

# **CONSULTATIVE IMMIGRATION REFORM WORKING GROUP**

## **PRINCIPLES AND RECOMMENDATIONS**

### **MIXED STATUS FAMILIES**

### **PERMANENT RESIDENT'S CERTIFICATE**

### **BERMUDIAN STATUS**

31 October 2017

#### **Introduction**

The Consultative Immigration Reform Working Group (CIRWG) has deliberated extensively on the issues of Mixed Status Families, the Permanent Resident's Certificate (PRC) and the Grant of Bermudian Status as it pertains to the Bermuda Immigration and Protection Act 1956 ("the Act").

The current law creates Mixed Status Families through a series of factors principally related to effective dates of various sections of the Act, which lead to some members of a family qualifying for either PRC or Bermudian Status while others do not have an avenue to apply for neither the PRC nor Bermudian Status, leaving them subject to Immigration control.

The current law allows for PRC's to be granted under either the Incentives for Job Makers Act 2011 (as amended in 2013) or as a dependant of an individual holding a PRC under section 31A of the Act.

The current law allows for the grant of Bermudian Status through various family circumstances, and also allows persons who were resident prior to 31 July 1989, who meet other criteria, but does not contain any other qualifiers for new applicants moving forward.

We outline below our work process, the critical issues, and the consultative process and, finally, the recommendations we propose.

## **Work Process**

The CIRWG was constituted in April 2016 and initially met three times weekly to establish our Terms of Reference, the sequence of issues to be assessed and to develop legislative proposals therefrom. We have since met twice weekly to ensure we continue to enhance on both quality and quantity of time. The recommendations on Adoption were proposed in June 2016, which resulted in the enactment of the Bermuda Immigration and Protection Amendment (Adoption) Act 2016.

The proposed Bill entitled “Bermuda Immigration and Protection Amendment Act 2016” also referred to as “Pathways to Status” was not used as a departure point for the three remaining substantive issues. A blank slate approach was taken to identify any problems, perceived or real. Care was taken to identify potential impacts on stakeholders within the Bermuda community be they social, cultural, political or economic.

The CIRWG reviewed the Act, in addition to the Incentives for Job Makers Act 2011 (as amended in 2013), the British Nationality Act 1981 and the European Union Court of Human Rights Article 8.

## **Consultation**

An absolute commitment to consultation formed the foundation for our process. We have sought and received multiple submissions via email, hard copy submissions as well as orally. There were three public consultation meetings held on the topic of Mixed Status Families at Francis Patton School, Berkley Institute and Dalton E Tucker. Public consultation meetings were also held at Elliot Primary School on the topics of PRC and Bermudian Status. Our deliberations were also enriched by critical technical insights coming from civil servants in the Department of Immigration.

## **The Data Gap**

We have been unable to determine with any degree of certainty what numbers of people are affected by the issues examined. It is strongly suggested that the Government undertake to determine the statistical impact of any amendments. The short term effects of any amendments will be critical for the public to understand, but far more importantly the long term levels be understood once a steady state is reached.

## **Historical Context**

Due to the long history of racialized immigration policies, historical context must form part of any decisions regarding immigration legislation and policies moving forward to ensure that the historical harm of that past and the current legacies do not continue. This will involve a constant and continued awareness to ensure any immigration legislation or policies do not place Black Bermudians in positions of inequality.

Lord Pitt's remarks in the Commission of Inquiry following the 1977 riots reverberate today, "The importance of substantially reducing immigration and assisting the promotion of Bermudians." Lord Pitt's recommendation was in direct response to the rapidly increasing expatriate population and an acknowledgement of the detrimental effects it was having on the African Bermudian population.

## **Cultural Identity**

Any immigration legislation or policy must keep in mind the need to balance the socio-political, environmental, racial, and cultural well-being of Bermudians. Bermudians must not be side-lined in their own community for opportunities forcing them overseas in the search for work to support their families.

## **Human Rights**

Human rights and international standards forms an integral part of the discussion on immigration. Every country has the right to set its own immigration standards.

Human rights can be considered binding on all countries even if they are not signatories to the relevant International Conventions. However, there is no universal international human rights standard that requires states to give citizenship rights, such as permanent status and the right to vote, to long-term guest workers.

