In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 9

IN THE MATTER OF DECISIONS MADE ON OR ABOUT THE 5TH JULY 2013 TO REFUSE BERMUDIAN STATUS (AS CONSOLIDATED BY ORDER OF THE IAT ON 14TH AUGUST 2013)

AND IN THE MATTER OF AN APPEAL RULING OF THE IMMIGRATION APPEAL TRIBUNAL DATED 25TH OCTOBER 2013 (BUT CIRCULATED 20TH DECEMBER 2013)

BETWEEN:-

THE MINISTER FOR HOME AFFAIRS

Appellant

-v-

(1) REBECCA CARNE

(2) ANTONIO CORREIA

Respondents

JUDGMENT

(in Court)

Date of hearing: April 4, 2014

Date of Judgment: May 2, 2014

Mr. Philip J. Perinchief, instructed by the Attorney-General's Chambers, for the Appellant

Mr. Peter Sanderson, Wakefield Quin, for the Respondents

Introductory

1. On August 10, 2011, the Bermuda Immigration and Protection Act 1956 ("the Act") was amended[1] to establish a new Immigration Appeal Tribunal (section 13A). The purpose of the Immigration Appeal Tribunal ("IAT") was to provide an independent appellate tribunal for appeals (under section 124 of the Act) from decisions made by the Minister. Formerly, appeals were made to the Cabinet Appeal Tribunal, which was merely another emanation of the Executive[2].

2. Section 13G of the Act confers a right of appeal from the IAT to this Court upon "*a person is aggrieved by a decision of the Immigration Appeal Tribunal*". The present appeal is the first appeal to be lodged under section 13G. The matter comes before this Court in the following way.

3. The Respondents were each holders of a Permanent Residence Certificate ("PRC"), issued in 2009 and 2007, respectively, by the Minister. The 1st Respondent (a British national) was naturalised as a British Overseas Territories Citizen by the Governor on August 17, 2012. The 2nd Respondent (a Portuguese national) was slightly earlier issued a similar certificate by the Governor on July 25, 2012. The naturalisation certificates were granted under the British Nationality Act 1981, and each application was supported by the Department of Immigration. However, neither application was made on a basis which explicitly foreshadowed the Bermudian Status applications which were to follow.

4. On July 26, 2012, the Respondents' counsel emailed the Immigration Department to query the procedure for applications for Bermudian Status under section 20B of the Act. The following day he was advised that no standard forms existed because although section 20B was still in force, "*it has not been used in quite some time now.*" Guidance was given as to what information to submit. The Respondents each applied formally for Bermudian Status under section 20B by letters dated August 6, 2012 (2nd Respondent) and October 1, 2012 (1st Respondent), respectively. The Department promptly raised the question of the need for approval for the grant of status to precede the naturalisation grant. The Respondents' counsel sought to rebut these arguments.

5. By letter dated July 5, 2013, the Minister refused each application on the sole ground that section 20B(2)(b) required the Respondents to have "*been approved for the grant of Bermudian status*" at the time of the granting of their certificates of naturalisation. The Respondents appealed these decisions by Notice & Grounds of Appeal dated July 15, 2013, on the ground that:

[1] By the Bermuda Immigration Amendment Act 2011.

[2] The lack of independence of the Cabinet Appeal Tribunal had been the subject of adverse comment for many years. This Court invited Parliament to consider the need for reform in *Re Haynes* [2008] Bda LR 75 (at paragraph 63), a decision which was referred to during debate in the House of Assembly on the Bermuda Immigration Amendment Act Bill 2011 .

"*the Respondent* [i.e. the Minister] *is wrong in his interpretation of section 20B and that the Appellant is in fact eligible for Bermudian status.*"

6. The appeal was seemingly argued before the IAT on the somewhat narrow binary basis that either the Minister's interpretation was correct, and the Respondents were not entitled to obtain Bermudian status, or, alternatively, his interpretation was wrong, and the Respondents were entitled to the grant of Bermudian status. The IAT (Ms. Kiernan Bell, Deputy Chairman, Ms. Belinda Wright and Mr. Clement Talbot) found as of October 25, 2013[3] that the Minister's interpretation of section 20B(2)(b) was wrong, and that the Respondents were entitled to the grant of Bermudian status. The Minister by Notice of Appeal dated January 10, 2014 appealed against this decision on the following grounds:

> "*(i) The learned Deputy chairperson and Panel members erred in law and misdirected themselves in their interpretation and/or application of the phrase, 'having been approved for the grant of Bermudian status', which appears in Section 20B(2)(b) of Part III of the Bermuda Immigration and Protection Act 1956 (BIPA and Amendments), in that the Minister of Home affairs or his duly authorized representatives , do have a role to play prior and subsequent to the granting or refusal of a Certificate of Bermuda status[4] (see paras. 20, 26 to 29 of Ruling).*
>
> *(ii) The learned Tribunal erred in law and in fact, and misdirected itself in that it misapplied the operation and principles of the International Covenant on Civil and Political Rights (the ICCPR) generally to the issues at hand, and in particular the application of Article 25 of the Covenant and its relation or relevance to clause or section 11(5)(b) [belonger status] of the Bermuda Constitution Order 1968 and in light of section 8 of the BIPA dealing with the issue of supremacy of laws where there is a conflict. (see paras 20, 26 to 29 of Ruling).*
>
> *(iii) The learned Tribunal erred in law and in fact, and exceeded and arbitrarily applied its powers and its discretion, and acted contrary to the intention of Parliament when it misinterpreted the nature, scope or ambit of the word 'JUST' in section 124 of the BIPA; thus unfairly, and not even-handedly, applying this word and principle on the scales of justice e.g. it is 'just' as well*

[3] The written decision was circulated at a later date. The earlier effective date was apparently in response to representations made by the 2nd Respondent's counsel about the impact of the timing of the decision on the Bermudian status rights of the 2nd Respondent's son.

[4] The reference to "*Certificate of Bermudian status*" was clearly intended to read "certificate of naturalisation".

that the responsible Minister strictly apply the appropriate provisions of immigration law as they currently stand or stood."

7. In addition to seeking to quash the IAT decision, the Minister invited the Court to determine the following questions:

   (a) the meaning of the phrase "*having been approved for the grant of Bermudian status*" in section 20B(2)(b) of the Act;

   (b) whether the grant of a certificate of naturalisation ousts the jurisdiction of the Minister to decide whether or not to grant Bermudian status;

   (c) whether the issuance by the Governor of a certificate of naturalisation constitutes pre-approval for the grant of Bermudian status;

   (d) what is the true meaning and effect of section 11(5)(b) of the Bermuda Constitution.

8. The present appeal is concerned with the circumstances in which PRC holders can obtain Bermudian status, deploying an interaction between provisions of the British Nationality Act 1981 and the Bermuda Immigration and Protection Act 1956, and asserting rights which have not seemingly been asserted in the post-PRC era. By the end of the hearing of the appeal before this Court, it seemed clear to me that the Minister's construction of the statutory provisions, in terms of the procedure they contemplated being followed for the purposes of a section 20B(2) status application, was essentially correct. However, it also seemed clear that in all the circumstances of the present case, where the only objection to the grant of Bermudian status which was raised by the Minister was more procedural than substantive, that the result achieved the IAT decision was obviously sound and could not properly be disturbed.

9. Nevertheless, the request for guidance made by the Minister's counsel combined with the importance and complexity of the issues raised by this first appeal from a decision of the IAT also made it obvious that a fully reasoned judgment should be delivered in the hope that greater clarity could be brought to an obscure area of Bermuda law.

