THE IMMIGRATION APPEAL TRIBUNAL

(Case No: 16 of 2014)

IN THE MATTER OF AN APPEAL OF THE DECISION MADE BY THE MINISTER OF HOME AFFAIRS ON OR ABOUT 2 SEPTEMBER 2011, REFUSING AN APPLICATION FOR A PERMENANT RESIDENT CERTIFICATE ("PRC") UNDER SECTION 31B OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956 ("the Act")

BETWEEN:

APPELLANT T

Appellant

-and-

THE MINISTER OF HOME AFFAIRS

Respondent

RULING

Hearing Date: 21 May 2014

Counsel who appeared:

Mr Eugene Johnston, attorney for the Appellant

Mr Michael Taylor and Wendy Greenidge, attorneys for the Respondent

HISTORY

1. By application dated 22 July 2010 the Appellant made application for a PRC under section 31B of the Act. Section 31B makes provision for the grant of a PRC to long term residents who have a Bermudian or PRC family or spousal connection. In this case the Appellant had to satisfy the Minister that he met the following provisions of section 31B of the section:

   (a) he was at least eighteen years of age at the time of the application;

   (b) he was ordinarily resident in Bermuda for a period of ten years immediately preceding the application;

   (c) he made his application before 1 August 2010;

(d) his brother or sister possesses Bermudian status or a PRC under section 31A of the Act.

2. The Appellant in his application for PRC properly disclosed in response to one of the questions set out therein that in the 10 years of being ordinarily resident in Bermuda, he had lived abroad for more than two months. He stated that he was resident in England from April 2008 to 19 July 2010 to "BE WITH FAMILY (WIFE + CHILDREN)".

3. The application form exhibited three reference letters confirming the Appellant's residency in Bermuda for the required 10 year period.

4. The Appellant also wrote to the Chief Immigration Officer on "21 July 22, 2010" and confirmed that his purpose for being in Bermuda during the month of November 2009 until April 2010 was to provide assistance to his sister *"as she was ill and had to have medical treatment at John Hopkins Hospital (cardiac surgery), hence I have been travelling back and forth to Bermuda as she needed my assistance."*

5. By letter dated 2 September 2011 the Acting Chief Immigration Officer informed the Appellant that his application had been refused by the Minister on the basis that he had not been ordinarily resident in Bermuda for a period of ten years immediately preceding the application. The Immigration Department's records indicated that the Appellant had arrived in Bermuda on 21 September 1998 and subsequently left in April 2008 to be with his family in the United Kingdom and he did not return to Bermuda until 19 July 2010.

6. Save for the 10 years of being ordinarily resident in Bermuda, all other requirements of section 31B of the Act had been met.

7. By letter dated 9 September 2011, the Appellant's former attorneys appealed the Minister's decision on the grounds that their client on the evidence presented to them was in fact ordinarily resident in Bermuda for the required ten year period.

8. By letter dated 10 March 2014 the Appellant's supporter made representations to the Immigration Appeal Tribunal (the "IAT") that the Department of Immigration's records were incorrect in so far as they showed that the Appellant was away from Bermuda from April 2008 to 19 July 2010. He attached a copy of the Appellant's passport showing admission into Bermuda on "Dec – 8 2009". By March 2014 it did not appear that the Appellant had legal representation and was relying on his supporter for assistance.

9. By the time of the hearing the Appellant had retained Mr Johnston.

RESPONSE

10. The Minister's attorney filed his Response on 28 March 2014 and reiterated that the Appellant did not meet the ten year requirement and his absence from Bermuda did not fall into any of the exceptions such as being away for school (section 19 (3) (b) of the Act) or temporarily working abroad for a Bermuda based company (section 20C (3) (a) and (b) of the Act).

11. The Response highlighted the Appellant's acknowledgement in the application form that he was residing in England to be with his wife and children for the period April 2008 to July 2010. The Minister asserted that this period could not be taken into account for determining the ten year requirement. Further, the Appellant's return to Bermuda on 8 December 2009 was as a visitor and this stay could not be considered as being

ordinarily resident in Bermuda. By implication, the Minister was accepting that his Acting Chief Immigration Officer had made a mistake in stating in her letter of 2 September 2011 that after the Appellant left Bermuda in April 2008, he had not returned to Bermuda until 19 July 2010. However, the Minister was also of the view that the earlier return to Bermuda was not as a resident but rather as a visitor.