A guiding principle must be in accordance with Article 8 European Court of Human Rights. However, even under this Article, there is a caveat; “The likelihood of the subsistence of the family in an alternate jurisdiction and the logistics of such are overriding factors.”

## **Sustainability**

Immigration policy must be tempered by sustainability, considering the size and limited space available on the island, and the priority of ensuring Bermudians have access to employment opportunities in their own country, so they no longer experience employment marginalization and discrimination.

The following United Nations General Assembly Resolutions (UNGAR) directly articulate the international standard for immigration policy for small jurisdictions (colonial territories):

- a) UNGAR 2621 to “adopt the necessary steps to prevent the systematic influx of foreign immigrants into colonial territories, which disrupts the integrity, political and cultural unity of the peoples under colonial domination.”

- b) UNGAR 35/118 goes on to “discourage or prevent the systematic influx of outside immigrants and settlers into Territories under colonial domination, which disrupts the demographic composition of those Territories and may constitute a major obstacle to the genuine exercise of the right to self-determination and independence by the people of those Territories.”
- c) UNGAR 55/146 request colonial powers “as a matter of priority to ensure that the exercise of self-determination is not affected by changes in the demographic composition due to immigration or displacement of populations in the Territories.”
- d) UNGAR 70/231 “requests the relevant administering powers to take all steps necessary to protect the property rights of the peoples of those territories.”

There is a persuasive argument that the impacts of allowing unsustainable numbers of guest workers to obtain citizenship and/or permanent residency would contravene the human rights of the host population.

Economic sustainability is important but must be balanced by prior discrimination history, the need to protect the socio-political and cultural identity of Bermudians, the creation of and access to employment opportunities and environmental impact.

Subject to further research, the international standards for immigration policy in colonial territories as articulated by the European Court, European Convention, UN Human Rights Committee and the UNGAR’s are aligned. For colonial territories, adequate care must be taken before granting Status and voting rights to people without family ties. Legislators should consider the historical and political factors peculiar to Bermuda, whilst focusing a high degree of scrutiny on data, models and standards regarding the potential impacts on social, cultural and political cohesion as well as on the rights of the local population to self-determination.

## **Multi-Generational Solutions**

It is clear from a review of the Bermuda Immigration & Protection Act 1956 that many of its amendments addressed short term goals. Immigration is a long term, multi-generational issue and as such solutions are required to be equally as long term in their philosophy. Immigration is a complex topic which is evidenced by the sheer number of amendments since 1956. Ill-considered solutions will assuredly have far reaching unintended consequences that Bermuda and its people cannot afford.

Uncertainty for families has been the result due more to critical cut-off dates established with successive changes to immigration laws, than to decisions made by families. This has resulted in Mixed Status Families where one or more immediate family members hold Bermudian Status, with one or more members holding PRC or neither. The unintended consequences have placed families in very different immigration status, and worse, at risk for splitting up.

Future immigration legislation/policies must provide solutions which ensure:

- a) the creation of Mixed Status Families does not arise through unintended consequences of immigration legislation/policy;
- b) problems faced currently by Mixed Status Families are resolved fairly;
- c) that 'right to family life' is not put in jeopardy by immigration policy/legislation;
- d) any 'deadlines' contained in legislation are closely looked at to ensure undue hardship is not placed on applicants;
- e) Bermudians are assured priority in policies developed and implementation thereof; and
- f) enforcement and compliance efforts should be stringent enough to ensure abuses are sufficiently discovered and dealt with.

## **MIXED STATUS FAMILIES**

### **Principle**

#### **Families should not be separated**

The European Union Human Rights Act Article 8 “right to family life” - the right to respect for one’s established family life. This is a qualified right. This includes close family ties, although there is no pre-determined model of a family or family life. It includes any stable relationship, be it married, engaged, or de facto; between parents and children; siblings; grandparents and grandchildren etc. This right is often engaged, for example, when measures are taken by the State to separate family members (by removing children into care, or deporting one member of a family group). The qualifier being the likelihood of the subsistence of the family in an alternate jurisdiction and the logistics of such are overriding factors.

Certain sections of the Act allowed for the grant of PRC and Bermudian Status, which resulted in creating families where some members of the family qualified and some did not. Uncertainty for families has been the result due more to critical cut-off dates established with successive changes to immigration laws, than to decisions made by families. This has resulted in the creation of Mixed Status Families.