Findings: factual background

The naturalisation application and the substantive import of the failure to seek simultaneous pre-approval for the grant of Bermudian status

10. It is common ground that as part of the naturalisation process, the Deputy Governor's Office consulted the Department of Immigration, which advised on June 20, 2012 (1st Respondent) and June 21, 2012 (2nd Respondent) that the "*Minister of National Security*

has no objection to" the Respondents being naturalised. The same officer corresponded with the Respondents later that year on behalf of the same Minister in respect of the Bermudian status applications, which were initially addressed to the "*Department of Immigration*"[5].

11. This consultation is in my judgment significant, because it demonstrates that if an application for pre-approval for Bermudian status had been made simultaneously with the naturalisation process, the same Minister would most likely have been involved in approving the naturalisation process and pre-approving the Respondents for the subsequent grant of Bermudian status. The Minister for National Security had no substantive or procedural objections in June 2012 to the grant of a naturalisation certificate. The Minister for National Security had no substantive objections to the Bermudian status applications in September 2012. The Minister for Home Affairs had no substantive objections to the applications in July 2013, nor indeed at the subsequent IAT appeal hearing. It appears that in the interim, the Department of Immigration was moved from under the ambit of the Ministry of National Security to under the Minister of Home Affair's umbrella.

12. Bearing in mind the constitutional importance of the grant of a certificate of naturalisation in terms of the rights it confers to a connection with Bermuda under section 11(5)(b) of the Bermuda Constitution, one would reasonably expect there to be little difference between 'character' grounds for the Minister objecting to the Governor granting naturalisation under section 18 of the British Nationality Act and factual grounds for the Minister refusing to grant Bermudian status under section 20B(2)(b) of the Act.

13. No evidence was filed on behalf of the Minister for the purpose of either the IAT appeal or the present appeal which was capable of supporting a finding that had the Bermudian status pre-approval application been formally made in conjunction with the naturalisation application, the procedural approach contended for by the Minister, that pre-approval application would likely have been refused.

The July 5, 2013 refusal of the Bermudian status applications

14. The Respondents applied for Bermudian status under section 20B(2)(b) of the Act. The Minister's refusal of the applications on July 5, 2013 was based solely on the grounds that although the Respondents held PRC certificates and had obtained British Overseas Territory citizenship, they had "*never been approved for Bermudian status* [as] *outlined in subsection 2(b) above*." This reasoning was consistent with a literal reading of the relevant words of the statute. It was also the most technical of justifications for refusing

[5] It seems that the documents evidencing this consultation handed up by Mr. Perinchief at the beginning of the hearing were not before the IAT.

one of the most significant applications that it is possible for an applicant to make under the Act.

15. It was also common ground that there was, at all material times, no standard form for section 20B(2)(b) applications, and no prescribed procedure for such applications, published or otherwise. This was apparently because no such applications had been made for many years. To my mind this seriously diminished the reliance which the Minister could reasonably place on what was essentially a procedural irregularity which formed the sole basis of the refusal decisions.

16. The Respondents had not failed to follow a prescribed administrative procedure. They had, at worst:

    (a) failed to disclose when applying for naturalisation, under a separate statutory provision altogether from section 20B(2)(b), that they were doing so with a view to subsequently applying for Bermudian status; and/or

    (b) failed to seek clarification from the Minister as to what the section 20B(2)(b) procedure was, it being unclear what the bare words of the statute envisaged in the absence of any administrative guidance published by the Ministry.

17. However, the Minister had himself failed to establish and publish procedural guidelines for such applications. Such a procedure would logically have, *inter alia*:

    (a) warned any applicants, based on the Minister's interpretation of the section, that if they intended to apply for Bermudian status after obtaining a certificate of naturalisation, they needed to seek pre-approval simultaneously with the naturalisation application process; and/or

    (b) included a mechanism whereby the Minister would not, when consulted by the Governor on the proposed grant of a naturalisation certificate, approve the issuance of such a certificate without the relevant applicant clarifying whether or not they intended to apply for Bermudian status.

18. At first blush, assuming the Minister's construction of the Act to be correct, the failure of the Respondents in these circumstances to seek and obtain pre-approval for Bermudian status before obtaining their certificates of naturalisation does not, <u>on these facts</u>, appear to amount to convincing grounds for refusing their status applications altogether.

The IAT decision

Overview

19. The practice of law in a small jurisdiction which lacks its own legal academy presents unique challenges when construing distinctively local legislation. The interpretation of such legislation cannot be illumined by reference to cases and /or practitioners' texts from other jurisdictions, considering similar legislation to our own. Much of our criminal and civil law, substantive and procedural, is heavily influenced by English law, making English case law and texts an invaluable guide for the task of determining the corresponding Bermudian law rules.

20. The 1956 Act is a classic instance of uniquely local legislation. Navigating through it often gives even the experienced judge or practitioner an unnerving sense of what it must be like to "fly blind". Some aspects of the Act have been the subject of repeated consideration by the Courts. Section 20B(2)(b) is not one of those familiar provisions. The Respondents' counsel, Mr. Sanderson, appears to be the first lawyer for many years to have discerned the beauty in these sleeping provisions, and to have been inspired to seek to bring them back to life.

21. It is clear from the IAT's Appeal Ruling, that the appeal before the Tribunal was argued primarily as a matter of statutory interpretation. That framing of the appeal did not facilitate the most clear and balanced approach to ascertaining the meaning of section 20(2)(b) of the Act. Because the IAT's ultimate task was not to clarify the law. It was to decide whether or not the Minister had lawfully refused the Respondents' otherwise meritorious applications for Bermudian status, on wholly technical and procedural grounds. As the IAT noted in paragraph 23 of its Ruling:

> "*…counsel for the Minister sensibly…conceded that the Appellants had met all of the substantive requirements for the grant of Bermuda status under section 20B save for the question of pre-approval for Bermudian status in section 20B(2)(b) relating to the naturalization as a BOT citizen.*"

22. Faced with a case infused with aspirational international human rights principles in favour of the grant of Bermudian status, and a substantively hollow bureaucratic case for refusing status, it is unsurprising that the IAT quite decisively allowed the appeal. In fairness to the Minister however, the IAT's decision did potentially suggest that future similar applications could be made for Bermudian status in circumstances where the Minister's central legislative role could be supplanted by the Governor's naturalisation powers.

23. I agree that the Minister's decision to refuse the Respondents' applications for Bermudian status cannot be sustained. However in light of the arguments made before this Court, where Mr. Perinchief refined his initial submissions on the interpretation of this Act, I find that the Minister's key interpretation arguments (i.e. how the Act should generally be read) are fundamentally sound. There is, though, a fundamental distinction between what a statute means in a general or abstract sense and how it may legally be applied to particular real life scenarios. The IAT decision will be considered with these two distinct features in mind.

The substance of the IAT decision

24. The pivotal finding recorded by the IAT was the following:

> "*27.The IAT find that the appellants having met all the substantive requirements for the grant of Bermudian status under section 20B (including the requirements of section 19(3)-(4)) should have their appeals allowed. The Appellants should not be denied Bermudian status in reliance on a failure to meet a procedural requirement which neither exists nor as a matter of common sense can be applied, being hopelessly circular in its application (requiring an applicant for the grant of status to first obtain approval for status).*"

25. I would rephrase the finding as follows. The requirements for Bermudian status having been substantively met, it was not open to the Minister to refuse the applications on the grounds of a failure to comply with a procedural requirement which, if it exists, is now impossible to comply with, in circumstances where the non-compliance had no impact on the merits of the application. Neither the Minister's grounds of appeal nor his counsel's submissions, which both focussed on how the statutory provisions should be construed generally, undermined the logic of this core finding in any direct and coherent way. The decision on the merits, properly understood, focussed on the legality of the way the Minister was seeking to apply section 20B(2)(b) to the facts of the cases before him, rather than how the section ought generally to be construed and applied.