12. In the circumstances, the Minister argued that the Appellant was not in strict compliance with the requirements of section 31B of the Act. In refusing the application, the Minister asserts that he engaged in no factual or legal error and there is no legal, discretionary or equitable basis for overturning the decision.

JURISDICTION OF THE IAT

13. Under section 31B (4) 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.

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14. Neither of the parties in this matter sought directions to agree what should be put before the IAT at the hearing in the way of additional documents, evidence or submissions. Parties are encouraged to have such a directions hearing or to file an agreed directions Order for the IAT's consideration as this step normally provides helpful structure to the process.

15. At the hearing Mr Johnston did not seek to call any evidence but was content to rely on the record which in this case consisted of a copy of the Department of Immigration's file which was updated with documents received by the parties or sent out by the IAT to the parties.

16. In the lead up to the hearing Mr Taylor filed several witness statements.

17. The first witness statement was that of Senior Inspector/Officer of the Department of Immigration, Leopold Lee, which was dated 29 April 2014 and exhibited the Appellant's arrival and departure records from Bermuda for the period 16 March 2008 to 8 November 2013. It showed that:

    (i) The Appellant arrived in Bermuda on 16 March 2008 and was admitted in as a Bermudian which was obviously a mistake. We know from the PRC application form that by April 2008 he was residing in the United Kingdom. He did not return to Bermuda for the remainder of the year, and for the better part of 2009.

    (ii) The Appellant arrived as a visitor in Bermuda on 8 December 2009 and departed on 20 December 2009. He had been away from Bermuda for 20 months, a little over a year and a half.

    (iii) The Appellant between February 2010 and the date of the PRC application (22 July 2010) came to Bermuda on 5 occasions each lasting approximately two weeks in duration. There were three additional trips to Bermuda in the remainder

of the year of similar durations. On 4 occasions he was granted entry as a visitor and on 19 July 2010 and on 14 September 2010 he was granted entry as a working visitor, meaning that he was on temporary work permits. On 10 October 2010 he returned to Bermuda and is described as a returning resident.

(iv) in 2011 came to Bermuda on three occasions, staying on one occasion for 8 months. He came in as a working visitor, returning resident and visitor. On his last trip of the year, he departed Bermuda on 13 December 2011.

(v) in 2012 did not travel to Bermuda.

(vi) in 2013 he came on one occasion for approximately two weeks.

18. At the hearing Mr Johnston did not object to the introduction of this witness statement and accordingly leave was granted to tender it into evidence.

19. Mr Taylor sought leave to tender a second statement from the Inspector, dated 3 May 2014 and leave was granted after Mr Johnston confirmed that he had no objection to its admission. The statement exhibited one Passenger Arrival Form for 8 December 2009 which sets out the Appellant's home address as being in the United Kingdom and ticks the purpose of his visit to Bermuda as a visitor. The part of the Form that requires completion if the person intends to work or reside in Bermuda is left blank.

20. Mr Taylor also sought leave to introduce the Affidavit of Marita Grimes (Personal Services Manager at the Department of Immigration), sworn on 19 May 2014. Leave was again granted after Mr Johnston confirmed that he had no objection to its admission. The affidavit highlights that the appellant was employed in England; the Appellant's PRC application acknowledged that he was residing in England to be with his wife and children; and the Appellant was granted a temporary work permit as a chef that commenced on 12 July 2010 which permit application included a guarantee that his family would not reside in Bermuda if he was granted a work permit. Accordingly, the Appellant was granted access to Bermuda as a working visitor.

21. Mr Johnston did not ask that the Inspector or Ms Grimes be produced for cross-examination. This was not surprising as it was the Appellant via his supporter (see paragraph 8 of this Ruling) who had rightly complained that the Acting Chief Immigration Officer in her letter of 2 September 2011 had not set out all of the return trips the Appellant had made to Bermuda.

22. Mr Johnston argued that the Appellant repeatedly came back to Bermuda which is consistent with being ordinarily resident in Bermuda. Mr Johnston advanced the argument that if the Appellant wished to enter Bermuda, he had to comply with the requirements of the Department of Immigration and therefore the IAT should not be troubled by the fact that oftentimes his client's status was recorded as that of a visitor. Immigration status is a consideration but it does not override a true belief or intention that a person is ordinarily resident in Bermuda. Immigration status would only become relevant and defeat a claim of being ordinarily resident if the person was in Bermuda unlawfully.