Mixed Status Families are primarily a defined group of people who have been resident on the island since before July 1989 and/or 1969 with succeeding generations born in Bermuda. These families have contributed to the Bermuda community and been immersed in Bermudian culture; and many of these individuals already have become Bermudian and/or have the right to apply for Bermudian Status as per the Supreme Court’s decision of May 2014.

As this is a defined group of individuals under the current provisions of the Act, the CIRWG recommends the following:

## **Recommendations**

A. Families where at least one child born between 1983 and 1989, qualified for Status under the 1994 Act (born in Bermuda or moved to Bermuda under age of six (6)):

- Siblings still residing in Bermuda (including those in University overseas but still Bermuda resident) but did not qualify because they were too old
  - **Eligible to apply for the grant of Bermudian Status**
- Siblings still residing in Bermuda (including those in University overseas but still Bermuda resident) but did not qualify as they were too young
  - **Eligible to apply for the grant of Bermudian Status**

B. Families where at least one parent qualified for PRC under the 2002 Act, and subsequently qualified for Bermudian Status under 20B(2)(b) of the Act. It is recognized that the public and government were not aware that they qualified for status under 20B(2)(b) as early as 2003, until that right was confirmed by the Courts in May 2014.

- Children born between 1989 and 1994 would have been eligible to inherit status from these parents, i.e. they were under the age of eighteen (18) at the time of their Parent's qualification under 20B(2)(b), and where they have not already acquired Bermudian Status
  - **Eligible to apply for the grant of Bermudian Status**

C. Families with at least one member qualifying for PRC under 31A and others gaining PRC under 31B, where those PRC 31B individuals have children now resident in Bermuda:

- **Provide for a PRC – 31B individual to pass on 31B to their dependents as minors;**
- **Once 3rd generation PRC individuals reach eighteen (18) they are eligible to apply for the grant of Bermudian Status should residency and other requirements be met**



- Non-Bermudian individuals as the spouse of a PRC 31B
  - **Eligible to apply for the PRC 31B following ten (10) years of marriage to PRC holder**

D. Families with at least one parent who has been granted Bermudian Status or qualifies for such under 20B(2)(b):

- Children of the family who would otherwise qualify for Bermudian Status other than their date of birth
  - **Eligible to apply for PRC 31A, then once meeting all criteria be**
  - **eligible to apply for the grant of Bermudian Status**
- Children of those above who have siblings who have been granted Bermudian Status
  - **Eligible to apply for PRC 31A then once meeting all criteria be**
  - **eligible to apply for the grant of Bermudian Status**

## PERMANENT RESIDENT'S CERTIFICATE

### Principles

#### **Families should not be separated**

As mentioned previously The European Union Human Rights Act Article 8 “right to family life”

#### **A new mechanism that eliminates gender, racial, and financial bias should be implemented that gives security of tenure to long-term residents.**

The Group is mindful that Bermuda needs to attract foreign investment to our shores and that there are some job categories which have low Bermudian participation. With these factors in mind; consideration should be given to how we remain competitive on a global scale while balancing the needs, opportunities, economy, and security of our local workforce.

The CIRWG recommends the following:

Introduction of a new mechanism to grant security of tenure to long term residents. This new mechanism should be drafted in a manner that alleviates implicit gender, racial and financial bias in the Incentives for Job Makers Act 2011. Lawmakers should reference the following clauses in the Act; 31A “Right of persons designated under section 5 of the Economic Development Act 1968 as exempt from Part V of this Act, to a permanent resident’s certificate and 31B “Right of certain other persons to the PRC”.