The interpretation of section 20B(2)(b) of the Act

26. The IAT understood it to be common ground, based on what they viewed as a concession by counsel for the Minister, that the crucial statutory provision was ambiguous. Ambiguous or not, the IAT was required to determine what the phrase "*having been approved for the grant of Bermudian status*" meant in its statutory context. And Mr. Perinchief, relying in part on an in-house Opinion by Consultant Crown Counsel Maurice Anthony Cottle, unambiguously challenged the interpretation contended for by Mr. Sanderson for the Respondents.

27. The Tribunal made one finding dealing with how the relevant provision ought to be interpreted, which is the subject of the first ground of appeal against its Ruling:

> "*26. The IAT has considered section 20B(2)(b) and its possible meaning against the background of the entirety of Part III of the Act which sets out the complete statutory code for the acquisition and enjoyment of Bermudian status. The IAT struggled to give any sensible meaning to the phrase 'having been approved for Bermuda status' [sic] in a subsection of a statutory provision which is in itself concerned with the grant of Bermudian status. While this language in section 20B(2)(b) may have had an ancillary purpose at some point in its legislative history, it has no demonstrable relevance today…*
>
> *28. The IAT therefore disregards the language in section 20B(2)(b). 'having been approved for Bermudian status' [sic] as a phrase to which no sensible meaning can be given. The IAT rely upon Bennion on Statutory Interpretation which was referred to in the Attorney General's Chambers opinion cited by counsel for the Minister (paragraph 86):*
>
> > *'It may happen, however, that no sensible meaning can be given to some word or phrase. It must then be disregarded. As Brett J said: 'it is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated' (Bennion on Statutory Interpretation, Fifth Edition, page 1157."*"

28. The Tribunal made a second finding as to the approach to be taken when construing legislation dealing with Bermudian status and citizenship, which forms the subject of the second ground of appeal against its Ruling:

> "*29. The IAT further finds that when interpreting statutory provisions connected to Bermudian status and citizenship it is appropriate and consistent with public policy as well as the aforementioned international treaty obligations to interpret such provisions broadly, and in the event of ambiguity, in favour of the applicant for Bermudian status. It is for Parliament to be clear and purposive in its drafting of legislation connected to citizenship. On any basis this language is unclear and ambiguous in its application. Therefore, the ambiguity in section 20B(2)(b) should be construed as far as possible so as to avoid domestic law creating a breach of Article 25 of the ICCPR…*"

29. The IAT thirdly determined the relief it considered appropriate, in findings which form the subject of the third ground of appeal:

"*30. Finally, the IAT, in accordance with its statutory power and authority granted under section 124 of the Act, has determined that for the reasons cited in paragraphs 27-29 above that it is just that the Applicants be granted Bermudian status.*"

30. Each of these three main grounds of appeal will be considered below.

Ground 1 of the appeal: the true meaning of the words "*having been approved for the grant of Bermudian status*" in section 20B(2) (b) of the Act

The competing arguments of counsel

31. The Respondents for the purposes of the present appeal embraced the finding of the IAT that the crucial words ought to be disregarded because it was impossible to make sense of them. Before the IAT, Mr. Sanderson by his own account relied primarily upon a somewhat different analysis. This was that the approval requirement was essentially ancillary to the naturalisation process, being designed to fulfil the requirements of the British Nationality Act 1981 of demonstrating that no restrictions on the right to remain in Bermuda existed. In the Respondents' Submissions at section 5, the various other alternative possible interpretations are helpfully set out. Mr Sanderson invited the Court to consider the following possible interpretations:

    (1) the analysis set out in the Cottle Opinion which characterised the words as contemplating an administrative step to be taken as part of the application process; and

    (2) an argument initially advanced by the Respondents before the IAT but not pursued, namely that the requirements of naturalisation required the Governor to be satisfied that the applicant was suitable for Bermudian status.

32. I found the arguments seeking to discredit the role of pre-approval as part of the status application process to be somewhat strained and over-complicated. The Minister's submissions were, to my mind, more straightforward having regard to the nature of the statutory provisions and recognised rules of statutory interpretation. Firstly, Mr. Perinchief submitted that while the application of the statutory provisions might be difficult, there was no ambiguity in the meaning of the words in their statutory context. Secondly, he submitted that the legislative intention of conferring on the Minister a role in the grant of Bermudian status under section 20B was clear. Overriding this clear legislative intention, by ignoring the statutory words in question because of difficulties in interpretation, was not justified in light of the canon of construction *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void): *Buckley-v-Law Society (No. 2)*[1984] 1 WLR 1101. And, thirdly, the Minister's counsel submitted that

the words of section 20B(2)(b) had to be construed in light of Part III of the Act as a whole and, in particular, those provisions of section 19 which were incorporated by reference into section 20B itself.

Section 20B(2)(b) in its statutory context

33. As already mentioned above, it is far easier to objectively construe statutory provisions with a view to ascertaining their true meaning if one approaches this primarily theoretical task separate and apart from the more practical endeavour of deciding how the provision applies to the facts of a particular case. The demarcation line between these two exercises was blurred by the IAT.

34. The starting point is to look at the section itself as a whole:

> "***Right to Bermudian status in certain other cases***
> *20B (1) A person may apply to the Minister under this section for the grant to him of Bermudian status.*
>
> *(2)This section applies to a person who is a Commonwealth citizen not possessing Bermudian status, was ordinarily resident in Bermuda on 31st July 1989 and either—*
>
> *(a) (i) is a person at least one of whose parents possessed Bermudian status at the time of his birth; and*
> *(ii) was born in Bermuda or first arrived in Bermuda before his sixth birthday; or*
>
> *(b) is a British Dependent Territories citizen by virtue of the grant to him by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 (U.K.) or the British Nationality Act 1948 (U.K.) or the British Nationality Act 1981 (U.K.), having been approved for the grant of Bermudian status; or*
>
> *(c) being a woman, is a British Dependent Territories citizen by virtue of the grant to her by the Governor of registration under section 6(2) of the British Nationality Act 1948 (U.K.) with the result that she thereby acquired rights under section 4(2) of the Bermuda Immigration and Protection Amendment Act 1980,*
>
> *and in relation to whom in addition the requirements of subsection (3) are fulfilled.*
>
> *(3)The requirements referred to in subsection (2), in relation to an applicant for the grant of Bermudian status under this section, are as follows—*

(a) the applicant must have reached the age of eighteen years before the application was made;

(b) the applicant must have been ordinarily resident in Bermuda for the period of ten years immediately preceding the application.

(4)Subsections (3) to (9) of section 19 shall have effect mutatis mutandis in relation to applications under this section as those subsections have effect in relation to applications under section 19.

[Section 20B inserted by 1994:23 effective 13 July 1994]" [emphasis added]

35. The provisions of Section 19 which apply to applications under section 20B provide as follows:

"(3) In relation to subsection (1)[6]*—*

(a) where any question arises as to a person's ordinary residence in Bermuda, that question shall be decided by the Minister;

(b) where an applicant under this section has been ordinarily resident in Bermuda, and has then been absent from Bermuda for any period for the purpose of his education outside Bermuda, the Minister may count that period of absence as a period of ordinary residence in Bermuda if the Minister is satisfied that, but for that period of absence, the applicant would have in fact continued to be ordinarily resident in Bermuda;

(c) nothing in paragraph (a) or (b) shall have effect so as to preclude any applicant from appealing to the Immigration Appeal Tribunal under subsection (8) on the ground that the Minister came to a wrong decision on the question whether during any material period he was or was not ordinarily resident in Bermuda.

