In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 475

IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT

BETWEEN:

MARCO TAVARES

Appellant

-and-

MINISTER OF NATIONAL SECURITY

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Peter Sanderson, Benedek Lewin Limited, for the Applicant**

Ms Lauren Sadler-Best, Attorney-General's Chambers, for the Respondent

Dates of Hearing: **24 February 2020**

Date of Judgment: **27 April 2020**

JUDGMENT

Application for indefinite leave to remain in Bermuda under section 25 of the Bermuda Immigration and Protection Act 1956; whether Minister took into account right to family life enshrined in Article 8 of the European Convention on Human Rights; scope of article 8

1. Mr Marco Tavares, the Appellant, applied for indefinite leave to remain in Bermuda under section 25 of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act"). This application was refused by the Minister of National Security ("the Minister") by letter dated 21 June 2017. Mr Tavares appealed that decision to the Immigration Appeal Tribunal ("the IAT" or "the Tribunal") under section 124 of the 1956 Act. By decision dated 28 October 2019 the IAT dismissed the appeal against the decision of the Minister. Mr Tavares now appeals against the decision of the IAT to this Court under section 13G of the 1956 Act. He relies upon three grounds of appeal:

    a. The IAT erred in finding that the Minister had regard to Mr Tavares's family life when there was insufficient documentation or evidence on the record to establish this.

    b. The IAT erred in seeming to consider its role as one of review, rather than a substantive appeal.

    c. The IAT erred in finding that the hardship faced by Mr Tavares and his family were insufficient to justify a grant of indefinite residency.

The background

2. The background facts are taken from the decision of the IAT.

3. Mr Tavares is a Portuguese national. He has lived and worked in Bermuda subject to work permit control since 1988. His wife, Paula Tavares, to whom he has been married since 2001, is a British Overseas Territories Citizen ("BOTC"). Mrs Tavares was born in Bermuda and has a Bermuda passport but is not qualified to apply for Bermudian status under the 1956 Act, and does not qualify for a permanent resident certificate ("PRC"). Mr and Mrs Tavares' two children were also born in Bermuda and are also BOTC but they do not possess Bermudian status.

4. Mr Tavares and his family have faced uncertainty as a result of their immigration status on several occasions primarily as a result of the expiry of work permits entitling Mr Tavares to engage in gainful employment in Bermuda. They have also faced other

difficulties including the refusal by the Department of Education to admit their son to a public middle school as the Department was not prepared to accept that he was a lawful resident of Bermuda owing to the fact that Mr Tavares was between work permits at the time. Mrs Tavares herself has faced difficulties seeking permission to work in Bermuda.

5. In her Witness Statement dated 18 July 2019, Mrs Tavares states that most of their problems would be solved if Mr Tavares could be naturalised, as it would mean that he would be free of work permit control as a naturalised BOTC, and so would she as the wife of a naturalised BOTC.

6. In October 2015 Mr Tavares applied to be naturalised as a BOTC. This application was denied by the Deputy Governor's Office on 28 November 2016 because Mr Tavares was unable to satisfy the condition that he had no restrictions on the period for which he is allowed to remain in Bermuda. Mr Tavares, at the time, was the holder of a work permit. In order to satisfy this requirement of the Deputy Governor's Office, Mr Tavares applied to the Minister for indefinite leave to remain in Bermuda under section 25 of the 1956 Act. By letter dated 21 June 2017, the Minister refused Mr Tavares' application explaining:

> *"After reviewing the application, covering letter and supporting documents, the Minister refused Mr Tavares' application for indefinite leave to remain or for freedom from immigration control. In arriving at this decision, the Minister considered Mr Tavares' family situation, to wit, that he is married to a BOTC holder and he has two children who were born and live in Bermuda.*
>
> *The Minister also considered the fact that Mr Tavares currently holds a work permit which expires in 1 year.*
>
> *The Minister does not believe that the applicant's family life will not [sic] be affected at this time.*
>
> *The only reason given by Mr Tavares purporting to justify indefinite leave is that such a grant will allow him to circumvent an obstacle to naturalisation and*

thus allow him to naturalise. The Minister considers that this is insufficient to justify the grant of indefinite leave to remain".

