IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2002 : No. 314

IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN THE MATTER OF REVEREND P L CHRISTOPHER HAYNES FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE FOLLOWING DECISONS:

A. The decision of the Minister of Labour, Home Affairs & Public Safety on the 10th April 2002 and 7th June 2002 in refusing an application for the renewal of the work permit of Reverend P L Christopher Haynes;

B. The decision by the Cabinet (Appeal Tribunal) on 25th July 2002 ruling against the appeal of the decision of the Minister of Labour, Home Affairs and Public Safety on 10th April 2002 and 7th June 2002

JUDGMENT

Date of hearing: January 21-22, 2008
Date of Judgment: February 6, 2008

Mr. Kelvin Hastings-Smith, Appleby, for the Applicant
Mr. Gregory Howard and Ms. Maryellen Goodwin,
Attorney-General's Chambers, for the Respondent

Introductory

1. Bermuda is said to have the highest per capita income level in the world. For many years, its economy has created far more jobs, in almost every conceivable job category, than available Bermudians can fill. The country has for several decades been dependent, to a significant degree, on migrant labour, whose right to work and reside in Bermuda is regulated by the Bermuda Immigration and Protection Act 1956.

The application of immigration law and policy, as no doubt occurs everywhere, explicitly requires the Minister to protect the legal right of Bermudians to be employed ahead of overseas workers. But whereas in many countries, as was the case in Bermuda less than 35 years ago, migrant workers who reside for more than a minimum prescribed period often as short as five years can apply for permanent residence rights, no equivalent regime exists in Bermuda. This country's small size and considerable dependence on imported labour resulted in a national consensus that the permanent residency regimes applicable in larger countries was against the public interest of Bermuda.

2. The tension between the interests of the host community to regulate what foreigners should be allowed to work and reside in Bermuda, and the interests of a guest worker to seek to remain in Bermuda is perhaps greatest in the case of persons who have been given multiple permissions to work and reside over a period of years. The longer the guest worker stays, invariably because he or she is making a valuable contribution to Bermuda, the stronger their economic, emotional, family and social ties with Bermuda will become. This tension was recognised by the courts and the legislature, without being satisfactorily resolved, three decades ago. In *Mucklow –v- Minister of Home Affairs*, Court of Appeal for Bermuda, Civil Appeal 1978: No. 2, Judgment dated July 17, 1978, the Court of Appeal (Hogan P, Duffus JA and Telford Georges JA) unanimously quashed the Minister's revocation of the appellant's right to reside on the grounds that the rules of natural justice applied to such revocation. At page 31 of Sir Michael Hogan's separate judgment, the Court President concluded as follows:

> " *I am satisfied that, in all fairness, permission to remain in Bermuda could not be revoked without observing the rules of natural justice, particularly the audi alteram partem principle, in respect of an individual who, like the appellant, is accepted to be a man of integrity and who had for some ten years been a resident and operated a cottage colony, acquired under a license from the government, with a reasonable expectation of being allowed to remain here.*"

3. In *Marks-v- Minister of Home Affairs*, Court of Appeal for Bermuda, Civil Appeal 12 of 1983, Judgment dated April 6, 1984, a differently constituted Court (Sir Alastair Blair-Kerr P, Harvey da Costa JA and Sir John Summerfield JA) unanimously quashed the Minister's decision not to renew the appellant's work permit on the grounds that the Minister had failed to act fairly by depriving the appellant of an opportunity to know the nature of complaints alleged against him. At pages 35-36 of the Court President's separate judgment, Sir Alastair Blair-Kerr made the following observations about the impact of the length of previous residence in Bermuda on the work permit renewal applicant's position:

> "*If, in 1976, the Minister had refused to grant permission to the appellant to engage in gainful occupation, he would have had no grounds for complaint. Despite his previous association with, he could not previously have argued that he had a reasonable expectation of being allowed to*

return…but by December 1982 a very different state of affairs existed. Permission to engage in gainful occupation had been renewed apparently automatically for six years….as we said on 17th November, non-renewal could have 'a traumatic upheaval on his life-perhaps temporarily depriving him of his means of livelihood….it was not enough that the Ministry did nothing to create in the mind of the appellant a reasonable expectation that he would receive a renewal of his permit…"

4. The legislative response to these *dicta* was the introduction in 1987[1] of a new section 7A of the 1956 Act, which provided as follows:

> *"7A (1) A grant to a person shall not, except to the extent, if any, expressed in the grant, confer upon him any right, or ground or support any hope, claim or expectation which he may assert—*
>
> *(a) to or of any extension or renewal of the right or rights expressed in the grant; or*
>
> *(b) to or of the award of any right or rights other than the right or rights so expressed.*
>
> *(2) In subsection (1), "grant" means a certificate, licence, permit or other permission (whether so called or by any other name) given or issued to a person under any provision of this Act.*"

5. This provision meant that guest workers could remain in Bermuda on a work permit basis for indefinite periods of time but could not legally complain that the various extensions gave rise to any legitimate expectation on their part of further renewals. However, successive governments left unresolved the broader humanitarian issue of how long guest workers could be permitted to remain in Bermuda while being deprived of any opportunity to obtain permanent residential rights. The nettle was eventually grasped by a new Minister of Home Affairs appointed in late 1998, who on August 18, 2000 presented a Green Paper, and on July 13, 2001 a White Paper, to the House of Assembly setting out Government's legislative proposals for dealing with the long-term residents' issue[2]. The most important broad proposal was that any person who was ordinarily resident in Bermuda before August 1, 1989 for a 20 year period could apply for a Permanent Resident's Certificate before August 1, 2010. The Bill which became the Bermuda Immigration and Protection Act 2002 on July 12, 2002 was presented to the House of Assembly on June 7, 2002 and passed in the House of Assembly two weeks later[3]. It is against this legal background that the decisions which gave rise to the present application for judicial review were made.

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[1] Through section 4 of the Bermuda Immigration and Protection Amendment Act 1987.

[2] '*Community for a new Millennium: Bermuda's Long-Term Residents*' presented by the Honourable Paula Cox. This official document was not referred to in argument, but the enactment of the resultant legislation, presented to Parliament by the Honourable Terry Lister, formed part of the factual matrix of the present case.

[3] www.royalgazette.com.