(4) The Minister shall not approve an application under this section if—

(a) the applicant has during the period mentioned in paragraph (b) of subsection (1) [7] *been convicted, whether in Bermuda or elsewhere, of an offence which, in the Minister's opinion, shows moral turpitude on the applicant's part; or*

(b) the applicant's character or conduct otherwise in the Minister's opinion disqualifies the applicant for the grant of Bermudian status,

[6] This reference for section 20B purposes should probably be read as a reference to section 20B(2), rather than to section 19(1).

[7] Although the period in section 19(1)(b) and section 20B(3)(b) is the same, this reference should probably be read for section 20B purposes as a reference to the latter rather than the former provision.

but otherwise the Minister shall approve the application if the requirements of this section have been satisfied.

(5) The Minister may require an applicant under this section to attend before him in support of his application, but, unless so required, such an applicant is not entitled to appear before the Minister.

(6) Where the Minister approves an application under this section, he shall forward to the applicant a certificate of Bermudian status which specifies the effective date of the grant of that status and is otherwise in a form approved by the Minister.

(7) Where the Minister rejects an application under this section, he shall inform the applicant of the rejection and of his right to appeal to the Immigration Appeal Tribunal under subsection (8).

(8) A person who is aggrieved by the Minister's rejection of his application under this section may, subject to section 124, appeal to the Immigration Appeal Tribunal against the rejection.

(9) Where a person's application under this section has been rejected, another such application by him need not be considered within 12 months of the date of the rejection."

36. The above provisions, as Mr. Perinchief emphasised, form part of a suite of provisions in Part III of the Act concerning the acquisition of Bermudian status. The substantive requirements for the acquisition of status under section 20B(2)(b) are (save for one point) not in dispute. An applicant must:

(a) be a Commonwealth citizen;

(b) have been ordinarily resident in Bermuda on July 31, 1989;

(c) be a British Overseas Territories Citizen having been naturalised under the British Nationality (and, the Minister contends, having <u>first</u> been approved <u>by the Minister</u> for the grant of Bermudian status);

(d) have reached 18 years of age before the application is made;

(e) have been ordinarily resident in Bermuda for the period of ten years immediately before the application is made;

(f) must not have been convicted of an offence of "moral turpitude";

(g) must not, in the opinion of the Minister, be disqualified for the grant of status by reason of his character or conduct.

37. Where (f) or (g), or the provisions of section 19(4) (a) or (b) apply, the Minister is not entitled to grant Bermudian status. However, section 19(4) (which subsection applies to section 20B as well) also importantly provides: "*but otherwise the Minister shall approve the application if the requirements of this section have been satisfied*" [emphasis added]. So:

(a) where an applicant for Bermudian status meets the positive requirements of section 20B (including section 20B(2)(b) in particular); and

(b) a specified ground for refusing the application does not arise, then

(c) the Minister is under a positive duty to grant Bermudian status.

38. The latter point is significant in terms of assessing the appropriateness of the order made by the IAT in circumstances where the Minister conceded that, apart from the "*having been approved for the grant of Bermudian status*" requirement, all other requirements under section 20B had been met.

39. Stepping back and looking at the scheme of the Act as a whole, in my judgment it is clear beyond serious argument that section 20B(2)(b) contemplates that any approval, whether preliminary or final, for the grant of Bermudian status should be given by the Minister. The grant of Bermudian status under that section and Part III of the Act as a whole clearly falls within his remit. Although this is not a straightforward conclusion to reach, it seems ultimately clear that the section envisages approval for Bermudian status being obtained as part of the naturalisation process, where the latter process is being deployed as a launching pad for a section 20B status application.

40. On the other hand, it seems to me to be far from clear that the approval requirement of section 20B(2)(b) is on its face either a purely substantive or purely procedural requirement which forms part of the qualifying criteria an applicant must meet. The other qualifying criteria are all objective: being a Commonwealth citizen, meeting age and residential requirements, having been naturalised pursuant to a specified statutory regime. Section 20B does not explicitly confer an obligation on applicants to seek approval or a right to the Minister to grant approval. Is the approval mechanism more than a legislative procedural marker for the Minister himself, signifying that he should adopt a procedure which twins the status and naturalisation processes?

The impact of the 1994 Explanatory Memorandum

41. The lack of clarity as to the meaning and intended operative effect of the crucial phrase justifies reference to the legislative history of section 20B(2)(b). It seems that the first version of the provision was enacted in 1989, and that the explanatory memorandum which was identified in preparation for the hearing before the IAT was distinctly unhelpful. However, the Minister's advisers managed to locate an Explanatory Memorandum dated June 21 1994 for the Bermuda Immigration and Protection Amendment Act 1994 Bill shortly before the hearing of the present appeal, and that document was far more illuminating. It states most significantly as follows (at page 11):

> "*20B This section provides for the grant of Bermudian status to a miscellaneous group of special cases. These are groups of people who fell afoul of technicalities of the law in the past…*
>
> *20B(2)(b) This paragraph makes provision for the person who had been approved for the grant of Bermudian status, became naturalised as a British national but did not complete his or her application for Bermudian status.*
>
> *Aliens who apply for Bermudian status must first become naturalised as British subjects (before 1949) or citizens of the United Kingdom and Colonies (1949 to 1982) or British Dependent Territories Citizens (after 1982).*
>
> *Former practice was to deal with an application for Bermudian status in two distinct steps. The applicant had first to become naturalised. But the person would not be recommended to the Governor for naturalisation unless he or she had first been approved for the grant of Bermudian status. Once the applicant had become naturalised, he or she was then expected to make an application for Bermudian status. Because of lack of understanding of this complicated process some people did not apply for Bermudian status. These individuals thought that they had already obtained Bermudian status by naturalisation. This provision corrects the unfortunate results of the misunderstanding.*
>
> *Current practice is that the applications for Bermudian status and naturalisation occur in parallel so that these failures to acquire Bermudian status no longer occur. Should the processing of Bermudian status applications revert to the former practice, then new cases could occur in the future.*" [emphasis added]

42. This nearly 20 years' old piece of the Act's legislative history suggests a legislative intent which could never conceivably have been extracted from the bare terms of the legislative provisions. Quite astonishingly, having regard to the way the matter was argued on both

sides in the lead up to the Minister's decision and in the appeal before the IAT, the Explanatory Memorandum suggests that section 20B(2)(b) was designed to facilitate the grant of status to applicants who:

> (a) were aliens entitled to obtain status, implicitly under some other provision of section 20B or Part III of the Act, provided they could obtain British nationality through naturalisation; and
>
> (b) had completed the naturalisation process with a view to obtaining Bermudian status, but had failed to appreciate the need to make a separate application for Bermudian status .

43. The procedure which was adopted initially, and which supposedly gave birth to this problem, was that the applicant would apply for naturalisation first, "*but the person would not be recommended to the Governor for naturalisation unless he or she had first been approved for Bermudian status.*" At the time of the 1994 'amendment', applications for Bermudian status and naturalisation applied in parallel, so the identified problem was not expected to recur unless there was a reversion to the old practice of dealing with naturalisation and status applications as two separate processes. This document provides a straightforward explanation as to both (a) why the Executive initially introduced the provision, and (b) why the section fell into disuse in the 1990's, but it does not provide an uncomplicated way of resolving the conundrum of how to construe the provision today.

44. Indeed, Mr. Perinchief in placing this great legal archaeological 'find' before the Court merely relied upon it to support the Minister's consistent interpretative theme: approval for Bermudian status envisaged approval by the Minister and these words could not be simply ignored when applying the statutory scheme. They were designed to deal with a past practice whereby persons had applied for naturalisation with a view to obtaining Bermudian status, but omitted to make their status applications having obtained naturalisation certificates. This refuted entirely the IAT's conclusion that the words had no discernable meaning. This narrow submission is clearly sound.