7. On 27 June 2019 Mr Tavares appealed the decision of the Minister to the IAT. The appeal hearing took place on 24 July 2019 and Mrs Tavares gave evidence in support of the appeal, which was not challenged by the Minister.

8. At the hearing before the IAT Mr Sanderson, representing Mr Tavares, argued that Tavares has a legitimate expectation that the Tribunal will take into account the right to family life enshrined in Article 8 of the European Convention on Human Rights ("ECHR").

9. Ms Sadler-Best, representing the Minister, accepted that Mr Tavares has a legitimate expectation that his Article 8 rights be taken into account by the Minister when considering his application for indefinite leave to remain in Bermuda. Ms Sadler- Best argued, however, that absent local legislation specifically implementing the rights under Article 8, there is no substantive right to a particular remedy. Instead, she argued, that the grant of an indefinite leave to remain is completely within the discretion of the Minister and, as such, provided the Minister has taken into account Mr Tavares' Article 8 rights in the exercise of that discretion, the Minister's decision should not be overturned by the IAT.

10. The IAT found that the Minister does have an obligation to take into account Mr Tavares' Article 8 rights under the ECHR and that this included an obligation for the Minister to consider the impact a decision to exercise its discretion to refuse or grant the application for indefinite leave to remain would have on Mr Tavares' family circumstances.

11. The IAT concluded that the letter from the Minister dated 21 June 2017 expressly stated that the Minister took into account Mr Tavares' "family situation" which included the BOTC status of his wife and children and considered that it would not be affected by his decision not to grant the application for indefinite leave to remain. The Tribunal concluded that the Minister did take into account the circumstances that would be visited upon Mr Tavares' family and having taken those circumstances into account the

Minister was entitled to reach the decision not to grant Mr Tavares the indefinite leave to remain in Bermuda.

Statutory framework

12. The Minister's power to grant to a person indefinite leave to remain in Bermuda comes from section 25 of the 1956 Act:

> "**Declaration of general principle regarding restriction on entry of persons into Bermuda, and subsequent residence, etc., therein**
>
> *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; or*
> *(d) who is a permanent resident;*
>
> *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 or a person who is a permanent resident, 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.*
> *(2) 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 Immigration Appeal Tribunal against such decision."*

13. Section 124 of the 1956 Act provides:

> *"**Appeals to Immigration Appeal Tribunal***
>
> *124 (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 Immigration Appeal Tribunal by notice in writing addressed to the Clerk of the Immigration Appeal Tribunal; and the Immigration Appeal Tribunal 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."*

14. The IAT's powers in relation to an appeal from the decision of the Minister are set out in section 13D of the 1956 Act which provides:

> ***"Determination of Appeals***
>
> *13D (1) On an appeal of the Minister's rejection of an application under section 19 to 20B, 20D to 20F, 31A or 31B or of the Minister's refusal to grant any permission under section 25(1) or of the Minister's decision regarding conditions or limitations imposed under section 25(1), the Immigration Appeal Tribunal may—*
>
> *(a) confirm the decision of the Minister; or*
>
> *(b) quash the decision and direct the Minister—*
>
> *(i) to issue a certificate of Bermudian status under section 21(1) or to grant a permanent resident's certificate under section 31A or 31B, as the case may be, where the appeal is in respect of an application under section 19 to 20B, 20D to 20F, 31A or 31B;*

(ii) to grant specific permission to land in, or having landed to remain or reside in Bermuda, where the appeal is in respect of a refusal of permission under section 25(1); or

(iii) to dispense with, vary or modify the conditions or limitations as the Tribunal sees fit, where the appeal is in respect of a decision of the Minister regarding conditions or limitations imposed under section 25(1).”

15. Section 13G of the 1956 provides that where a person is aggrieved by the decision of the IAT, he may lodge an appeal with the Supreme Court within 21 days date of the decision of the IAT.

16. A further provision which should be noted is section 31B of the 1956 Act which grants certain persons the right to reside in Bermuda on a permanent basis:

*“**Right of certain other persons to permanent resident’s certificate***

31B (1) Subject to the provisions of this section, a person referred to in subsection (2) may apply to the Minister under this section for the grant of a permanent resident’s certificate if—

(a) he is at least eighteen years of age;

(b) he has been ordinarily resident in Bermuda for a period of ten years immediately preceding the application; and subject to subsection (6), he makes his application before 1 August 2010.