6. The parties agreed at the outset that there were no factual disputes which required resolution through oral examination, having regard to the fact this Court was not being asked to consider the merits of the decisions complained of, only the legality of the manner in which they were reached. The core background facts were not in dispute. The Applicant was first employed by the African Methodist Episcopal Church ("the AME Church") on or about June 15, 1983. He had resided in Bermuda for 18 years when the AME Church applied on October 3, 2001 for a further renewal. There were no qualified Bermudian applicants for the post which was duly advertised. The application was formally refused by letter dated June 7, 2002, the same day the long-term residents' amendments were tabled in the House of Assembly, by which time he had been in Bermuda for approximately 19 years. While the application was processed, objections from certain parishioners were received by the Ministry and orally discussed with the AME Church representative who was handling the application on the Applicant's behalf. The objections included the suggestion that the applicant had been engaged in ministerial work beyond the scope of his work permit. No reasons were given for the decision (none are, of course, required), and the Applicant was given until July 30, 2002 to leave Bermuda with his family. He had throughout this period lived in Bermuda with his wife and one daughter (apparently born shortly before he came to Bermuda), but also had two teenage daughters who were born after his arrival in Bermuda. He was, when this decision was made, a Guyanese national who had not permanently resided in Guyana since 1972. An appeal was belatedly filed by the Church's attorneys against the work permit refusal on June 14, 2002 to the Cabinet Appeal Tribunal, but the appeal was dismissed on July 25, 2002, with no reasons being given (again, none were required to be given). On July 29, 2002, the Ministry gave the Applicant until August 30, 2002 to leave Bermuda.

7. On August 27, 2007, the Applicant applied for leave to seek judicial review of the decisions of the Minister and the Cabinet Appeals Tribunal, and a stay of the requirement that he leave Bermuda by August 30, 2002. Acting Chief Justice Norma Wade-Miller granted an Order in these terms on August 27, 2007. By the time the case came to be heard, Mr. Hastings-Smith was forced to concede that the Applicant and the AME Church had now "parted ways". This lent credence to Mr. Howard's submission that the relief sought in relation to the Minister's June 7, 2002 decision was academic. Nevertheless, the following main issue was eventually left with the Court for determination as regards both decisions: were they unlawful and liable to be quashed because of procedural unfairness?[4]

8. Prior to the hearing I requested counsel to address me on the question of whether the Applicant could complain that his section 6(8) of the Bermuda Constitution rights were contravened by the non-independent character of the Cabinet Appeal Tribunal, in light of my decision in *Fay-v- The Governor* [2006] Bda LR.65. Supplementary submissions were prepared on this point and the Applicant applied for leave to amend to include a claim for relief under section 15 of the Constitution in the present

[4] The bias arguments directed at the Immigration Board were not pursued as the evidence made it clear that the Board made no recommendation to the Minister. The irrationality argument raised in the course of the hearing was also not supported by the evidence.

proceedings. I adjourned that application until the end of the application for judicial review, but will also consider this ancillary issue below.

Legal findings: framework of the Act

9. Mr. Howard's written and oral submissions provided a clear yet concise outline of the framework of the Bermuda Immigration and Protection Act 1956. Section 25(1) provides the general statement of principle of who may reside in Bermuda as follows:

> *"25 (1) Without prejudice to any of the succeeding provisions of this Part, or to any provision of any other Part, it is hereby declared that it is unlawful for any person other than a person—*
>
> *(a) who possesses Bermudian status; or*
>
> *(b) who is for the time being a special category person; or*
>
> *(c) who is, bona fide, a visitor to Bermuda,*
>
> *to land in, or having landed, to remain or reside in, Bermuda, without in each case specific permission (with or without the imposition of conditions or limitations) being given by or on behalf of the Minister; and, as respects any special category person or a bona fide visitor, such landing, remaining or residence shall be unlawful unless he conforms to any requirements imposed by this Part:*
>
> *Provided that the Minister, in his discretion, may dispense with the requirements imposed by the foregoing provisions of this subsection.*"

10. The Minister's decision as to whether or not someone requiring permission to reside in Bermuda may reside is subject to appeal. Section 25(2) provides as follows:

> "*Any person who is aggrieved by any decision of the Minister with respect to a refusal to grant any permission under subsection (1) or with respect to any condition or limitation imposed under subsection (1) may, subject to section 124, appeal to the Cabinet against such decision.*"

11. Section 60(1) of the Act provides that save for persons not requiring permission to do so, it shall be unlawful to engage in gainful employment in Bermuda without the express permission of the Minister. It was common ground that section 61(4) contained the key statutory provisions governing the regulation of permission to work in Bermuda and the factors the Minister must take into account:

> "*The Minister, in considering any application for the grant, extension or variation of permission to engage in gainful occupation, shall, subject to any general directions which the Cabinet may from time to time give in respect of the consideration of such applications, take particularly into account—*

(a) the character of the applicant and, where relevant, of his or her spouse;

(b) the existing and likely economic situation of Bermuda;

(c) the availability of the services of persons already resident in Bermuda and local companies;

(d) the desirability of giving preference to the spouses of persons possessing Bermudian status;

(e) the protection of local interests; and

(f) generally, the requirements of the community as a whole,

and the Minister shall, in respect of any such application, consult with such public authorities as may, in the circumstances, be appropriate, and shall in particular, in the case of an application for permission to practise any profession in respect of which there is established any statutory body for regulating the matters dealt with by that profession, consult with that body."

12. The Minister is empowered to revoke permission to reside once it has initially been given and to revoke a work permit during its term. In both cases, the person affected must be given an opportunity to be heard and a right of appeal is conferred to the Cabinet. Section 34 provides:

> "*34 (1) Subject to this section, the Minister may, by an order in writing served upon the person to whom it relates, revoke any permission to land, remain or reside which has been granted to that person in accordance with this Part either forthwith or as from a day to be specified in the order; and thereupon, notwithstanding any other provision of this Part, that permission shall cease to have effect forthwith or on the day so specified as the case may be.*
>
> *(2)Before the Minister makes any order under subsection (1) against any person, he shall cause a notification in writing to be served upon that person that he proposes to make such an order in his case at the expiration of fourteen days or such longer period as may be specified in the notification; and shall inform that person of the grounds upon which the Minister proposes to make the order and shall invite him within that period to submit in writing to the Minister any reason which he wishes to advance why such an order should not be made in his case.*
> *(3)The Minister shall not make any order under subsection (1) until the expiration of the period specified in the respective notification served under subsection (2) and the Minister shall, where reasons are submitted to him in accordance with subsection (2), take those reasons into consideration when he decides whether or not the order should be made.*
> *(4)Any person aggrieved by any decision of the Minister to make an order under subsection (1) against him may, subject to section 124, appeal to the Cabinet against such decision.*"

13. Section 34(2)-(4) (right of prior notice and subsequent appeal) applies to work permit revocations as well. Section 61 provides in salient part as follows

"*(7) The Minister may extend, revoke, vary or modify the terms of any such permission:*