45. Mr. Perinchief did not advance the entirely new and broader argument, which it was probably too late for the Minister to raise against the Respondents in any event, that section 20B(2)(b) only properly applied at all to (a) former 'aliens', who (b) had been approved for status under some other head by the Minister as part of a naturalisation application which contemplated a subsequent Bermudian status application, in circumstances where (c) the subsequent status application had yet to be made. However, it is a point which cannot be ignored and I feel obliged for completeness to deal with the point, here, not least in case the Minister seeks to rely on it by way of further appeal.

46. However, the meaning of the crucial words which is suggested by the Explanatory Memorandum, more carefully considered, raises the following questions of construction which must be resolved in terms of providing a foundation for the disposition of ground 1 of the present appeal.

47. The first question is what weight can be given to the Explanatory Memorandum itself. Oliver Jones' '*Bennion on Statutory Interpretation*', Sixth Edition, quotes the following extract from the judgment of Brooke LJ in *Flora (Tarlochan Singh)-v- Wakom (Heathrow) Ltd.* [2006] EWCA Civ 1103 at [15]-[17] as authority for the use to which an explanatory memorandum may be put. The Explanatory Memorandum cannot simply be adopted wholesale and substituted for the presumed intent of Parliament as expressed in the legislative enactment itself:

> "15. *The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in R (Westminster City Council) v NASS [2002] UKHL 38 at [2]-[6]; [2002] 1 WLR 2956; see also R (S) v Chief Constable of South Yorkshire Police [2004] UKHL 39 at [4], [2004] 1 WLR 2196. As Lord Steyn says in the NASS case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.*
>
> *16. The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the act is set (NASS, para 5). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of Explanatory Notes as an aid to construction by saying (at para 6):*
>
> > *'What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'*
>
> *17. The value of para 354 of the Explanatory Notes as an aid to construction in the present appeal is that it identifies the contextual scene as containing a determination "to ensure that the real value of periodical payments is preserved over the whole period for which they are payable." That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment*

equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them."

48. In my judgment section 20B(2)(b) is a classic illustration of a case where what Parliament has enacted achieves a contrary result to what Government apparently intended. As the Minister's counsel himself insisted, the provision must be interpreted in light of its statutory context in Part III of the Act as a whole. The scheme of Part III in articulating the eligibility criteria for the grant of Bermudian status is, quite understandably, to set out the criteria explicitly. It does not leave essential matters unstated to be determined by implication, creating a risk that the Minister will be flooded with applications by persons relying on creative interpretations of the eligibility criteria. Let us look again at the crucial provisions of section 20B:

> "*20B (1) A person may apply to the Minister under this section for the grant to him of Bermudian status.*
>
> *(2)This section applies to a person who is a Commonwealth citizen not possessing Bermudian status, was ordinarily resident in Bermuda on 31st July 1989 and either—*
>
> *(a) (i) is a person at least one of whose parents possessed Bermudian status at the time of his birth; and*
> *(ii) was born in Bermuda or first arrived in Bermuda before his sixth birthday; or*
>
> *(b) is a British Dependent Territories citizen by virtue of the grant to him by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 (U.K.) or the British Nationality Act 1948 (U.K.) or the British Nationality Act 1981 (U.K.), having been approved for the grant of Bermudian status; or*
>
> *(c) being a woman, is a British Dependent Territories citizen by virtue of the grant to her by the Governor of registration under section 6(2) of the British Nationality Act 1948 (U.K.) with the result that she thereby acquired rights under section 4(2) of the Bermuda Immigration and Protection Amendment Act 1980,*
>
> *and in relation to whom in addition the requirements of subsection (3) are fulfilled.*" [emphasis added]

49. Without reference to the Explanatory Memorandum, the straightforward interpretation of section 20B upon which the Minister relied was that subsection (2)(b) set out the qualifying criteria in explicit terms. To rely on paragraph (b) of that subsection, you had to have been naturalised by the Governor through an application process which entailed

the Minister giving pre-approval for the grant of Bermudian status pursuant to the provisions of section 20B(2)(b) itself. Yet the Explanatory Memorandum suggests that section 20B(2)(b) should not be read as providing a freestanding[8] basis for the grant of status at all, and should be read as if Parliament had instead provided:

> "(b)*is a* ***[former alien who has become a]*** *British Dependent Territories citizen by virtue of the grant to him by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 (U.K.) or the British Nationality Act 1948 (U.K.) or the British Nationality Act 1981 (U.K.), having been approved for the grant of Bermudian status* ***[in reliance upon any provisions of this Act save for subsection (2)(b) of this section]***"

50. Such an interpretation, albeit supported by the meaning ascribed to section 20B(2)(b) of the 1994 Bill in the 1994 Explanatory Memorandum would require a quite breath-taking exercise of rewriting the statutory language enacted by Parliament. I know of no canon of statutory interpretation which would justify any court undertaking such an exercise[9]. This conclusion is fortified by the fact that in my judgment, contrary to the view taken by the IAT, and consistently with the arguments advanced by Mr. Perinchief before this Court, the relevant statutory provisions are not ambiguous, even if applying them in practice (absent explicit procedural rules) may be difficult.

51. There is a further consideration, which is the interaction between the Act and the British Nationality Act. Section 3 of the Act defines the terms "alien" and "Commonwealth citizen" with reference to the provisions of that Act:

> "***Meaning of "Commonwealth citizen" and "alien"***
>
> *3(1) For the purposes of this Act "Commonwealth citizen" has the same meaning as it has in the British Nationality Act 1981 of the United Kingdom, that is to say, it means a person who has the status of a Commonwealth citizen under that Act; and for those purposes "alien" also has the same meaning as "alien" has in that Act, that is to say, it means a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland within the meanings respectively assigned to those expressions in that Act.*
>
> (3) *A person who is a Commonwealth citizen shall for all the purposes of this Act be treated as a Commonwealth citizen, notwithstanding that by virtue of the*

[8] Subject, of course, to meeting the other requirements of section 20B.

[9] Section 5 of the Bermuda Constitution Order is an exceptional example of express legislative authority to adapt and modify "existing laws" so as to bring them into conformity with the Constitution. Similarly, section 2 of the Colonial Laws Validity Act 1865 requires laws enacted by Bermuda's Parliament to be read in a way which does not conflict with United Kingdom laws which extend to Bermuda.

law of any foreign country he may be also a national or citizen of that country."

52. This illustrates the fact that these two pieces of legislation, one dealing with citizenship granted by the Governor, and the other Bermudian status granted by the Minister, cover common terrain. It also demonstrates that the term "alien", used in the Explanatory Memorandum to describe the applicants to which section 20B(2)(b) was supposedly intended to apply, is a defined term under the Act. It would have been quite straightforward for the draftsman to include a reference in section 20B(2)(b) itself to aliens or former aliens, if it was desired to limit the scope of the provision to such applicants.

53. Another important and quite compelling factor which undermines the weight to be attached to the Explanatory Memorandum as supporting reading the statute in a narrower way than was contended for by even the Minister for the purposes of the present appeal, is the fact that, as Mr. Sanderson pointed out, the provision was first enacted as section 20A(2)(b) of the Act through section 6 of the Bermuda Immigration and Protection Act 1989. All the Explanatory Memorandum to the Bill which preceded that Act said in respect of the corresponding provisions was: "*to confer upon a certain category of persons a special right to the grant of Bermudian status*". In 1994, the structure of section 20B was changed in somewhat cosmetic terms. Certain procedural provisions were moved to section 19, but these were incorporated by reference into section 20B in any event. An entirely new section 20A was introduced, but the essential elements of section 20B, and in particular the wording subsection (2)(b) were left unchanged.