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

(a) the brother or sister of a person who possesses Bermudian status where that brother or sister does not qualify for such grant;

(b) the natural parent of a person who possesses Bermudian status where that parent does not qualify for such grant;

(c) the brother or sister of a person who has been granted a permanent resident's certificate under section 31A where that brother or sister does not otherwise qualify for such grant;

(d) the natural parent of a person who has been granted a permanent resident's certificate under section 31A where that natural parent does not otherwise qualify for such grant;

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

(f) the spouse of a person who has been granted a permanent resident's certificate under section 31A where that spouse does not qualify for such grant or for the grant of Bermudian status."

17. Article 8 of the ECHR provides:

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

Ground of appeal (1): wrong to find that the Minister had considered family life

18. At [20] of the judgement, the IAT found that the Minister did take into account the circumstances that visited the Tavares' family and determined that there was no reason

to exercise his discretion to grant the application. Counsel for Mr Tavares submits that this was a finding based on no evidence as nowhere in the bundle of disclosed documents or the refusal letter was anything showing any consideration of this issue.

19. Counsel for Mr Tavares argues that the consideration of family life is a balancing exercise, and one would expect to see how the balancing exercise was undertaken. Reliance is placed upon the Privy Council decision in *Stefan v GMC* [1999] 1 WLR PC, where the Privy Council considered a decision of the Health Committee of the GMC that the appellant's fitness to practice was impaired and that she should be suspended indefinitely. The Privy Council considered that there was a common law obligation to give reasons for the decision and stated at 1303G:

> *"Their Lordships are also persuaded that in all cases heard by the Health Committee there will be a common law obligation to give at least some brief statement of the reasons which form the basis of their decision. Plainly the Health Committee are bound to carry out their functions with due regard to fairness. The first two of the grounds already mentioned will apply in any case coming before the committee: the provision of a right of appeal and the judicial character of the body point to an obligation to give reasons".*

20. Reliance is also placed on the House of Lords decision in *South Bucks DC v Porter* [2004] 1 WLR 1953, concerning the reasons given by a planning inspector, where Lord Brown stated at [36]:

> *"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the*

main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

21. It seems to me that the reasons why Mr Tavares should be naturalised and why he should be granted indefinite leave to remain as a precondition to naturalisation were set out in the letter from Wakefield Quin Limited dated 12 October 2015. The fundamental point made in that letter was that despite the fact that Mr and Mrs Tavares did not possess Bermudian status, they were deeply rooted in the Bermuda society and both the children were born in this jurisdiction. In that letter the following evidence was submitted on behalf of Mr Tavares:

    a. Mr Tavares is the husband of Paula Tavares, a BOTC born in Bermuda.

    b. Mrs Tavares was born in Bermuda and spent most of her life here, other than a period of three years during her childhood, and going away to university. Unfortunately, the three years' absence during her childhood meant that she was away on 31 July 1989 (she returned in September 1989), and so could not qualify for either status or permanent resident's certificate.

    c. Nonetheless, Mrs Tavares has always considered Bermuda to be her home, and it has also been her husband's home for the past 18 years. Their children have been born and brought up here.

    d. Mr and Mrs Tavares have been married since 2001. Despite his wife being BOTC, Mr Tavares has only ever been in Bermuda on a work permit. Mrs Tavares has also always been told that she requires a work permit, despite

being a born citizen of Bermuda. She would like to work, but the requirement to have a work permit places obstacle in the way of this.

e. If Mr Tavares can naturalise, then he will be considered a belonger, and his wife will also be a belonger as the wife of a naturalised person. This would enable them both to work freely. It would give some measure of relief to both of them.

f. In order to naturalise as a BOTC it is necessary that Mr Tavares does not have any restrictions on the period for which he is allowed to remain in Bermuda. He therefore seeks a grant of indefinite leave to reside from the Minister prior to a decision on his naturalisation application.