Provided that any revocation or restriction of the terms of any such permission shall be effected by means of an order in writing served upon the person to whom it relates and that the provisions of section 34 (2), (3) and (4) shall apply mutatis mutandis to the making of such an order under this subsection as they apply to the making of an order revoking permission to reside…"

14. It was also common ground that no right of appeal is conferred in respect of a decision not to grant a work permit application, whether initially or by way of renewal. Section 124 of the Act provides as follows (emphasis added):

> "*(1) Without prejudice to anything in section 10, where a person is aggrieved by any decision of the Minister* **in respect of which an appeal is expressly allowed by any provision of this Act**, *he may, subject to the succeeding provisions of this section, within seven days of the service of any notice upon him communicating that decision to him, appeal to the Cabinet by notice in writing addressed to the Secretary to the Cabinet; and the Cabinet shall, subject as hereafter provided, determine any such appeal, and may make such order as appears to him just; and the Minister shall govern himself accordingly.*

15. It was also common ground that judicial review of invalid decisions was possible notwithstanding the provisions of section 10(1):

> "*10(1) Save where otherwise expressly provided and without prejudice to any Parliamentary procedure under the Statutory Instruments Act 1977 [title 1 item 3] applicable to the making of any statutory instrument under this Act, any determination, decision, direction or order come to, given or made in the exercise of any power conferred or the discharge of any duty imposed by or under this Act upon—*
>
> *(a) the Cabinet;*
>
> *(b) the Governor, acting in accordance with the advice of the Cabinet; or*
>
> *(c) the Governor, acting in his discretion in the discharge of his special responsibilities under the Constitution,*
>
> *shall be final and conclusive and not subject to question or review by any court or tribunal whatsoever.*
>
> *(2) It shall not be incumbent upon the Governor nor, upon any member of the Cabinet nor upon any public officer to give reasons to any person or authority whatsoever for any such determination, decision, direction or order as is mentioned in subsection (1).*

16. The Respondent's submission that greater protections are afforded to a person subject to immigration control whose permission to work and/or reside are revoked than are extended to persons whose applications to work and/or reside are refused is borne out by the statutory scheme. It is also correct, in the case of persons who have been granted several permissions over a number of years, that the following statutory provision explicitly ousts the public law doctrine of legitimate expectation:

> *"7A (1) A grant to a person shall not, except to the extent, if any, expressed in the grant, confer upon him any right, or ground or support any hope, claim or expectation which he may assert—*
>
> *(a) to or of any extension or renewal of the right or rights expressed in the grant; or*
>
> *(b) to or of the award of any right or rights other than the right or rights so expressed.*
>
> *(2) In subsection (1), "grant" means a certificate, licence, permit or other permission (whether so called or by any other name) given or issued to a person under any provision of this Act.*"

17. Contrary to the suggestion made from the Bench in the course of the hearing, section 11(2) of the Constitution permits Parliament unrestricted liberty to enact laws "*(d) for the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion therefrom of any such person*", by way of derogation from the freedom of movement rights conferred by section 11. These laws need not be reasonably justifiable in a democratic society. The relevance of the fair hearing rights under section 6(8) of the Constitution will be addressed as a supplementary matter below.

Factual findings

18. The primary facts relevant to the central question of whether the Applicant's right to be heard was infringed are not controversial. There were two areas of controversy which involved how the facts were characterised as opposed to what the facts were. The first issue was the status of the pre-2002 Immigration Department investigation into alleged work permit violations on the Applicant's part. The second issue was whether the process which resulted in the decisions complained of was fair.

19. Mr. Hastings-Smith contended that that the initial enquiry into the Applicant's involvement with a Ministry which did not seemingly fall as part of his employment with the AME Church was resolved in the late 1990's. Mr. Howard contended that the Ministry's concerns had never been resolved, and (having regard to the nature of the objections the Ministry received) may well have formed the basis of the 2002 work permit refusal. It was not disputed that from around 1996 until 2001, the Applicant was granted annual permits whereas previously he had been granted several three year terms.

20. It is clear that concerns existed on the part of the Department of Immigration from 1996 until 1998 that the Applicant may have been engaged in gainful employment outside of the scope of his work permit. On June 11, 1998, the Department advised the AME church that they were considering revoking the Applicant's permission to reside and work, and invited representations within 14 days. On June 23, 1998, five officers of the Intercession & Restoration Ministries wrote to the Immigration Department advising that this not-for-profit organisation was well aware of the Applicant's immigration status which he had never infringed by working for them. On July 8, 1998, a chasing letter was sent by the Department to the applicant's employer, who asked for further time to respond in an undated letter received by the Department on August 13, 1998. The Immigration Department records produced are thereafter silent, but it is implicitly accepted that annual permits were granted thereafter in 1998, 1999 and 2000, the last permit expiring on September 11, 2001.

21. Having regard to the presumption of regularity in relation to official acts, I feel bound to find that the Department's concerns about the suspected work permit violations were allayed and that they properly granted the subsequent permits rather than to conclude that they negligently failed to follow up the matter or deliberately granted fresh permits to someone they suspected of committing ongoing immigration offences. There is some support for this presumptive conclusion from a document produced by the Applicant, which suggests that it was agreed that the Intercession Ministry would be brought under the Applicant's AME Church employment with the Mount Zion Church[5].

22. All the material before the Court suggests that the Department only ever communicated with the Applicant's employer, the AME Church. This was the case from 1996 to 1998, and after the October 3, 2001 application to employ the Applicant. In general terms, the Department had no reason to communicate with the Applicant directly concerning his work permit application. The process of the application is unclear, but it appears that the Immigration Board (which included various interested church members) either by accident or design made no recommendation to the Minister. By letter dated March 7, 2002, six members of the Applicant's own Church wrote an objecting letter to the Immigration Department, apparently enclosing a January 30, 2002 objection letter signed by approximately 30[6] members of the same Church and originally sent to the AME Bishop in Philadelphia.

23. Of the eight specific matters listed in the March 7, 2002 letter, two raise questions about whether the Intercession Ministry fell within the Applicant's work permit, four express concerns (some doctrinal) about the effects of his active involvement in a separate Ministry on the Mount Zion Church, one suggests the need for an independent audit in relation to a single large investment and one suggests the

[5] Letter dated July 1, 1998, Intercession & Restoration Ministry to Bishop Cousin, exhibited to Second Haynes Affidavit.
[6] Some of the signatories may have also signed the March 7, 2002 letter.

Applicant's wife may have been working unlawfully. The final broad point made is that it would not be in the interest of Bermuda for the Applicant to become eligible for long-term residency. The internal Church letter of January 30, 2002 lists various complaints about the Applicant's commitment to the AME Church and its values, and suggests he is preoccupied with the Intercession & Restoration Ministry. There was no evidence before the Court of any communication between the Department and the Applicant or his employer before the application was refused until the Affidavit of the Assistant Chief Immigration Officer Majiedah Azhar was sworn on October 9, 2007.