54. The 1994 Explanatory Memorandum, therefore, would have been seriously misleading to the extent that it purported to suggest that section 20B(2)(b) was a new provision which was being explained to Parliament with a view to its being enacted for the first time. However, fairly read in the context of the entire document, it merely set out the Minister's view as to the function an existing provision served. Where provisions are entirely new (e.g. section 19), the Memorandum makes this clear. As regards one instance where redrafting has taken place (section 20), this is made explicit. Unfortunately the Memorandum is silent as to the extent of any changes to section 20B; but this affords no grounds for inferring that Parliament re-enacted a 1989 provision in its original terms but infused it with new meaning drawn from the 1994 Explanatory Memorandum. The rules of statutory interpretation are designed to prevent the courts from indulging in this sort of creative writing exercise; the relevant rules require the courts to, first and foremost, determine legislative intent from the actual words used in an enactment.

55. However the Memorandum itself may be read, section 20B(2)(b) is unarguably an enactment which was already adopted by Parliament in 1989, having been introduced by an earlier Explanatory Memorandum which described the provision in open-ended terms. The 1994 Act simply re-enacted section 20B(2)(b), and made other largely cosmetic changes to section 20B. This is a further, and in my judgment the most compelling, reason for declining to infer that Parliament intended, in reliance upon the 1994 Explanatory Memorandum, to impose by mere implication a limitation to the scope of the provision which was inconsistent with the express terms of the words the draftsman used.

56. One substantive change to the structure of section 20B(1), introduced in 1994 but unexplained in the Explanatory Memorandum, must be noted. The subsection was amended by removing the words in bold text and brackets below:

> "**[Without prejudice to any rights that]** *a person* **[to whom this section applies may have under section 19, he]** *may apply to the Minister under this section for the grant to him of Bermudian status.*"

57. The 1989 version of section 19 was not placed before me by counsel. However it appears to be the case that in 1989 when what is now section 20B was first enacted, it was according to its terms intended to provide an additional right to apply for Bermudian status, without prejudice to the right to apply for status under section 19. The current version of section 20B, does not expressly contemplate that applicants may have status rights under section or any other provision of the Act. This further supports construing section 20B(2)(b) today, according to the natural and ordinary meaning of the statutory words in their context, as providing a 'freestanding' basis for status, provided the other requirements of section 20B are met.

58. In summary, I find that the 1994 Explanatory Memorandum supports ground 1 of the Minister's appeal to the extent that it confirms in an evidential and practical sense that "*having been approved for the grant of Bermudian status*" can indeed be read as meaning, consistent with the natural and ordinary meaning of the words in their legislative context, having been pre-approved by the Minister for the grant of status. In other words, it sheds light on the implementation of the subsection in practice between 1989 and 1994. It refutes the proposition that the words are so impenetrable that no meaning can be assigned to them, even though it does not constitute, in any formal sense, an aide to the interpretation of the section as originally enacted five years earlier.

The procedural dimensions of section 20B(2)(b)

59. The scheme of Part III of the Act appears to be to provide a right to apply for Bermudian status without specifying the procedure to be followed in any detail. Section 120(2) of the Act empowers the Minister, through regulations, to specify forms for use in connection

with the Act. It is also clearly open to the Minister to adopt and publish administrative rules governing applications for Bermudian status. It is common ground that no explicit procedure existed in 2012 for dealing with section 20B(2)(b) applications.

60. On any sensible view of section 20B(2(b), it envisages by necessary implication the following procedure in broad terms. When an applicant wishes to rely upon that paragraph of that subsection for the grant of Bermudian status, the applicant will with a view to becoming eligible for the grant of status under section 20B apply for naturalisation with the approval of the Minister. The Minister's approval serves the function of signifying that, subject to meeting the naturalisation requirement, the applicant is eligible for the grant of Bermudian status.

61. It also serves the function of ensuring that a person cannot apply for naturalisation in circumstances where this is the sole outstanding qualification they require to apply for status under section 20B, without the Minister's input. How that approval is obtained or signified is not made explicit. A number of possibilities exist, all of which lie within the competence of the Minister to deploy by both public and internal rules. The most obvious options, alluded to above already are:

    (1) requiring section 20B(2)(b) applicants to apply for status at the same time as they apply for naturalisation (through a published procedure);

    (2) establishing a protocol with the Governor whereby the Minister is afforded an opportunity to signify whether or not an applicant for naturalisation is otherwise eligible for the grant of Bermudian status (through an internal administrative procedure).

62. This is another context in which the rule of construction relied upon by Mr. Perinchief, it is better for a thing to have effect than to be made void, applies with equal force. The extract from '*Bennion on Statutory Interpretation*', 3rd Edition cited by counsel states in material part as follows:

> "*An important application of the rule is that an Act is taken to give the courts such jurisdiction and powers as are necessary for its implementation, even though not expressly conferred.*"

63. While the statute is silent as to the mechanism by which the approval contemplated by section 20B(2)(b) is to be obtained or granted, it does mandate that an applicant relying upon the provision should have been approved for the grant of status at the time of their obtaining their naturalisation certificate. The Court cannot throw its hands in the air, as it were, and declare the provision to be either unenforceable or (as the IAT found) incomprehensible. The Court (and indeed the Minister and the IAT) must do its best to

determine whether, in all the circumstances of a particular case, there has been a substantive and/or substantial failure to meet the approval requirements of section 20B(2)(b), or merely a technical non-compliance with the requirements of the Act.

64. Where clear procedures exist and an applicant bypasses them altogether, it might well be more obviously the case that substantive grounds existed for refusing an applicant status on the grounds that the requisite approval had not been obtained. Where the bare terms of the Act have not been supplemented by an explicit procedure and the Minister has approved the naturalisation application but not the grant of status, as is the situation in the present case, there is considerable room for doubt as to what consequences Parliament intended to flow from non-compliance. Where, as here, the Minister has no substantive objections to the grant of status, the provision, in operation, assumes a wholly procedural rather than substantive character.

65. According to general principles of statutory interpretation, particularly (but not exclusively) where provisions are procedural in nature, the task of the Court is to determine what consequences Parliament intended to flow from the non-compliance in question. This entails a context-driven analysis of the function of the requirement and the extent to which there has been complete or merely partial non-compliance. In *Ravichandran-v-Secretary of State for the Home Department; R-v-Secretary of State for The Home Department, ex parte Jeyeanthan* [1999] EWCA Civ 3010, Lord Woolf MR observed:

> "*The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the noncompliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as "shall" or "must" is used….*
>
> *I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority*

of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows:

> *(1) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
>
> *(2) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.*
>
> *(3)If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)*

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. "[10]

66. It is in this context of considering how the provisions of the Act ought to be applied in practice and where Parliament's presumed intentions are in doubt, which will be addressed in considering the relevance of international human rights principles in relation to ground 2 below, that broad policy considerations come into play.

Relevant provisions of the Bermuda Constitution

67. It is necessary to ensure that ordinary local legislation is construed in a way which is consistent with, *inter alia*, the fundamental rights and freedoms provisions of Chapter 1 of the Bermuda Constitution. This is not because Bermuda's Constitution, like its counterparts in independent Commonwealth countries, contains a clause declaring the Constitution to be the supreme law of the land. It is because Bermuda's Parliament is not competent to enact legislation which is inconsistent with United Kingdom legislation which extends to Bermuda. This principle, referred to in the course of argument, is noteworthy in that it applies with equal force to all UK legislation which extends to Bermuda, including the British Nationality Act 1981.

