arguments in advance and future IAT directions orders are likely to reflect a standard direction to this effect).

The Act – section 31A

14. At the time of the July 2010 application for a section 31A PRC a person would be granted a 31A PRC if that person:

    a) Was ordinarily resident in Bermuda on or before 31 July 1989;

    b) Was ordinarily resident in Bermuda for a period of 20 years;

    c) Was 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.

The Issue

15. The fundamental issue in dispute in this appeal is whether or not the facts and circumstances are such that the Appellant is able to establish that he was "ordinarily resident" in Bermuda prior to 31 July 1989. It is not in dispute that all of the other requirements of section 31A have been met, and, if the Appellant can establish he was ordinarily resident in Bermuda before 31 July 1989 a PRC should be granted.

16. The question of whether or not the Appellant was ordinarily resident in Bermuda by that date was a matter for the Minister to decide based on the facts of the case and it is not in dispute that the meaning of the words 'ordinarily resident' is a question of law and that the Minister must decide that question on proper legal principles.

17. In simple terms, the Minister made his decision that the Appellant was not ordinarily resident in Bermuda by the relevant date because the Appellant had not arrived in Bermuda to reside until September 1989.

18. On the day of the hearing, counsel for the Minister alleged new facts for refusing the PRC, stating that on the second June trip by the Appellant with his wife (to determine if the family was prepared to move to Bermuda), that at some point on that trip (when he formed the intention to move to Bermuda) he was then here 'unlawfully', the corollary to this being that the IAT could not take this trip into account in determining the question of whether he had become ordinarily resident in Bermuda on this trip.

19. It is not in dispute that he came to Bermuda in late June 1989 with his wife for the purpose of deciding whether his family would be prepared to relocate. It is not in dispute that during that trip the family agreed that they would be prepared to relocate to Bermuda.

20. Counsel for the Minister during the course of his argument made reference to facts not in evidence (for example, there was no evidence before the IAT about where the offer of employment was either made or accepted, nor was there any evidence from the Department of Immigration on this point). The IAT determined that it was inappropriate to allow a new allegation of unlawful conduct by the Appellant during his visit to Bermuda in June 1989 to be raised at this late stage without those allegations having been previously pleaded and properly put to the Appellant. Such allegations if they are to be made should be properly and fully particularized (full details of unlawful conduct should be pleaded), there should be proper and complete disclosure of all documents relied upon - inter alia policy statements, landing cards, conditions on entry which have been allegedly breached, and so on. Witness testimony would be required.

21. In short, the IAT declined to make any ruling on this point (the unlawfulness of the June 1989 trip) for the following reasons:

a) This was not a reason/ground for the Minister refusing the section 31A PRC in 2010;

b) The alleged unlawfulness was not pleaded by the Minister in the Minister's Rule 8 Response (nor had there been any application to amend the Response under Rule 9 of the Rules);

c) Any proper consideration of such a serious allegation would require the IAT to assume facts not in evidence;

d) No evidence having been adduced by the Minister to the unlawfulness or otherwise of the Appellant's trip to Bermuda in June 1989 or any alleged breaches of the Act;

e) The Appellant had not had the opportunity to adduce evidence to contest whatever might be the Minister's evidence about unlawfulness;

f) The admitted facts and circumstances in the record of appeal (set out above) do not prima facie elicit any presumption or assumption of unlawful behavior or breach of the Act by the Appellant;

g) The facts and circumstances in the record of appeal have been known to the Minister since July 2010.

22. The IAT would observe that it is generally unhelpful to seek to introduce novel and new points at such a late stage. As was put by Mr Justice Lewison in *Brayfal T/A DRK v. HMRC* "*modern case management attaches importance to a card-on-the table approach. It discourages surprises and ambushes*". The IAT also notes that it serves to waste time, may delay the final determination of the appeal and may even be prejudicial to the administration of justice itself. The IAT therefore proceeded on the basis that the pre-1989 trip was a lawful trip and the Appellant's immigration status as a visitor was lawful at the material time.

The Law

23. Counsel for the Appellant and Counsel for the Respondent were not in disagreement on the authorities which were of relevance to the IAT in considering the meaning of the words "ordinarily resident". *Schurman v. Minister of Immigration* [2004] Bda LR 21, *Ex P Shah* [1983] 2 AC 309, *Mark v. Mark* [2006] 1 AC 98, *Macrae v. Macrae* [1949] P 397 and *Tuczka v. Revenue and Customs Commissioners* [2011] STC 1438 were relied upon.