24. From the Azhar Affidavit, I find that on March 13, 2002 the Board referred the application to the Minister who made his decision on March 27, 2002. Before this decision was made, the deponent was requested to speak to the Presiding Elder of the AME Church to ascertain whether the Applicant's employer took the position that his work with the Intercession & Restoration Ministry fell within the ambit of his employment with the Church. She was told that the employer felt that the other Ministry was not part of what the Applicant had been employed to do and would not be upset if the work permit application was refused. The employer was also seemingly aware of the contents of the March 7, 2002 objection letter, which purported to have been copied to him. This discussion was recorded in an undated file memo exhibited to the deponent's unchallenged Affidavit.

25. It was clearly open to the Minister to reach the decision he did, and no question of the decision being invalid by reason of irrationality arises. It is unclear why it took so long for the formal decision of June 7, 2002 to be communicated, but it is quite possible that informal lobbying took place after the decision was actually made on March 27, 2002 (and possibly verbally communicated shortly thereafter[7]) with a view to affording the Applicant a second bite at the cherry on appeal. A short form letter was sent to the employer on April 10, 2002, but it was only on June 7, 2002 that the Department formally notified the employer and (by copy) the Applicant himself that (a) the work permit application had been refused, (b) the Applicant was to cease work immediately and leave Bermuda by July 30, 2002, and (c) of his appeal rights under section 124(1) of the Act. Telemaque and Associates on June 14, 2002 wrote to the Cabinet Secretary a letter which opened in the following terms: "*Please be advised that we have been instructed by the Employer to appeal the decision of the Minister not to renew the work permit of the Appellant.*" The letter indicated that the Applicant had the support of Bishop Grady and attached various glowing testimonials including a letter of support apparently signed by some 145 members of the Mount Zion congregation. A financial report for the period 1993 to 2002 was also attached in support of the contention that the Applicant had contributed to (a) the Mount Zion Church "[b]*urning its mortgage several years prior to its maturity date*" and (b) "*a $410,138 deficit transformed to a $633,921 surplus.*"

[7] One supporting letter is dated April 9, 2002, and several April 10, 2002. It is probably commonplace for the eagerly awaited results of work permit applications to be communicated informally before the formal letter can be got out.

26. The appeal letter does not address any of the objections directly at all, and it clearly represented an attempt on the part of the employer to reverse the decision to refuse the work permit application, the case for which was fully put. The issue of the decision to refuse the Applicant the right to reside in Bermuda was not addressed either. Three short sentences in a three page letter were devoted to mentioning, almost casually:

> "*By way of background, the first permit granted in respect of the Appellant was granted on 15 June 1983 for a period of three years. We are instructed that the practice of granting three year permits in respect of the Appellant subsisted until 20 March 1996. Thereafter, the Appellant's permits were granted for one year only.*"

27. On July 25, 2002, the Secretary to the Cabinet wrote to the attorneys who had represented themselves as acting for the employer, in respect of the work permit issue alone, as follows:

> "*The Appeal Tribunal of Cabinet has heard the appeal which you lodged on behalf of your client, Reverend Haynes, against the decision of the Minister of Labour, Home Affairs and Public Safety to deny his request to reside in Bermuda and seek employment.*
>
> *I am directed to inform you that the Appeal Tribunal has ruled against the appeal.*
>
> *Reverend Haynes can expect to hear from the Chief Immigration Officer in the near future concerning this matter.*"

28. It is with the benefit of hindsight quite obvious that the appeal which the Cabinet appeal tribunal purported to dismiss was not the appeal which was lodged by the lawyers for the Applicant's employer who explicitly purported to challenge the work permit refusal alone. It is equally obvious, based on the evidence before the Court, that at no time before the Applicant's permission to work and reside in Bermuda was revoked on June 7, 2002 was he invited to advance reasons as to why he should not be permitted to reside in Bermuda and seek fresh employment. On July 29, 2002, the Chief Immigration Officer wrote Telemaque & Associates (copying the Applicant himself) and advised that as the appeal against the decision of the Minister to refuse the Applicant permission to continue to reside and seek employment in Bermuda had been dismissed, he and his family had until August 30, 2002 to leave Bermuda.

Legal findings: is the decision to refuse to grant a work permit liable to be quashed on the grounds of procedural impropriety?

29. Mr. Hastings-Smith forcefully contended that the June 7, 2007 work permit application refusal was reached in a fundamentally flawed manner because the Applicant himself had never been given an opportunity to be heard in answer to the allegations made against him. Mr. Howard insisted, in the face of persistent probing from the Bench, that the Respondent could not reasonably be expected to have dealt with anyone other than the employer whom they had dealt with throughout.

30. The Respondent's submissions, carefully considered, are clearly right in all the circumstances of the present case. Under the framework of the Act, the Minister is given a very broad discretion when dealing with work permit applications and the refusal of a work permit is an administrative discretionary decision which involves no finding against the employee. The Act provides no appeal against such decisions, a point to which I will return later. The volume of work permits which the Department of Immigration processes would make it a massive administrative inconvenience if the law were to require direct communications with employees in respect of every application where allegations of misconduct against the employee were made. After all, in the vast majority of work permit cases, section 7A deprives the applicant of any expectation of renewal. In the instant case, the employer was given an opportunity to meet the main concern the Minister had (which was more than the law strictly required) and gave no cause for the Minister to make further enquiries. The impression was given that the employer shared the Minister's concerns about breaching immigration law, and would not be distressed if the application was refused.

31. In the course of the hearing I expressed concerns about the informal nature of the oral communication which took place. On reflection, having regard to all the circumstances of this case and the wider immigration context, it cannot be contrary to the interests of public administration for immigration officials to make verbal enquiries on sensitive matters where reliable information may not be forthcoming because employers may be reluctant to implicate long-serving employees with having committed immigration offences. The peculiar facts of the present case are that it appears that different Church factions took different views of the Applicant's conduct and whether or not he should continue to be employed, and changed horses between the date of the Azhar telephone call in March 2002 and the date of the filing of the appeal on June 14, 2002. This creates the illusory impression that the Applicant personally should have been more directly involved in the application process before the Minister.

32. These unusual facts should not be allowed to obscure the ordinary framework within which the Department works. In the overwhelming majority of work permit applications, the Department of Immigration is surely concerned with the question of whether Employer A should be able to hire Employee B, and the case for employment is made (or unmade) by the employer. The employee only in practical terms comes into the frame if he is seeking permission to reside and seek fresh employment. If he obtains permission to seek and finds fresh employment, the work permit application will ordinarily be taken up by the new employer. It is a notorious

fact that it is would-be employers who almost invariably place advertisements for jobs, and generally handle the work permit application process. In the present case, it seems clear that fairness did not require the Applicant personally to be communicated with by the Department because in substance they were dealing with an application by his employer from which he hoped to benefit and afforded his employer an adequate opportunity to be heard.