22. It seems reasonably clear that the Minister was aware of these points because he specifically refers to them in his letter of 21 June 2017:

a. The letter specifically refers to the "*covering letter"* which appears to be a reference to the letter from Wakefield Quin dated 12 October 2015.

b. The letter expressly states that the Minister considered "*Mr Tavares' family situation, to wit, he is married to a BOTC holder and that he has two children who are born and live in Bermuda."*

c. The Minister did not believe that Mr Tavares' family life will be affected by the refusal to grant him indefinite leave to stay because Mr Tavares was in possession of a work permit which did not expire for another year.

d. The Minister considered that the only reason why indefinite leave to remain was being sought was because it was a precondition to the grant of naturalisation. He did not believe that in the circumstances that was a sufficient reason to justify the grant of indefinite leave to remain.

23. In the circumstances, this is not a case where the Minister has given no reasons for his decision or that his reasons are not clearly expressed. The Minister has decided to refuse the grant of indefinite leave to remain because he has taken the view that the primary

justification advanced was to fulfil the precondition to the grant of naturalisation and that justification, in his view, was insufficient. It may be that the reason which he has given can be challenged but, it seems to me, that this is not a case where the Minister has failed to consider the evidence put before him or that he has failed to give any reason for his decision.

24. Here, in relation to the appeal before the IAT, Mrs Tavares submitted a Witness Statement dated 18 July 2019. She also provided further oral evidence at the hearing. In her Witness Statement Mrs Tavares highlighted:

    a. Mr Tavares' appeal against the Minister's decision not to grant indefinite leave to remain affects their entire family.

    b. The two children and Mrs Tavares are BOTC due to the fact they were all born in Bermuda. The children are the fourth-generation of the family to be living in Bermuda, but neither Mr and Mrs Tavares or their children have any rights to live and work in Bermuda.

    c. The family has suffered many problems with authorities due to their status. In December 2010, the family was given a month to settle their affairs and leave Bermuda due to Mr Tavares' work permit issues. This was repeated in June 2011 and in August 2011.

    d. Most of the family problems would be solved if Mr Tavares could be naturalised, as it would mean that he would be free of work permit control as a naturalised BOTC, and so would Mrs Tavares, as the wife of a naturalised BOTC.

25. It can be seen from the Ruling of the IAT that the IAT took into account the evidence given by Mrs Tavares in her Witness Statement and at the appeal hearing. In the circumstances I dismiss the first ground of appeal that the IAT erred in finding that the Minister had regard to Mr Tavares' family life on the basis that there was insufficient documentation or evidence on the record to establish this.

Ground of appeal (2): the IAT erred in seeming to consider its role as one of review only, rather than a substantive appeal

26. Counsel for Mr Tavares submits that at paragraph 22 of the Ruling, the IAT held that it was not required to consider if it had a power to consider the application afresh. Counsel submits that this was a grave error, as it was absolutely integral to the appeal process that the IAT do this.

27. The difficulty with the submission is that the IAT makes a positive finding that even if the Tribunal was required to consider the application afresh, they would have come to the same conclusion as the Minister.

28. At paragraph 4 of the Ruling, the IAT noted that this was an appeal under section 124 of the 1956 Act and that the tribunal has the power to *"make such orders as appear to him just*" on appeal.

29. The IAT noted at paragraph 5 of the Ruling that section 13D of the in 1956 Act gave the Tribunal the power, upon a decision made under section 25, to direct the Minister to grant specific permission to remain in Bermuda and to dispense with any conditions or limitations as the Tribunal sees fit.

30. At paragraph 20 the IAT concluded that the Minister took into account the circumstances that would be visited upon the Tavares family (Article 8 rights) and determined that there was no reason to exercise his discretion to grant the application for indefinite leave to remain.

31. At paragraph 21 of the Ruling, the IAT recorded the submission made by Mr Tavares's counsel that the Tribunal had a wider power available to it to "do what is just" when considering the appeal. In particular, the Tribunal recorded the submission that it was open to the Tribunal to replace the Minister's discretion with that of its own when circumstances call for it.