68. The Bermuda Constitution is United Kingdom Order-in-Council 1968: 185, made by Her Majesty under the Bermuda Constitution Act 1967 (UK), and self-evidently expressly extends to Bermuda. The Colonial Laws Validity Act 1865 provides in relevant part as follows:

> "*2 Colonial Laws, when void for repugnancy*

[10] Pages 2-3, 8-9.

> *Any colonial law which is or shall be in any respect repugnant to the provisions of an Act of Parliament extending to the Colony which such law may relate or repugnant to any order or regulation made on the authority of such Act of Parliament or having in the Colony the force and effect of such Act shall be read subject to such Act order or regulation and shall, to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.*"

69. The only provision of the Constitution to which counsel referred was section 11(5), which defines those who belong to Bermuda (who have enhanced freedom of movement rights) as follows:

> "*(5) For the purposes of this section, a person shall be deemed to belong to Bermuda if that person—*
>
> *(a) possesses Bermudian status;*
>
> *(b) is a citizen of the United Kingdom and Colonies**[British overseas territories citizen]** by virtue of the grant by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 [1914 c.17] or the British Nationality Act 1948 [1948 c.56];*
>
> *[NOTE by the British Nationality Act 1981 section 51 without prejudice to subsection (3)(c) thereof in any UK statutory instrument made before 1 January 1983 "British subject" and "Commonwealth citizen" have the same meaning and in relation to any time after 1 January 1983 means a person who has the status of a Commonwealth citizen under the British Nationality Act 1981]*
>
> *(c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person under a decree of a court or a deed of separation; **or***
>
> *(d) is under the age of eighteen years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies.*" [emphasis added]

70. The reference in section 11(5) to "*citizen of the United Kingdom and Colonies*" was amended by section 51(3)(a)(ii) of the British Nationality Act 1981 to refer, thereafter, to a "*British Dependent Territories Citizen*". Such citizens were renamed "*British overseas territory*" citizens in all UK legislation (including subordinate legislation) by section 2 of the British Overseas Territories Act 2002. There seems little room for doubt that a naturalised British overseas territories citizen (in respect of Bermuda) belongs to Bermuda under section 11(5) of the Constitution.

71. Section 11(5) of the Constitution accordingly demonstrates that (a) there is a distinction between being granted Bermudian status and being naturalised as a British overseas territories citizen in respect of Bermuda, and (b) that naturalisation brings with it the constitutionally protected status of belonging to Bermuda. Section 12 of the Constitution prohibits discrimination on various grounds, including place of origin. However, section 12(5) expressly limits this prohibition to the following extent:

> "*(5)Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it requires a person to possess Bermudian status or belong to Bermuda for the purposes of section 11 of this Constitution or to possess any other qualification (not being a qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes.*"

72. Other provisions of the Constitution expressly confer rights on those who possess Bermudian status which are not available to persons who simply belong to Bermuda, whether under section 11(50(b) or otherwise. The right to vote is essentially limited to those who hold Bermudian status (section 55(1)(b)), as is the right to serve in either House (section 29(b)). Section 12(5) of the Constitution permits discrimination in favour of those who hold Bermudian status at the public service and local government levels under ordinary legislation. Although section 12(5) permits discrimination in favour of naturalised citizens who belong to Bermuda, it is not easy to think of any examples of ordinary legislation governing the Public Service or political rights, which equates the status of Bermudian status holders and persons naturalised in respect of Bermuda. The Public Service Commission Regulations, for example, currently provide for the following hierarchy of hiring preferences:

> *"(4) For the purpose of appointment to an office, a person with Bermudian status ("a Bermudian") who is not already an officer shall, other things being equal, rank equally with a Bermudian who is already an officer unless the Commission for special reasons decides otherwise in the particular case.*
>
> *(5) Subject to paragraph (11), the Commission shall not recommend a person for permanent appointment to an established office if he is not a Bermudian.*
>
> *(6) A Bermudian shall be preferred to a person who is not a Bermudian ("a non-Bermudian").*
>
> *(7) Where a non-Bermudian—*
>
> *(a) is the spouse of a Bermudian; and*
>
> *(b) is by virtue of section 60(1)(c) of the Bermuda Immigration and Protection Act 1956 exempt from the need to obtain permission to engage in gainful occupation in Bermuda,*

he shall be preferred to any other non-Bermudian who is not such a spouse so exempt.

(8) Where in a competition for an office—

(a) one of the candidates is in a higher category of preference under this Regulation than another candidate; and

(b) the candidate in the higher category of preference is fit to be appointed,

the Commission shall recommend the candidate in the higher category of preference even if the other candidate is more fit or no less fit."

73. The Regulations appear to have the surprising effect that a newly-minted 'alien' spouse of a Bermudian has more privileged access to a Public Service job than a naturalised British overseas territories citizen who belongs to Bermuda under section 11(5) of the Constitution.

74. For present purposes, it suffices to note, firstly, that the Constitution on its face contemplates significant disabilities for naturalized British overseas territories citizens (in respect of Bermuda) and significant privileges for those British overseas territories citizens who also possess Bermudian status. Secondly, there is no inherent repugnancy between the general scheme of the Act as contended for by the Minister, and the Bermuda Constitution. Section 20B(2)(b) contemplates two parallel regimes for acquiring the right to belong to Bermuda: (a) grant by the Minister of Bermudian status; (b) grant by the Governor of a naturalisation certificate as a British overseas territories citizen in respect of Bermuda.

75. This reinforces the ultimately common sense view that section 20B(2)(b) does envisage applications for naturalisation made with a view to obtaining Bermudian status being administratively handled on an integrated basis, as the Minister contended. It also supports the Tribunal's ultimate conclusion that an application under the section cannot properly be refused on purely procedural or technical grounds. Because the benefits of obtaining Bermudian status, even for someone who has acquired the right to belong to Bermuda under section 11(5)(b) of the Constitution, are clearly significant and not trivial.

The British Nationality Act

76. The British Nationality Act 1981 (UK), apart from various provisions concerning the domestic Immigration Act 1971, extends to Bermuda: section 55(5). The 1981 Act, like the Bermuda Constitution, is significant in terms of construing section 22B(2)(b) because the Act must be read in such a way as will conform to the provisions of the UK statute (in the event of any conflict). Mr. Sanderson placed the relevant provisions of the Act before

the Court. The following provision furnishes the primary jurisdictional basis for the naturalisation process:

> "*18 Acquisition by naturalisation.*
>
> *(1) If, on an application for naturalisation as a British overseas territories citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.*
>
> *(2) If, on an application for naturalisation as a British overseas territories citizen made by a person of full age and capacity who on the date of the application is married to such a citizen, or is the civil partner of such a citizen the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.*
>
> *(3) Every application under this section shall specify the British overseas territory which is to be treated as the relevant territory for the purposes of that application; and, in relation to any such application, references in Schedule 1 to the relevant territory shall be construed accordingly."*[11]

77. The relevant provisions of Schedule 1 provide as follows:

> "*Schedule 1*
>
> *Naturalisation as a British overseas territories citizen under section 18(1).*
>
> *…*
>
> *5(1) Subject to paragraph 6, the requirements for naturalisation as a British overseas territories citizen under section 18(1) are, in the case of any person who applies for it—*
>
> > *(a) the requirements specified in sub-paragraph (2) of this paragraph, or the alternative requirement specified in sub-paragraph (3) of this paragraph; and*
> >
> > *(b) that he is of good character; and*

[11] As amended by the British Overseas territories Act 2002 and the Civil Partnerships Act 2004: www.legislation.gov.uk

(c) that he has a sufficient knowledge of the English language or any other language recognised for official purposes in the relevant territory; and

(d) that either—

(i) his intentions are such that, in the event of a certificate of naturalisation as a British overseas territories citizen being granted to him, his home or (if he has more than one) his principal home will be in the relevant territory; or

(ii) he intends, in the event of such a certificate being granted to him, to enter into, or continue in, Crown service under the government of that territory, or service under an international organisation of which that territory or the government of that territory is a member, or service in the employment of a company or association established in that territory.