33. The only circumstances in which the employee personally will ordinarily have a right to be heard are where (a) an existing permit is revoked, for instance because of summary dismissal or some other form of premature termination event (section 61(7)), and (b) where permission to continue to reside and seek employment is revoked for similar reasons (section 34(2)). Dealing only, for present purposes, with the work permit revocation situation, it is immediately obvious why the employee himself would wish to be heard. Firstly, he has a statutory right to be heard. But secondly, and more practically, the revocation will likely have been based on matters he is accused of which his employer will have no interest in answering. If he has been fired, it is pointless to ask the employer if he wishes to object to the revocation of the work permit. Where he has no employer campaigning for him to remain in Bermuda, and no permission to seek fresh employment, the former employee will be the only obvious advocate in his own cause.

34. So the present case suggests, as counsel for the respondent argued, that the usual practice of the Immigration Department is to communicate with the employee with respect to permission to reside. This is consistent with the scheme of the Act under which permission to reside is clearly legally distinct from permission to work. It is also illustrated by the facts of two recent immigration cases placed before this Court. In *Patterson-v- Minister of Labour, Home Affairs and Public Safety and Cabinet Appeal Tribunal* [2001] Bda LR 66 an employee sought permission to work and reside after his initial employment came to end and dealt directly with the Department. In Friedman-v- *Minister of Labour, Home Affairs and Public Safety and Cabinet Appeal Tribunal* [2004] Bda LR 51, the Department communicated directly with the employee in revoking his work permit following a Magistrates' Court conviction for offensive words. In each case the employee themselves had a statutory right to be heard. An exceptional case where the "employee' communicated directly on a work permit application arose in respect of a psychiatrist seeking permission to work in private practice on his own account: *Neville Marks-v- Minister of Home Affairs*, Court of Appeal for Bermuda, Civil Appeal No. 12 of 1983[8].

35. The need to imply the right to be heard arises only where the statute is silent, and I accept Mr. Hastings-Smith's broad submission that even in a non-renewal case there may be a right to be afforded an opportunity to meet the case against the work permit applicant. After all, the Court of Appeal decision in *Marks* is binding on this Court, even if the legitimate expectation *dicta* have been made redundant by section 7A of the Act. As da Costa JA observed at page 24 of his separate judgment:

[8] Judgment dated April 6, 1984.

> "*…in fairness the Minister of Home Affairs should disclose information of which the applicant is unaware and which the Minister considers persuasive, for otherwise the applicant would never be able to make representations on his own behalf.*"

36. But the evidence in the present case (albeit only filed over five years after the Applicant commenced the present proceedings in partial reliance on the complaint that he had been deprived an opportunity to know the case against him) demonstrates that the Applicant's employer, who had dealt with his work permit applications throughout, *was* made aware of information which "*the Minister considers persuasive*". In fact the employer, rightly or wrongly, only confirmed the Minister's concerns. In these circumstances it is not properly open to the Court to find that the Applicant was deprived of an opportunity to meet the case against him because the Respondent did not take the further step of allowing the Applicant to make personal representations on his own behalf.

37. The application to quash the Minister's decision of June 7, 2002 refusing to grant the Applicant's work permit application is accordingly dismissed. To the extent that the Applicant purported to challenge a decision by the Cabinet Appeal Tribunal in this regard, that application is also dismissed.

38. In reaching this conclusion I am guided by the following *dictum* of Lord Bridge in *Lloyd-v-McMahon* [1987] AC 625 at 702H, upon which Mr. Howard relied:

> "*…what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework within which it operates.*"

Finding: is the decision to refuse the Applicant permission to continue to reside in Bermuda and seek employment liable to be quashed on the grounds of procedural impropriety?

39. I have already found as a fact based on uncontroversial evidence that the Applicant personally was not given an opportunity to advance reasons as to why he should not be given permission to remain and seek employment. The Assistant Chief Immigration Officer spoke to the Applicant's then employer to elicit information about the Minister's concern as to whether the Applicant had been straying outside the confines of his work permit. She satisfied herself that the Presiding Elder was aware of both the Minister's concerns and the matters raised in the March 7, 2002 objection letter. Mr. Howard was bound to concede that there was no suggestion in the evidence before the Court that the applicant personally was aware of these matters, let alone extended an opportunity to address them after the work permit application had been finally refused without any right of appeal.

40. In fact, the evidence before the Court (in particular the June 7, 2002 decision letter as read with the June 14, 2002 appeal letter) suggests that the Applicant and his employer both believed that (a) a right of appeal existed against the Minister's work permit refusal decision, and (b) that the need to address the right to remain and seek new employment did not arise. The appeal letter clearly indicates that the same AME Church official who was conducting the application before the Minister was not instructing the Church's attorneys on the appeal. Be that as it may, the crucial question is whether the Applicant himself was given an adequate opportunity to meet the case against him on the right to reside and seek employment issue.

41. This question is more than a technical one. The June 7, 2002 letter written on behalf of the Minister communicated not just the work permit refusal, but also the following decision:

> "*Therefore…he and his wife must settle their affairs and leave Bermuda by July 30, 2002*."

42. This is implicitly a decision to terminate the permission the Applicant had to reside in Bermuda linked to his employment with the AME Church since 1983, or, perhaps more accurately, to signify that such permission had come to an end by virtue of the end of the relevant employment relationship. It does not, however, clearly signify the refusal of an application for permission to continue to reside in Bermuda and seek alternative employment, and still arguably left the door open to such an application. Yet, after the fact, the Department appears to have sought to characterise the June 7, 2007 decision in a far broader way. This conclusion is justified beyond serious argument because the Department itself on July 29, 2002 wrote his employer's lawyer, copying the Applicant himself, after the appeal had been dismissed stating:

> "*I refer to your appeal to Cabinet against the refusal by the Minister of Labour, Home Affairs to grant permission for your client to continue to reside and seek employment in Bermuda.*"

43. Yet the June 7, 2002 decision letter was addressed to the employer, and only explicitly communicated the decision to refuse the work permit application. At that point, according to all the evidence, no application had been made by the Applicant to continue to reside and seek alternative employment. So in my judgment it was reasonable for both (a) the employer and its lawyers, and (b) the Applicant himself, to assume that the only operative decision that had been made and which was open to legal challenge was the work permit refusal. The purported existence of the second element of the June 7, 2002 decision would only have become apparent when the July 29, 2002 letter was received. It seems obvious, with the benefit of hindsight and far greater leisure to analyse the matter than was available to the Department at the time, that an important procedural step was overlooked and the employment and residence issues became blurred in the June 7, 2002 letter.