32. The critical part of the Ruling in this regard is paragraph 22 where the IAT states:

> *"If there was a power to consider the ILR Application fresh, a conclusion we do not believe we are required to reach in this case, we would still find that, taking into account the Appellant's Article 8 rights, the Minister's decision not to grant ILR was correct. In coming to this conclusion, taking Mrs Tavares' evidence at its highest, we conclude that the negative impact upon the Appellant's family life as a result of the requirement that she and the Appellant are required to seek work permit approval before working would not qualify as the kind of hardship amounting to an interference with the Appellant's Article 8 rights".*

33. It seems to me that in paragraph 22 of the Ruling the Tribunal is clearly stating that even if the Tribunal was required to consider Mr Tavares' application afresh, having regard to all the evidence before the Tribunal, it would have come to the same conclusion as the Minister. In the circumstances I am unable to see how this ground of appeal advances Mr Tavares' case before this Court.

Ground of appeal (3): the IAT erred in finding that the hardship faced by Mr Tavares and his family were insufficient to justify a grant of indefinite residency

Standard of review

34. An appeal against the decision of the IAT is governed by order 55 of the Rules of the Supreme Court 1985 which provides that such an appeal shall be by way of a rehearing. In *Aguiar v Minister for Home Affairs* [2018] SC (Bda) 83 Civ (20 November 2018) I referred to the standard of review on such an appeal at [13]

> *"in a case where the appeal is by way of rehearing the decision of the tribunal below is entitled to great weight and respect. However, the decision can be departed from and the appellant body can exercise its discretion when it comes to the view that the decision of the tribunal below was, for whatever reason, plainly wrong."*

35. Similar test was expressed by Ground CJ in *Bermuda Telephone Company Limited v Minister of Telecommunications and E-Commerce* [2008] Bda LR 58 at [13]:

> *"13. I noted above that the parties filed extensive evidence and that that was inappropriate. It may be that they were misled by the use of the word "rehearing" in Ord. 55. That expression does not mean that the court will treat the matter as coming before it for the first time, and hear it anew. Its meaning was explained by May LJ in E. I. Dupont de Nemours & Co. v S. T. Dupont [2003] EWCA Civ 1368:*
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> *"90. Rehearings on appeal under RSC Ords 55 and 59 were well understood not to extend to rehearings in the fullest sense of the word. The court did not hear the case again from the start. It reviewed the decision under appeal giving it the respect appropriate to the nature of the court or tribunal, the subject matter and, importantly, the nature of those parts of the decision making process which were challenged."*
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> *14. In the case of appeals under the Act, the extent of appellate review is further restricted by section 60(1) to points of law or mixed fact and law. The latter expression, though well understood in the context of judicial review, is not a common expression to find in statutory provisions in this jurisdiction. It seems, however, that it is more frequently used in Canadian statutes, and the Canadian Supreme Court has explained it as follows:*
> *"It is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal." Housen v Nikolaisen [2002] 2 SCR 235 at para. 24.*
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> *15. I do not think it particularly necessary to belabour this. I accept the appellant's submission that the proper approach on an appeal such as this is: "...not the same as a judicial review but engages the merits of the decision*

[it] is an appellate style review, but [one] where the Court is prevented from questioning pure factual findings. It can review the commission's conclusions (namely that the rate was just and reasonable). In that review, the Court should give due deference to the original decision maker and only intervene if the decision is plainly wrong."

The case before the IAT

36. The primary case before the IAT was based upon Article 8 of the ECHR. It was said that pursuant to a declaration of the United Kingdom dated 22 November 2010, ECHR applies in Bermuda on a permanent basis. It was submitted that whilst the declaration does not give a direct effect to the ECHR, Mr Tavares has a legitimate expectation, when the IAT considers what orders would be just to make in a case, that it should have regard to the terms of ECHR, as should the Minister when determining an application which would impact on an applicant's family life.

37. Counsel for Mr Tavares relied upon the decision of Kawaley J in *Davis v The Governor* [2012] Bda LR 29, where Kawaley J considered the relevance of ECHR to a decision made by an immigration officer to deport the applicant. He said at [34]:

"34. The doctrine of proportionality arises most directly under Bermudian law when considering whether legislation or administrative action is "reasonably required" for the purposes of the permitted public policy grounds for interfering with certain fundamental constitutional rights. The doctrine may also be invoked indirectly when considering whether a decision-maker exercising a statutory discretion which engages fundamental rights protected by an international convention such as the ECHR has met the legitimate expectation of the citizen that the Government would adhere to its international legal obligations when dealing with his case. The doctrine cannot be deployed in circumstances where no constitutional fundamental rights are engaged.