23. Mr Johnston placed reliance on paragraph 6 of Lord Justice Lloyd's judgment in the English Court of Appeal case of *Grace v The Commissioner For Her Majesty's Revenue and Customs* [2009] EWCA Civ 1082, particularly the passage where it is recognised that *"short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and occasion."*

24. Set out below is an extract from paragraph 6 of Lord Justice Lloyd's judgment which helpfully sets out a summary of relevant factors that pertain to being resident and ordinarily resident in a particular place:

> "6. Lewison J's summary is as follows:
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> *"(i) The word "reside" is a familiar English word which means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place": Levene v Commissioners of Inland Revenue (1928) 13 TC 486, 505. This is the definition taken from the Oxford English Dictionary in 1928, and is still the definition in the current on-line edition;*
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> *(ii) Physical presence in a particular place does not necessarily amount to residence in that place where, for example, a person's physical presence there is no more than a stop gap measure: Goodwin v Curtis (1998) 70 TC 478, 510;*
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> *(iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: Commissioners of Inland Revenue v Zorab (1926) 11 TC 289, 291;*
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> *(iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: Fox v Stirk [1970] 2 QB 463, 477; Goodwin v Curtis (1998) 70 TC 478, 510;*
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> *(v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: Lysaght v Commissioners of Inland Revenue (1928) 13 TC 511, 529;*
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> *(vi) Although a person can have only one domicile at a time, he may simultaneously reside in more than one place, or in more than one country: Levene v Commissioners of Inland Revenue (1928) 13 TC 486, 505;*
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> *(vii) "Ordinarily resident" refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: R v Barnet LBC ex p Shah [1983] 2 AC 309, 343;*

(viii) *Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: Re Norris (1888) 4 TLR 452; R v Barnet LBC ex p Shah [1983] 2 AC 309, 342;*

(ix) *It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his "real home": R v Barnet LBC ex p Shah [1983] 2 AC 309, 345 and 348;*

(x) *There are only two respects in which a person's state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: R v Barnet LBC ex p Shah [1983] 2 AC 309, 344;*

(xi) *Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: Lysaght v Commissioners of Inland Revenue (1928) 13 TC 511, 535;*

(xii) *The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business or profession as well as a love of a place: R v Barnet LBC ex p Shah [1983] 2 AC 309, 344;*

(xiii) *Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have "left" the United Kingdom) unless there has been a definite break in his pattern of life: Re Combe (1932) 17 TC 405, 411.*

This has the incidental advantage of identifying almost all the decided cases to which I need to refer."

25. It is important to observe that the Act does not provide a definition of "ordinarily resident". The words should therefore be given their normally understood meaning or their plain and obvious construction *(see: the House of Lord's decision in Azam v Secretary of State for the Home Department et al [1974] AC 18; Sir James Astwood's judgment in Whalley v Minister of Labour and Home Affairs Civil Jur 1993: No 46; and Justice Simmons judgment in Schurman v the Minister of Immigration [2004] Bda LR 2).* The factors set out by Lord Justice Lloyd in the *Grace* decision provide assistance in determining whether a person is resident or ordinarily resident in a particular place.

26. Mr Johnston, accepts that the Appellant left Bermuda at the end of his work permit in 2008 and took up residence in the United Kingdom but he argues that you can be ordinarily resident in more than one place and that a physical break is not sufficient to break the status of being ordinarily resident in a place if in all the circumstances the break is not permanent and there continues to be sufficient continuity with the place and a settled purpose to reside there. The necessity of continuity and settled purpose is not broken by being viewed by immigration authorities as a visitor or ticking the visitor box to gain entry to a country. It is argued that it is not permissible to place weight on how the person came to be in Bermuda.

27. Mr Taylor argued that significant weight should be given to the Appellant's acknowledgment in his PRC application that he was residing in the United Kingdom to be with his wife and children. In 2008 the Appellant had to and did leave Bermuda because he had no work permit that allowed him to stay. The temporary visits to Bermuda to assist his sister are insufficient to maintain the status of being ordinarily resident in Bermuda. Providing occasional assistance to his sister is not consistent with having a settled intention to reside in Bermuda. Visits to a particular place do not provide the necessary connectors that normally accompany the status of being ordinarily resident in a place such as a home and a job. Mr Taylor argued that the basis of one's immigration status, the basis for being let into a county is a relevant factor and if a person comes to a country as a visitor, then this status ought to govern his relationship with the country.

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28. The weight of the evidence supports the decision that was made by the Minister and accordingly his decision is upheld.