44. The true legal position, as mentioned above, is that no right of appeal exists under the Act in respect of a decision not to grant initially or by way of renewal a work permit. An appeal only exists with respect a decision to revoke a subsisting work permit. This is why, after the appeal was dismissed, the Cabinet secretary and the Department of Immigration characterised the appeal as being in respect of a refusal of permission to reside and seek employment. Because if such decision was made, it could either have been made under section 25, which confers a right of appeal in respect of a refusal to grant permission to reside, or equally under section 34 of the Act, which confers an appeal against a decision to revoke any previous permission to be in Bermuda, or under section 61(7) (revocation of a work permit). The statutory scheme regards revoking an existing permission to reside in Bermuda, however, as requiring a higher level of legal protection for the applicant than the refusal of permission to an applicant who has no current residential rights at all. Before such a decision is made, as in the case of work permit revocations, the Act requires the Minister to comply with certain mandatory procedural requirements under section 34(2)-(3). Section 34, it should be recalled, provides as follows:

> *"34 (1) Subject to this section, the Minister may, by an order in writing served upon the person to whom it relates, revoke any permission to land, remain or reside which has been granted to that person in accordance with this Part either forthwith or as from a day to be specified in the order; and thereupon, notwithstanding any other provision of this Part, that permission shall cease to have effect forthwith or on the day so specified as the case may be.*
>
> **(2) Before the Minister makes any order under subsection (1) against any person, he shall cause a notification in writing to be served upon that person that he proposes to make such an order in his case at the expiration of fourteen days or such longer period as may be specified in the notification; and shall inform that person of the grounds upon which the Minister proposes to make the order and shall invite him within that period to submit in writing to the Minister any reason which he wishes to advance why such an order should not be made in his case.**
>
> **(3) The Minister shall not make any order under subsection (1) until the expiration of the period specified in the respective notification served under subsection (2) and the Minister shall, where reasons are submitted to him in accordance with subsection (2), take those reasons into consideration when he decides whether or not the order should be made.**
>
> *(4) Any person aggrieved by any decision of the Minister to make an order under subsection (1) against him may, subject to section 124, appeal to the Cabinet against such decision.*" [emphasis added]

45. As regards any decision made on June 7, 2002 under section 34 of the Act, the Applicant's statutory fair hearing rights were unarguably infringed. If counsel for

the Respondent had come to Court prepared to meet this point, however, he might well have contended that a purposive reading of the evidence suggested that the Applicant had at best implied permission to remain in Bermuda until such time as his appeal rights were exhausted, and that no revocation took place at all. It is only fair to point out that the significance of the distinction between the legally separate decisions under section 25 or 34 (permission to remain in Bermuda) and section 61 of the Act (work permit) only became apparent in the course of argument. This may be attributable to the fact that the present application was filed at a time when the Applicant was still hoping to pursue employment with the AME Church. The application logically focussed on the work permit decision, not just because that was the only decision which appeared in substance to have been made, but also because that was the decision the Applicant wished to have reconsidered. Until the Azhar Affidavit was filed five years later, it appeared that the Applicant had an almost unanswerable case for setting aside the work permit refusal decision.

46. Accordingly I will assume in the Respondent's favour that section 34 and the statutory fair hearing rights were not engaged. Instead, I will consider the legality of the decision that the Applicant should leave Bermuda without being permitted to seek fresh employment on the basis of the common law arguments advanced by Mr. Hastings-Smith (on the premise that no statutory fair hearing rights were infringed) as this seems to be most consistent with the all the material placed before this Court. In this respect, the Applicant's counsel's submission that communication with the employer did not suffice is clearly sound. On the facts of the present case, what should have occurred was something along the following lines. One letter should have been sent to the employer in terms similar to those of the June 7, 2002 letter, only excluding any reference to (a) the Applicant leaving Bermuda, and (b) appeal rights. Bearing in mind the history of the employer handling the work permit application, it would have sufficed (and did suffice) for the work permit refusal decision to be merely copied to the Applicant himself. The proposed decision that the Applicant should leave and not be permitted to seek alternative employment should have formed the subject of a separate letter addressed to the Applicant, which indicated that if the Applicant proposed to make any application to reside in Bermuda and seek fresh employment, the Minister's provisional view was that such application should be refused. Such letter could have set out the main ground of the proposed refusal (presumably the concern about allegations of work permit infringements, which the Applicant himself had never been personally asked to respond to) and asked whether the Applicant wished to make any representations in response to the Minister's concerns.

47. In other words, assuming section 34 was not engaged, the facts of this case require the Court to supplement the statutory regime to meet the common law requirements of fairness. This was not a merely abstract technical matter on the unusual facts of this case in which, on the same day that legislation was introduced to Parliament offering long-awaited relief to eligible and prospectively qualifying long-term residents (such the Applicant), the Applicant was summarily told he had to leave Bermuda after nearly nineteen years. This is particularly the case because (a) the

allegation that his work with the Intercessional and Restoration Ministry fell outside the Applicant's work permit had been previously made and the doubts about the propriety of this work seemingly resolved; and (b) the timing and contents of the objection letter suggest that it was substantially motivated by a desire to prevent the Applicant from acquiring long-term residents' rights, rather to address the real merits of the work permit application. It appears, in effect, that a decision was implicitly made that the Applicant should be deprived of the right to take advantage of the long-term residents' legislation promised in August 2001 in circumstances where the Applicant reasonably believed that a comparatively routine work permit application was being made by his employer of 18 years standing. While there is no suggestion that this is what the minister actually intended, this was the practical effect of the decision communicated on June 7, 2007.

48. So the effect of a decision to revoke his permission to remain in Bermuda very obviously was to deprive the Applicant of the right to seek to become a permanent resident when he was on the brink of becoming entitled to seek that right, notwithstanding the fact that he (a) was a man of good character, (b) a citizen of a friendly nation (Bermuda is an Associate member of CARICOM of which Guyana is member), (c) the Applicant had obviously made a significant positive impact on the spiritual well-being of a segment of the Bermudian population, being retained by the same employer for almost 20 years, (d) the Applicant had three children who had spent either all (two) or most (one) of their lives in Bermuda, and (e) the Applicant had never been convicted of a criminal offence nor even actually accused by the proper authorities of any immigration infractions.