Factors including, but not limited to, which determines a person’s eligibility to apply;

- A suitable time frame by which a person would be considered a long-term resident of Bermuda
- The person occupies a position in an essential job category where there is low Bermudian participation
- The person has made some form of investment in Bermuda
- The person has immersed themselves in the Bermuda community and has made positive contributions towards the betterment of the community

## **Considerations when drafting specific Legislation & Policy**

- Criteria should be balanced through a points-based system. Instead of persons needing to have all requirements on the list of criteria; the list should be weighted by points to give equal opportunity to those that may not have a specific set of circumstances due to their race, finances, age or gender
- Ensure that legislation is intended to be multi-generational and not have expiry dates thereby resulting in unintended consequences
- Consideration should be given to the impact on Bermudian employment opportunity and upward mobility
- Consideration should be given to the economy and population in relation to Bermuda's infrastructure, health insurance, Government debt, unfunded pensions etc.
- Consideration should be given to the impact of attracting and retaining global talent, investment and economic stimulation
- Consideration should be given to external and global factors
- Consideration should be given to International standards and precedent

## **BERMUDIAN STATUS**

### **Principles**

**The Grant of Bermudian Status is a privilege** extended by the government.

There should be a route for long-term residents to apply for the grant of Bermudian Status after meeting certain stringent criteria and based on population demographics offering equal opportunity for all qualified persons to apply, eliminating any bias and discrimination.

**Children of Bermudians should be Bermudian** – if at least one parent is Bermudian then you are Bermudian.

**Once acquired Bermudian Status is a right** – no matter how status is acquired, it cannot be taken away.

For avoidance of doubt, the laws governing British Nationality will continue to apply in relation to determining commonwealth citizenship as a precursor to Bermudian status.

### **Recommendations**

- Children of Bermudians should be Bermudian
  - Remove domicile requirement up to the 3<sup>rd</sup> generation born overseas
  - If required, ensure the test for domicile is applied fairly and without discrimination
  
- *Establish a mechanism to apply for the grant of Bermudian Status*
  - The Grant of Bermudian Status should be a privilege gained through a rigorous process
  - A points system should be introduced to allow balancing the criteria and numbers. This points system should be evaluated at relevant intervals of not less than ten (10) years to ensure we are meeting the current needs of Bermuda's population, infrastructure, growth rate, economic factors, and sustainability.

- A limit to the maximum number of grants of Bermudian Status per annum should be established
  
- The criteria for Bermudian Status should include but not limited to:
  - Length of residence
  - Family connection
  - Bermuda History/Culture/Society course and test
  - Possession of PRC
  - Contribution to Bermuda
  - Commitment to Bermuda
- Evaluation of Criteria should be designed to eliminate any form of bias.
- If there is an interview process then the interview committee must be diverse to reduce any form of bias.

## **Considerations when drafting specific Legislation & Policy**

- Consideration should be given to measuring and maintaining records of Bermudians emigrating from Bermuda
- Consideration should be given to the impact on Bermudian job seekers
- Consideration should be given to ensuring the criteria/points system is balanced to reduce the impact on racial bias, ethnic diversity and cultural change
- Care must be taken so as not to create a right for all long term residents to Bermudian Status
- Consideration should be given to International standards
- Consideration should be given to the economic growth in relation to population growth needed to support Bermuda's infrastructure, health insurance, Government debt, unfunded pensions etc.
- Consideration should be given to the impact on attracting and retaining global talent
- Consideration should be given to attracting and retaining global investment and economic stimulation
- Consideration should be given to external and global factors
- Consideration should be given to ensuring Bermudians are given priority in policies and implementation
- Enforcement and compliance efforts should be stringent enough to ensure abuses are sufficiently dealt with

## **Conclusion**

This report is the culmination of over eighteen months of hard work, deliberation, collaboration, research, soul searching and most importantly, open consultation with the people of Bermuda. Throughout it all the CIRWG was singularly focused on generating a report that would work for the betterment of all Bermudians and all other constituents. That was a tall order. The people of Bermuda can take comfort in knowing that the contents of this report enjoys full consensus support of the CIRWG, without dissent. Every point has been the subject of detailed consideration and robust discussion.

The CIRWG wishes to thank the Government of Bermuda and all of Bermuda for entrusting this momentous task to us.

Finally, I wish to acknowledge and publicly thank my fellow group members who have been steadfast in discharging our duty:

Mr. Dennis Fagundo (Deputy Chairman)

Senator Ms. Crystal Caesar

Mrs. Malika Cartwright

Ms. Lynne Winfield

Mrs. Belinda Wright

Mr. Stephen Todd

Mr. Gordon (Rick) Woolridge

Mr. Marvin Hanna (Recording Secretary)

Sincerely

William Madeiros (Chairman)