24. The leading judgment on the meaning of the words "ordinarily resident" is Lord Scarman's judgment in *Ex P Shah*. The following principles can be derived from

his judgment referring to the need for a simple test to apply on the meaning of the words:

> *"The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose"* (p. 344 F).

25. So far as the meaning of 'settled purpose' Lord Scarman held:

> *"There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. All that is necessary is that the purpose of living where one does have a sufficient degree of continuity to be properly described as settled"* (p. 344).

26. Finally, Lord Scarman distinguished between ordinary residence and 'domicile – and the person's 'real home' is not the relevant test for ordinary residence (p. 343).

27. In the Bermuda case of *Schurman,* the Bermuda Court held that the regular visits of the appellant to stay with her family on vacations from school were sufficient to meet the test of ordinary residence.

28. In the UK tax case of *Tuczka*, a case concerned with when an individual became 'ordinarily resident' in the UK, the question for the tribunal and the court was at what point did the purpose become settled. T*uczka* concerned an appeal against the First-tier Tribunal (TaxChamber) ("FTT") against the FTT's decision dismissing the appeal by Dr Tuczka against the determination by the HMRC that he was ordinarily resident in the UK for the three tax years 1998-1999, 1999-2000 and 2000-2001. The facts, which were not in dispute, were inter alia that Dr Tuczka started to work in London on 1 July 1997 (nine months prior to the tax year in question).

29. Dr Tuczka submitted that for a person to be ordinarily resident in the UK he must have the intention of staying in the UK permanently or at least for an indefinite period. If he intends to remain only for a limited period, his stay would be temporary, which, it was contended, precluded a finding of ordinary residence.

30. It was held:

> *"Once it is found or accepted that the tax payer is resident in the United Kingdom, the question whether he is also ordinarily resident here involves a factual evaluation to determine whether his residence has acquired a*

sufficient settled purpose to be part of the ordinary pattern of his life".

31. In UK tax returns a potential tax payer must self assess their status as resident or ordinarily resident in the UK and Dr Tuczka had identified himself as 'resident' but not 'ordinarily resident'. Notwithstanding, it follows for both *Ex P Shah* and *Tuczka* that 'residence' in some capacity is a necessary first component of the test of being 'ordinarily resident' . As Lord Scarman put it, you must have a regular, habitual mode of life in a particular place.

Ruling and Reasons

32. In this case the IAT is being asked to find that the Appellant became ordinarily resident in Bermuda before he moved to Bermuda in September 1989 to make his residence here (where he has resided ever since).

33. The IAT finds that this goes beyond the ordinary and common meaning of the words "ordinarily resident".

34. It is common ground that the Tribunal has the discretion under section 124 to determine any appeals against decisions of the Minister under section 31A *"and may make such order as appears to [the Tribunal] to be just and the Minister shall govern himself accordingly".*

35. The IAT, however, like the Minister, must exercise its powers and interpret the meaning of the words 'ordinarily resident' in accordance with principles of statutory construction. The Minister made his decision on the basis that the Appellant was not residing in Bermuda before the critical date.

36. In this instance, despite clear evidence of the intention by the Appellant to move himself and his family to Bermuda prior to 31 July, we find that as a matter of fact the Appellant and his family had not become ordinarily resident by the relevant date of 31 July 1989. The IAT, applying Lord Scarman's test in *Shah* have concluded that the Appellant did not have a regular and habitual mode of life in Bermuda prior to July 1989. The trip in June 1989 (which for the purposes of this appeal the IAT accept was a lawful trip) was insufficient to establish the start of a regular and habitual mode of life in Bermuda, notwithstanding the IAT accepts that the Appellant's settled intention to move to Bermuda was proven as of that date.

37. The IAT distinguish the 'visits' by Ms Schurman in the Schurman case (which were sufficient to meet the test of being ordinarily resident) with the visit by the Appellant and his wife to Bermuda in June 1989. In *Schurman* the appellant was visiting her family home, albeit with an immigration status as a lawful visitor for Bermuda Immigration purposes. These visits were a regular and habitual part of her mode of life. In contrast, the June 1989 trip of the Appellant was not at that stage a regular and habitual course of the Appellant's life.

38. In the premises the appeal is refused on the basis that the Appellant had not, by the statutory date of 31 July 1989, become ordinarily resident in Bermuda.

DATED this 26th **day of** September **2014**

Ms Kiernan J Bell
Immigration Appeals Tribunal Deputy Chairman

Ms J E Belinda Wright, Panel Member

Mr Francis R Mussenden, 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.