29. The burden was on the Appellant to show that the Minister erred in reaching the decision he did. The burden was on the Appellant to establish that he was ordinarily resident in Bermuda. Save for cursory representations contained in the PRC application form, the letters of reference, and a few Immigration entries that describe the Appellant as a resident, the IAT was left with the submissions of counsel that the Appellant was ordinarily resident in Bermuda.

30. In the letter dated 9 September 2011 from the Appellant's former attorneys a submission is made in the following terms: *"We respectfully submit that our client has in fact, on the basis of the evidence presented to us, been ordinarily resident in Bermuda for a period of 10 years from the 21st of September 1998 until recently. We would be obliged to receive a notice of hearing in order to fully present our client's position in this regard."*

31. The Appellant did not submit any further evidence beyond that which was included with his PRC application form and the letter from his supporter. The Appellant did not seek to give any evidence at the appeal hearing.

32. Mr Johnston did the best with what he had to work with but he had no or very little evidence to establish that the Appellant was ordinarily resident in Bermuda for the required 10 year period.

33. It was incumbent on the Appellant to provide satisfactory evidence that his connections to Bermuda were enduring to such an extent that he continued to ordinarily reside in Bermuda after 2008. The IAT accepts that a person can, particularly in this day and age of travel, be ordinarily resident in more than one place. By way of example, it is not uncommon for people to live part of year in one country and part of the year in another. However, in this case, there were no indicia of residence in Bermuda. There was no evidence that the Appellant maintained a home in Bermuda; had stored all of his belongings here; had maintained his banking accounts; had an ongoing job in Bermuda.

34. The remaining connections to Bermuda were a sister residing in Bermuda, periodic visits to Bermuda, and a few temporary work engagements which were regulated by the

Department of Immigration with the acknowledgement that the permission would not allow the Appellant's family to reside in Bermuda. These temporary work permits give temporary rights of residency in Bermuda and in ordinary circumstances this type of permission is not going to constitute a period of being ordinarily resident in a country unless the permission is back to back with an earlier period of being ordinarily resident in Bermuda or are given with such frequency that an inference can be drawn that the person has established an abode in Bermuda. .

35. The Appellant's acknowledgement in his PRC application form that he was resident in the United Kingdom from April 2008 to 19 July 2010 to be with his wife and children does not support the Appeal. Once a person has taken up residency in another country with his family, and is not a citizen of the country he has left and has no right of residency that he can point to, there is a heavy evidentiary burden to demonstrate that he continues to be ordinarily resident in the jurisdiction.

36. After leaving Bermuda at the end of March 2008, the Appellant did not return to Bermuda until 20 months later. 20 months is a very long time to be away from a place that a person considers himself to be ordinarily resident in. While it is a judgment call as to when absence gives rise to a strong inference of not being resident in the jurisdiction, an absence of more than a year and certainly more than a year and a half, gives rise to such an inference particularly when no reasonable explanation is forthcoming. The Appellant did say in his application form that he was residing in the United Kingdom to be with his family but that is unsatisfactory without more as being with one's immediate family is a strong indicator of where a person normally resides as opposed to being a plausible explanation for not returning to a place you consider to be your home, even if it is not your primary home. Where your wife and children reside is indicative of your place of residence unless you are divorced or separated or separated by the demands of work. None of those factors featured in this case during the 20 month period. In addition, the Appellant must have known from the Minister's refusal that his enduring connections to Bermuda, if they actually existed, needed to be particularised in the appeal. Indeed his former attorneys alluded to the existence of such evidence but that evidence was not forthcoming unless it was simply the subsequent trips to Bermuda which viewed as a whole weighed heavily in favour of coming to Bermuda as a visitor as opposed to returning to one's home.

37. Before the Minster made his decision in September 2011, the Appellant wrote to the Chief Immigration Officer on "21 July 22, 2010" and confirmed that his purpose for being in Bermuda during the month of November 2009 until April 2010 was to provide assistance to his sister *"as she was ill and had to have medical treatment at John Hopkins Hospital (cardiac surgery), hence I have been travelling back and forth to Bermuda as she needed my assistance."* This explanation for being in Bermuda is not what one would expect from someone who is ordinarily resident in a jurisdiction. Coming back to a place for short stays to assist a loved one, does not strike the IAT as being the type of evidence that supports a finding of being ordinarily resident in that place. Such a loving and supportive gesture is the type of conduct one would expect from someone regardless of their visitor or residency status. However, this letter is sent on the very same day as the date of the PRC application and one would have thought that the Appellant's presence in Bermuda would be explained by reference to being ordinarily resident in Bermuda, if that were the case.