49. Bearing in mind the notorious fact that the legislation promised in the August 2001 White Paper contemplated granting long-term residence certificates not just to persons who had already been in Bermuda for 20 years, but also persons who would reach that threshold in the comparatively near future as well, arguments of legitimate expectation could have been advanced by the Applicant in support of an application to reside and seek employment after the initial work permit application was refused. The Applicant's rights (and those of his wife and children) under article 8 of the European Convention European Convention on Human Rights to respect for his family life were potentially engaged, and the characterisation of the Applicant's work with the Intercession and Restoration Ministry potentially engaged the freedom of conscience rights (Bermuda Constitution, section 9) of the Applicant and those of his flock who considered that he was contributing positively to their spiritual wellbeing[9]. None of these matters were referred to in argument with these legalistic labels explicitly attached to them, but they do flow logically from the evidence and submissions placed before the Court. These circumstances

[9] Indeed it is entirely possible that an appreciation of the need for caution when regulating religious activities explains why the Immigration Department opted for a velvet glove rather than a mailed fist approach to complaints made against the Applicant in the late 1990's. A letter from the then Assistant Chief Immigration Officer to the AME Church dated July 8, 1998 referred to "*the sensitivity of the matter*".

heightened the significance of affording the Applicant an opportunity to be heard as the statutory regime by necessary implication required[10].

50. Mr. Howard bravely sought to contend that the letter written by the employer's lawyer in support of a purported appeal against the work permit refusal constituted an opportunity for the Applicant to be heard on the right to remain issue, but this submission flies in the face of any sensible reading of the documentary record. In my judgment the requirements of natural justice were clearly breached by the way in which the Minister reached his June 7, 2002 decision, and this breach was not cured by the appeal to Cabinet, who could only lawfully have set aside this aspect of the Minister's decision but failed to do so. Indeed, if the Cabinet Appeal Tribunal were an independent judicial tribunal, one would have expected them to have responded to the employer's appeal letter (a) indicating that there was no right of appeal on the work permit issue, and (b) inviting the Applicant personally to file an appeal on the right to reside issue if he so wished.

51. I do, however, accept Crown Counsel's submission that the record does suggest that the Department and the Minister attempted to act fairly. Bearing in mind the high volume of work permit applications the Department processes, the general standards of good administration must be extremely high because the number of applications for judicial review which have come before the Courts over the last few decades can probably be counted on one hand, while the number of refused applications must run into the hundreds (if not thousands). But, only the rare cases where an applicant is sufficiently aggrieved to pursue legal proceedings and a judge has formed the view at the leave stage that an arguable case exists, come on for full hearing in open Court. In the present case a procedural impropriety clearly occurred which invalidated the Minister's decision that the Applicant could not continue to reside and seek fresh employment after his employment over nearly 19 years with the AME Church came to an end. This was a case where, as in *Neville Marks-v-Minister of Home Affairs*, Court of Appeal for Bermuda, Civil Appeal No. 12 of 1983, the requirements of fairness imposed a public law duty on the Minister to afford the Applicant a right to meet the case against him before having such a dramatic decision made. What fairness required, in these circumstances, was crucially governed by "*the kind of decision*" being made, rather than the character of the decision-maker and the legislative framework, even though these matters are also taken into account: *Lloyd-v-McMahon* [1987] AC 625 at 702H.

52. The present facts are far stronger for the Applicant than those in the *Marks* case, because there the applicant was dealing directly with the Department and at least knew what decision was being made. The unfairness occurred because he was not given an opportunity to meet complaints which had been made against him. This was also the position in *Friedman-v- Minister of Labour, Home Affairs and Public Safety and Cabinet Appeal Tribunal* [2004] Bda LR 51. In the present case, however, the Applicant was both (a) denied an opportunity to address the concerns

[10] These matters are merely mentioned to illustrate the sort of arguments that might have been advanced. No view is expressed on the merit of these potential contentions.

which formed the basis of the decision to refuse him permission to remain and seek employment, and (b) given no prior notice that this decision was even being made. On the evidence, the Applicant had actual or constructive knowledge that a work permit application was being considered, but no basis for knowing (prior to receipt of the June 7, 2002 letter) that a decision that he must leave Bermuda altogether was being taken.

53. There may be cases when the Department can deal with both work permit revocation or refusal and right to reside revocation or refusal in the same letter. But, this will usually be where the applicant is personally dealing with the Immigration Department, although copying the applicant with a letter addressed to the employer would probably generally suffice. It may also be appropriate in circumstances where all the Ministry is signifying is that at the end of an existing period of permission the applicant is expected to leave. What fairness requires in such circumstances (assuming section 34 is not engaged) will probably be different in cases where the Applicant has very tenuous Bermudian ties as opposed to cases where the connecting factors to Bermuda are stronger, as in the present case. In the present case, the applicant could have been told in a composite letter both that (a) his application for employment with A has been refused, and (b) that the Minister was considering revoking permission for him to continue to reside in Bermuda and seek fresh employment on whatever grounds applied, and that he should provide reasons within a specific time as to why such decision should not be made. Having received any representations, the Minister could then validly (c) communicate the decision that the Applicant must leave Bermuda. In the present case what should have been a two or three staged process was collapsed into one, with (a) and (c) being merged and (b) omitted altogether.

54. For these reasons I find that the decision of the Minister affirmed by the Cabinet Appeals Tribunal that the Applicant's permission to reside in Bermuda should be revoked and that he should be ordered to leave Bermuda was unlawful by reason of procedural impropriety and is liable to be quashed.

Discretion

55. As far as the work permit decision is concerned, Mr. Howard submitted that should I find in favour of the Applicant, I should decline to grant the relief sought because the position was now academic. The AME Church no longer wished to hire the Applicant. If I had found in the Applicant's favour on that aspect of the decisions of June 7, 2002 and July 25, 2002[11], I would have declined in the exercise of the Court's discretion to quash the decisions complained of.

56. As far as the decision to refuse the Applicant permission to continue to reside and seek employment is concerned, no suggestion that the relief sought is academic

[11] In fact and in law the Cabinet Appeal Tribunal made no decision on the work permit issue, in respect of which no appeal rights existed, at all.

arises. I therefore grant the order of certiorari the Applicant seeks and quash the decisions. The matter is remitted to the Minister to deal with according to law.