41. Nevertheless, I do find in the alternative that, to the extent the Minister was exercising a statutory discretion in deciding to recommend the Deportation

Order which the Governor duly made, the Applicants (and their children) may fairly be said to have had a legitimate expectation that their family law rights under article 8 of ECHR and/or the common law (as reinforced by local family law legislation) would be taken into account."

38. In relation to Article 8 counsel specifically relied upon the European Court of Human Rights case of *Kuric v Slovenia* [2010] ECHR 26828/06 and set out paragraphs 350-354, 359 and 361 from the judgement in his written submissions.

39. Relying upon Article 8, counsel for Mr Tavares submitted, that it was just to grant Mr Tavares indefinite leave, so that he can be naturalised, and then both Mr and Mrs Tavares will be outside of work permit control.

Case before this Court

40. Counsel submits that the Tavares family plight is analogous to that of the parties in *Kuric*. Counsel argues that Bermuda has allowed the situation to develop where multiple generations of the same family have been allowed to be born and grow up in Bermuda, without providing any pathway to Bermudian status, belonger status, or PRC. They require permits to work, and will not be granted a permit if there is a qualified Bermudian who applies. Mr Tavares' company requires a 60% Bermudian partner to run it. It is practically impossible for them to buy a home due to licence requirements. This is a situation, counsel submits, without parallel in any other western democratic jurisdiction.

41. Counsel further submits that Mrs Tavares' evidence speaks to the real hardships the family has faced due to their immigration problems. Having regard to international human rights standards and principles of justice and in particular Article 8, it is just to grant Mr Tavares indefinite leave to stay, so that he can be naturalised, and then both Mr and Mrs Tavares will be outside of work permit control.

Discussion

42. In *Kuric*, 11 applicants before the ECtHR belonged to a group of people known as the "erased". They complained that the Slovenian authorities prevented them from acquiring citizenship of the newly established Slovenian State in 1991, and/or from preserving their status as permanent residents, as a result of which they have faced almost 20 years of extreme hardship. Mainly former citizens of the Socialist Federal Republic of Yugoslavia (the "SFRY") who had their permanent residence in Slovenia, following the declaration of Independence by Slovenia in 1991, they either did not request Slovenian citizenship within the prescribed time limit or their request was not granted. As a result, their names were "erased" from the Slovenian Register of Permanent Residents on 26 February 1992. At the time, approximately 200,000 Slovenian residents, including the applicants, were citizens of other former SFRY republics.

43. On or shortly after 26 February 1992, the municipal authorities removed them from the Register of Permanent Residents and, according to the Slovenian government, transferred them into the Register of Aliens which was for people without a residence permit. According to the government, people were informed about the change to the media, by notices, and even contacted personally in some municipalities. The applicants denied ever receiving notification of their names being removed from the first register and being entered into the second. They subsequently learned that they had become aliens when, for example, they tried to renew their personal documents. The applicants claimed the erasure of their names from the Register of Permanent Residents had serious and enduring negative consequences. Some were evicted from their apartments, could not work or travel, lost all their personal possessions, including their documents, and lived for years on end in shelter and municipal parks with grave detrimental consequences for their health.

44. The applicants argued that under article 8 of the ECHR, they had been arbitrarily deprived of the possibility of acquiring Slovenian citizenship and/or preserving their status as permanent residents after Slovenia declared its independence in 1991, because they were not in a position to submit a formal request for citizenship within the short

period set out in the domestic legislation. As a result, on 26 February 1992 their names had been unlawfully "erased" from the Register of Permanent Residence.

45. The ECtHR noted at paragraph 356 that before 26 February 1992, when the relevant parts of the independence legislation became applicable, the applicants and their names were transferred from the Register of Permanent Residents into the Register of Aliens without a Residence Permit, they have been living in the territory of the Republic of Slovenia for several years, and most of them for decades. Some applicants were even born there. Before that date all the applicants had been in lawful permanent residence on Slovenian territory under the SFRY legislation applicable at the material time. The Court stated that it was important to note that prior to 1991 the applicants did not enter Slovenia as aliens but settled there as SFRY citizens and registered their permanent residence in the same way as citizens of the then Socialist Republic of Slovenia.