38. It was accepted by Mr Taylor that the Acting Chief Immigration Officer in her letter of 2 September 2011 erred in suggesting that the Appellant had not returned to Bermuda until 19 July 2010. This error was corrected by the evidence that was filed in the appeal which provided a record of the Appellant's return trips to Bermuda. It is true that the Minister should have been made aware of these returns but it is equally true by the introduction of this evidence by the Minister in response to the Appeal that that information would have made no difference in how he would have decided the application. The majority of the return trips were recorded as visits (as opposed to work/reside) and it is clear from the Passenger Arrival Form that it is the arriving passenger that determines the appropriate designation. The evidence of frequent return trips to Bermuda in 2010 did allow Mr Johnston to advance the argument that this was indicative of maintaining a place of residency. The IAT accepts that frequency of returning to a particular place can be indicative of residency but whether it actually is depends on all the surrounding circumstances which may include what permissions are needed or obtained to enter the place; what the stated purpose of the entry is for; where the person is going to stay; and how the person conducts himself within the jurisdiction. In this case, there is no evidence that shows that in substance the Appellant conducted himself as a resident of Bermuda and had the accoutrements of being resident in Bermuda. There were the reference letters that accompanied the PRC application which stated that the Appellant was a resident of Bermuda but none of these people were called by the Appellant to give evidence at the hearing of the Appeal to make good these representations which is surprising given the Minister's refusal to grant the Appellant's PRC application.

39. Mr Johnston says the IAT would be wrong to put much weight on the Appellant's immigration status and what is of relevance is whether on the facts the person is ordinarily resident in Bermuda which is not an immigration question. The IAT is of the view that immigration status is a relevant consideration although not determinative in each and every case. Hypothetical situations can be envisioned where someone enters a country as a visitor but conducts himself in such a way that over time he would be considered ordinarily resident in the country. Over staying the period of time that visitors are allowed to be in a country; working; buying property; raising children in the country are all circumstances or indicia that may support a finding that a person is ordinarily resident in that country. None of these indicia exist in this case.

40. If a person is allowed to enter as a visitor, and the person's conduct is consistent with that permission, then it is reasonable to assume that he is not there for any other purpose such as seeking to establish or maintain residency status. The person's immigration status is therefore a relevant consideration, particularly in Bermuda where entry and the ability to remain in Bermuda are highly regulated. In this case, there is no evidence that the Appellant acted inconsistently with the status of a visitor or inconsistently with the permission to temporarily work in Bermuda. He left the island as Bermuda law required him to do. Had he stayed beyond permitted times, then perhaps he might have been able to maintain that he remained ordinarily resident in Bermuda. Even if he had, it is difficult to see how that would have assisted the Appellant. An application for PRC status under section 31B of the Act incorporates by reference section 19 (4) of the Act which requires the Minister to refuse any application where he is of the opinion that the applicant's character or conduct should disqualify the applicant from obtaining a PRC. If an applicant had misrepresented the purpose of his stay in Bermuda by saying that he was entering as a visitor when in actual fact he was seeking to use that permission to maintain residency for the purpose of filing a PRC application,

the Minister would inevitably and justifiably find that to be conduct that would disqualify the applicant.

41. In this case, we have the ambitious arguments of counsel for the Appellant and he has put forth the best case the circumstances would permit. An examination of these arguments required consideration of hypothetical situations in which a person's conduct could be questioned. Nothing the IAT has said should be taken as impugning the conduct or character of the Appellant.

42. Even if one were to put to one side the factor of immigration status, the IAT is still left with a situation where there is no body of evidence that can be pointed to that illustrates that during the period of 2008 to 2010, the Appellant was ordinarily resident in Bermuda as opposed to visiting and assisting his sister in Bermuda. Residency connotes some degree of permanence, some degree of continuity; it represents a person's abode (recognising that a person can have more than one place of abode), living in the community not as a visitor but as a resident member of that community. Pointing to travel records that show frequent trips to Bermuda in 2010 is not sufficient. It is what takes place in Bermuda that counts and there is no evidence of what the Appellant was doing in Bermuda other than what the immigration records show, and those records and documents fall very much short of establishing that the Appellant was ordinarily resident in Bermuda between 2008 and 2010.

43. In the circumstances the Appeal is dismissed. Pursuant to section 13D (1) (a) of the Act the IAT confirms the decision of the Minister.

DATED this 22nd day of December 2014

Timothy Z Marshall, Chairman of the IAT

Jon Brunson, IAT Member

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.