Supplementary submissions: compliance of Cabinet Appeal Tribunal provisions with section 6(8) of the Bermuda Constitution

57. Before the hearing I invited counsel to be prepared to address the issue of whether the Applicant was entitled to relief under section 15 of the Bermuda Constitution on the grounds that his rights under section 6(8) were infringed because the Cabinet Appeal Tribunal is not an "*independent*" tribunal. Section 6(8), of course provides as follows:

> "*(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*"

58. In *Fay-v-Governor* [2006] Bda LR 65, I permitted the Applicant whose claim for judicial review failed to amend the proceedings to add a claim for breach of section 6(8) which was ultimately upheld. The crucial holding, in respect of a disciplinary appeal from the Dental Board to the Governor, was as follows:

> "*In effect, it is all but formally conceded on behalf of the Governor that it would be a breach of the separation of powers embodied in the Bermuda Constitution for him to be performing a judicial function. Because if it were right that the Governor's statutory role was not a judicial one at all, in any event the appeal regime would not cure the non-compliance with section 6(8) at the Board level. Because the appeal provisions did not afford the Applicants a right to appear before a "tribunal" at all, let alone an "independent" one. After all, In his September 24, 2004 decision on the Applicants appeal, the Governor observed: "It is beyond the normal responsibilities of the Governor to intervene in the issues surrounding dentistry in Bermuda." So it is unsurprising that the Solicitor-General has failed to mount a more robust response to the Applicants' constitutional application.*
>
> *Accordingly, I am bound to find that the right of appeal to the Governor does not afford access to a tribunal which complies with section 6(8) of the Bermuda Constitution. The extent to which the statutory framework offends the rule that no man shall be a judge in his own cause at the Dental Board level, applying Hall-v-Bermuda Bar Council, Court of Appeal for Bermuda, Civil Appeal No. 13 of 1982 as to the scope of this principle, could hardly be more graphically illustrated than it is by the present case. It was, quite sensibly, never suggested by the Crown that the possibility of judicial review*

proceedings before this Court could be regarded as curing any deficiencies in the statutory procedures at the Board and appeal levels. Looking at the statutory procedural framework as a whole, as well as looking at the present proceedings as a whole, it cannot be said the statutory provisions or their application to the Applicants' case meets the standard imposed by section 6(8) of the Constitution. Based on the highly persuasive Privy Council case of Preiss-v-General Dental Council [2001] 1 WLR 1926 and the Scottish Court of Session case of County Properties –v- Scottish Ministers [2005] 5 LRC 709, I rule that section 6(8) requires the Applicants to have a right of appeal to an independent and impartial tribunal including the right to a full rehearing."

59. At the beginning of the hearing I adjourned the Applicant's application for leave to re-amend until the determination of the present application on the basis that only if the judicial review application failed would the need to consider an application for constitutional relief arise. In the event, the need to seek such relief does not arise, so the application for leave to re-amend is dismissed. Because the submissions made on this issue were at the invitation of the Court, the appropriate costs order in this limited respect would appear to be, subject to hearing counsel, to make no order as to these costs. In deference to those submissions, however, I should make some brief comment on them particularly because I invited Crown Counsel to consider the possible need for legislative reform.

60. It does appear to be arguable, as Mr. Howard submitted on behalf of the Minister, that where administrative policy matters such as immigration are concerned, that the fact that a Government Minister makes a decision affecting civil rights and obligations does not infringe section 6(8) of the Constitution if judicial review is available without a full re-hearing on the facts: *R (Alconbury Developments Ltd. and others)-v-Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. The latter case was a planning case, however, and Bermuda's Development and Planning Act 1974 provides for initial decisions to be made by the Development Applications Board with a right of appeal to the Minister and thereafter to this Court. So under Bermuda law, even in the planning area, the scope of access to an independent and impartial tribunal appears to be more extensive than it is in England and Wales. The Respondent also relied upon a more apposite immigration case *R(Q)-v- Secretary of State for the Home Department et al* [2004]QB 1, which reached a similar conclusion with respect to the procedure for processing asylum seekers on arrival in the United Kingdom who had no statutory appeal rights.

61. It is also arguable, however, that what type of statutory framework does or does not (initially or by way of appeal) comply with fundamental fair hearing rights depends in part on the nature of decision being made and whether appeal rights are in fact conferred by statute. *Preiss –v- General Dental Council* [2001] 1 WLR 1926 PC, on which Mr. Hastings-Smith relied, suggests that in the disciplinary context, appearance before a non-independent tribunal at first instance was cured by a right

of appeal with a full re-hearing before the Privy Council. The scheme of the Bermuda Immigration and Protection Act 1956, in providing appeal rights where permission to work and/or reside is revoked, suggests that that type of decision is more akin to a disciplinary decision than a mere administrative decision. Indeed, in the United Kingdom an extensive independent immigration tribunal system exists for dealing with decisions which affect the rights of persons with a stronger connection with the country than persons being processed for initial entry at an airport.

62. The fact that appeal rights have been conferred by the 1956 Act is inconsistent with the contention that the matters in question are merely administrative policy matters in which judicial review is a sufficient remedy for the failure of the appeal tribunal to comply with section 6(8) of the Constitution because it is not independent of the Executive branch of Government. There is, however, a fundamental distinction, between immigration decisions where no right of appeal exists (refusal of permission to enter or refusal to grant or renew a work permit) and decisions to interfere with vested rights by revoking existing grants. Such decisions may require a process of factual adjudication by a tribunal which is independent and impartial, while other decisions do not. And is certainly arguable that where a right of appeal is conferred by Parliament, it should be a right of appeal to a tribunal which complies with section 6(8) and is independent of the Executive. Obviously, the Cabinet Appeal Tribunal does not comply. When the Bermuda Immigration and Protection Act was enacted in 1956, appeals lay to the Governor-in Council. This was, no doubt, a historical retention of the Governor-in Council exercising appellate judicial powers in the pre-Supreme Court Act 1905 era. This role was an antiquated colonial version of the Privy Council in London (the mediaeval precursor of the modern Cabinet, which by the nineteenth century in Britain had transferred its judicial appellate powers to an independent Judicial Committee. In 1968, the 1956 Act was amended to transfer the appellate jurisdiction of the Governor-in-Council to the Cabinet which replaced it, unwittingly retaining an historical anachronism in the process.

63. Parliament may wish to consider, having regard to the great public importance of immigration law and policy in Bermuda, whether the appeal provisions under the Bermuda Immigration and Protection Act 1956 should be either modified or repealed altogether in order to avoid the courts having to decide whether they comply with section 6(8) of the Bermuda Constitution. The importance of judicial independence in terms of statutory tribunals is, it must be noted, a topic which the Courts in Britain have on occasion had to resolve on an *ad hoc* basis : *Regina (Brooke and Another) –v-Parole Board*, 'The Times', February 5, 2008 (where the Court of Appeal held that the Parole Board was too closely aligned with the Executive).

Conclusion

64. I find that the June 7, 2002 decision of the Minister affirmed by the Cabinet Appeals Tribunal that (a) the Applicant's permission to reside in Bermuda should be revoked and (b) he should be ordered to leave Bermuda, was unlawful by reason of procedural impropriety and is liable to be quashed. I will hear counsel as to costs.

Dated this 6th day of February, 2008 _____

KAWALEY J