46. The ECtHR also placed reliance on the fact that in 1999 the Constitutional Court found unconstitutional the provisions of the law applicable as from the day of the "the erasure" (the Aliens Act) as it did not regulate the status of the "erased" who had not received an official notification about the change of the status. Following this Constitutional Court's decision, the Legal Status Act was passed in order to regulate the situation of "the erased". However, in 2003, the Constitutional Court reiterated its 1999 ruling. It further held that the Legal Status Act was unconstitutional, in particular since it failed to grant "the erased" retroactive permanent residence permits and to regulate the situation of those deported.

47. In these exceptional circumstances the ECtHR considered that the prolonged refusal of the Slovenian authorities to regulate the applicants' situation comprehensively, in line with the Constitutional Court's decisions, in particular the failure to pass appropriate legislation and to issue permanent residence permits to individual applicants, constitutes an interference with the exercise of the applicants' rights to respect for their private and/or family life, especially in cases of statelessness.

48. I agree with the Ruling of the IAT that the facts in *Kuric* were truly exceptional and bear little resemblance to the position of the Tavares family. The applicants in *Kuric*, before their names were transferred to the Register of Aliens, had been in lawful

permanent residence on Slovenian territory under the SFRY legislation applicable at the material time. Second, the Constitutional Court had deemed this legislation to be unconstitutional and had required the Slovenian authorities to regulate the applicants' situation comprehensively and at the time of the application to the ECtHR the Slovenian authorities were in breach of the orders made by the Constitutional Court. Third, there was no evidence that the applicants had ties with any other country and were effectively stateless. Fourth, the applicants suffered serious and enduring negative consequences including being evicted from their apartments, could not work or travel, lost all their personal possessions, including the documents, and lived for years on end in shelters and in municipal parks with grave detrimental consequences for their health.

49. In contrast Mr Tavares is entitled to work and reside in Bermuda albeit as long as he is a holder of a work permit issued by the Department of Immigration. Mr and Mrs Tavares, together with the children, possesses Portuguese citizenship and have the ability to reside and work throughout the EU as EU citizens. Their position cannot reasonably be compared with the position of the applicants in *Kuric.*

50. In *Kuric*, the ECtHR emphasised at paragraph 350 that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there and referred to the cases of *Abdulaziz v UK* [1985] ECHR 9214/80, para 67; *Boultif v Switzerland* [2001] ECtHR 54273/00, para 39; and *Uner v The Netherlands* [2006] ECHR 870, para54.

51. In the *Minister of Home Affairs v Barbosa* [2019] UKPC 41, the Privy Council has reiterated that the specification of the right of abode in an overseas territory is a matter exclusively for the local legislature. Lord Kitchin and Lord Sales explained:

> *"42. … A person's status as a British Dependent Territories citizen was likewise distinct from his connection to any particular Dependent Territory and carried no right of abode in respect of any such territory, that being a matter governed by local legislation. In addition, section 23(1) provided among other things that a person would at commencement become a British Dependent Territories citizen if, immediately before commencement, he was a citizen of the United Kingdom and Colonies who had that citizenship by his birth, naturalisation or*

registration in a Dependent Territory (again, his status as a British Dependent Territories citizen was not tied to any particular Dependent Territory).

43. British Dependent Territories have been renamed as British Overseas Territories and British Dependent Territories citizens have been renamed British Overseas Territories citizens: sections 1 and 2 of the British Overseas Territories Act 2002, respectively. Section 3(1) of that Act has the effect that, subject to certain *exceptions, anyone who was a British Dependent Territories citizen at its commencement became a British citizen. As a result, Mr Barbosa is now a British Overseas Territories citizen and also a full British citizen. As a British citizen he has rights of entry and abode in the United Kingdom. However, neither status gives him a right of abode in Bermuda or a right to be treated as a person who belongs to Bermuda. These are rights defined by the law of Bermuda, not a United Kingdom statute.*

44. … There is no uniformity in the disparate legislative provisions enacted by the various overseas territories that define who qualifies as a belonger (p 221). The specification of the right of abode in an overseas territory such as Bermuda is a matter for the local legislature, with the result that in several territories there is no right of abode there for a number of people who have British citizenship or British Overseas Territories citizenship, even if such citizenship exists only by virtue of a connection with the territory in question (p 225).

59. …Indeed, in the light of the long constitutional tradition outlined above according to which it is for the local legislature of what is now called a British Overseas Territory (formerly a Dependent Territory and before that, a colony) to set out who is entitled to a right of abode in that territory, it would require clear and express language in a United Kingdom statute before it could be concluded that the United Kingdom Parliament was purporting to legislate about such matters for one of the British Overseas Territories."

52. In my judgment the IAT was entitled to take the view that the Minister had taken into account the circumstances that would be visited upon the Tavares' family and determined that there was no reason to exercise its discretion to grant the indefinite leave to remain application.

53. The IAT was also entitled to take the view that *"taking Mrs Tavares' evidence at its highest, we conclude that the negative impact on the Appellant's family life as a result of the requirement that she and the Appellant are required to seek work permit approval before working would not qualify as the kind of hardship amounting to interference with the Appellant's article 8 rights."*

54. This analysis by the IAT gives appropriate recognition to the proposition, stated in *Kuric* at paragraph 350, that international law recognises the general right of states to control entry and residence of non-nationals and the ECHR confers no right on individuals or families to choose where they prefer to live.

55. In considering whether Article 8 was engaged, the IAT, in my view, undertook the appropriate analysis: whether the lawful requirement of a work permit, as a condition of residence, was disproportionate to the legitimate end sought to be achieved by these statutory provisions. It is to be noted that the statutory provisions expressly cater for permanent residency in Bermuda in terms of section 31B(1) of the 1956 Act but Mr Tavares is unable to take advantage of that provision.

56. In considering proportionality, the IAT was entitled to take into account that Mr Tavares remains with his family, is lawfully resident in Bermuda, as has been the case since 1998. As the IAT noted, in the case of Mr Tavares, unlike the applicants in the *Kuric* case, there is no loss of housing, has not suffered the inability to travel or to work and is not stateless.

57. In this regard it should be noted that, in accordance with general practice, Mr Tavares' work permits expressly referred to the position that:

1. *Employees are not immigrants to Bermuda, i.e. a permanent resident of Bermuda and, in the event of termination of services for any reason; the worker must obtain permission to legally remain in Bermuda.*

2. *The grant of a work permit in no way implies any right to further renewables or to any other rights not specifically stated.*

3. *Application to continue employment or to reside beyond the expiry date given will be considered on the merits of the application at the time.*

4. *On termination of employment for whatever reason, the employer is required to advise the Department of Immigration of what arrangements the employee has made to leave, or remain in, Bermuda.*

58. Whilst the point was not expressly addressed by counsel, it seems to me that the Minister and the IAT would be entitled to take into account that family life in Bermuda was established in the knowledge that Mr Tavares was subject to the above conditions set out in his work permit.

59. Finally, it is common ground that Mr and Mrs Tavares and their children possess Portuguese citizenship and have the ability to reside and work throughout the EU as EU citizens. Again, whilst the point was not addressed by counsel, the ECHR jurisprudence suggests that in considering whether Article 8 is engaged the court is required to consider, among other matters, whether there are "insurmountable obstacles" in the way of the family living in the country of origin of the non-national concerned. For present purposes this point need not be explored further.

60. For these reasons I have come to the conclusion that Article 8 of ECHR does not assist Mr Tavares in his application to obtain indefinite leave to remain in Bermuda. In making this decision I do not minimise the real hardship referred to by Mrs Tavares in her witness statement and in her affidavit and it is understandable that Mr and Mrs Tavares consider their current immigration position to be unjust and unfair. However, as noted by Baker P in the *Minister of Home Affairs v Marco Tavares and Paula Tavares*, Civil Appeal No. 19 of 2017 at [80], the Courts are required to apply the law

as it presently exists and it is not for the Courts to strain the meaning of the existing legislation or its application to assist individual litigants who may be hard done by. Rather it is for Parliament to legislate to produce a comprehensive immigration scheme that is consistent and fair to all concerned.

Dated 27 April 2020

NARINDER K HARGUN

CHIEF JUSTICE