(2) The requirements referred to in sub-paragraph (1)(a) of this paragraph are—

(a) that he was in the relevant territory at the beginning of the period of five years ending with the date of the application, and that the number of days on which he was absent from that territory in that period does not exceed 450; and

(b) that the number of days on which he was absent from that territory in the period of twelve months so ending does not exceed 90; and

(c) that he was not at any time in the period of twelve months so ending subject under the immigration laws to any restriction on the period for which he might remain in that territory; and

(d) that he was not at any time in the period of five years so ending in that territory in breach of the immigration laws.

(3) The alternative requirement referred to in sub-paragraph (1)(a) of this paragraph is that on the date of the application he is serving outside the relevant territory in Crown service under the government of that territory.

6. If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of paragraph 5 do all or any of the following things, namely—

(a) treat the applicant as fulfilling the requirement specified in paragraph 5(2)(a) or paragraph 5(2)(b), or both, although the number of days on

which he was absent from the relevant territory in the period there mentioned exceeds the number there mentioned;

(b) treat the applicant as having been in the relevant territory for the whole or any part of any period during which he would otherwise fall to be treated under paragraph 9(2) as having been absent;

(c) disregard any such restriction as is mentioned in paragraph 5(2)(c), not being a restriction to which the applicant was subject on the date of the application;

(d) treat the applicant as fulfilling the requirement specified in paragraph 5(2)(d) although he was in the relevant territory in breach of the immigration laws in the period there mentioned;

(e)waive the need to fulfil the requirement specified in paragraph 5(1)(c) if he considers that because of the applicant's age or physical or mental condition it would be unreasonable to expect him to fulfil it…"[12]

78. Finally, Mr. Sanderson with a view to demonstrating the legal significance of the naturalisation process as applied to Bermuda referred to the oath and pledge contemplated by the following provisions of Schedule 5 of the 1981 UK Act:

"*SCHEDULE 5 CITIZENSHIP OATH AND PLEDGE*

1….

2 The form of citizenship oath and pledge is as follows for registration of or naturalisation as a British overseas territories citizen—

OATH

"I,[name], swear by Almighty God that, on becoming a British overseas territories citizen, I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law."

PLEDGE

"I will give my loyalty to [Bermuda] *and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British overseas territories citizen*."…

[12] www.legislation.gov.uk

79. The following general points arise from the statutory scheme for naturalisation as a British overseas territories citizen in respect of Bermuda:

(1) British overseas territories citizenship is the same umbrella category of citizenship under which most holders of Bermudian status probably fall, assuming that they acquired their British citizenship by virtue of birth or some other connection to Bermuda under other provisions of the UK Act[13];

(2) the eligibility requirements for naturalisation are generally less onerous in terms of residential requirements than those applicable to Bermudian status under section 20B. However, there is a requirement under section 5(1)(b) of the 1981 Act that applicants be of "*good character*", which can be construed as more onerous than the requirements of section 19 (4)(a) of the Act, but broadly equivalent to section 19(4)(b) of the Act. Section 19(4) of the Bermuda Immigration and Protection Act 1956, which applies to applications under section 20B, provides as follows:

> "(4) *The Minister shall not approve an application under this section if—*
>
> *(a) the applicant has during the period mentioned in paragraph (b) of subsection (1) been convicted, whether in Bermuda or elsewhere, of an offence which, in the Minister's opinion, shows moral turpitude on the applicant's part; or*
>
> *(b) the applicant's character or conduct otherwise in the Minister's opinion disqualifies the applicant for the grant of Bermudian status.*";

(3) the idea of the 1956 Bermudian Act operating in parallel with the 1981 UK Act is very broadly similar to the way in which the 1981 UK Act must be read together with the UK Immigration Act 1971, with the latter act governing residential rights. There is no inherent inconsistency between citizenship being defined by the 1981 UK Act and Bermudian status being defined and regulated by the 1956 Bermudian Act. It is somewhat unusual, however, that the qualifying requirements for citizenship and status do not entirely match. These dual regimes are explained by Ian Hendry and Susan

[13] For example, at the commencement of the 1981 UK Act, section 23 provides that persons who were British citizens by virtue of, *inter alia*, birth, registration or naturalisation in a British overseas territory became British overseas territories citizens. Section 15 makes provision for the acquisition of British overseas territories citizenship after commencement by birth, etc. In addition, most British overseas territories citizens are also British citizens: Hendry and Dickson, '*British Overseas Territories Law*', at page 204.

Dickson, '*British Overseas Territories Law*' (Hart Publishing: Oxford/Oregon, 2011) at page 209 as follows:

> "…*the policy of Parliament has been to leave the determination of the right of abode in the overseas territories to the to the territory legislatures (whether local or Her Majesty in Council), and the same applies to belonger status, of which the right of abode is a principal incident…The result is that there remains a disjunction between British nationality and belonger status in a number of cases…*"[14]

(4) in the case of Bermuda, the 'disjunction' between British nationality and Bermudian status is quite stark. Naturalisation does confer the right to belong to Bermuda under section 11(5) of the Constitution, and a right of abode in Bermuda. However, it is only Bermudian status, which confers the 'high-level' rights generally associated with citizenship, the right to vote and the right to participate fully in public affairs and the public service;

(5) the UK Parliament has left it to the Bermuda Constitution and Bermuda's Parliament to determine the acquisition and incidents of Bermudian status. It is accordingly difficult to imagine circumstances in which a Bermudian Governor (acting on behalf of the Secretary of State) would grant a naturalisation certificate under section 18 of the 1981 UK Act, which confers the constitutional right to "belong to Bermuda" under section 11(5) of the Constitution, without consulting the Minister responsible for Immigration. That consultation occurred in the present case;

(6) the somewhat peculiar distinction between the more generous rights conferred by Bermudian status under, *inter alia*, the Bermuda Constitution, compared with the rights conferred by that instrument on naturalised British overseas territories citizens, does create the potential for discriminatory treatment of different categories of British overseas territories citizens. Accordingly:

(a) the need to avoid such a discriminatory outcome or effect when dealing Bermudian status applications that are linked to naturalisation applications is a consideration which falls to be taken into account when interpreting section 20B(2)(b), both on its face and as applied in practice; and

(b) the most obvious procedural device which can be deployed towards this end is for applications under section 20B(2)(b) of the Act and section 18 of the 1981 UK Act to be administratively coordinated;

[14] Although this text was not referred to in the course of argument, it has no material impact on the present decision and is merely cited for illustrative principles.

(7) it is noteworthy that the 1981 UK Act empowers the Secretary of State to waive any of the stated residential requirements on what might be called 'justice' grounds. This is generally supportive of construing section 20B(2)(b) in a flexible and practical manner rather than in a bureaucratic, rigid and technical manner.

Summary: Ground 1 of Minister's appeal

80. I find that the IAT erred in law in concluding that the words "*having been approved for the grant of Bermudian status*" in section 20B(2)(b) could be ignored because it was impossible to assign any sensible meaning to them. It is true that ascertaining the phrase's meaning is difficult, but in my judgment the provision is not ultimately ambiguous in legal terms. Interpreting local statutory provisions which have not been explained by the courts or legal commentators is an inherently difficult task which judicial tribunals cannot shirk from. Much of the difficulty in this case also flowed from the fact that no procedure had been adopted for such applications, while any genuine ambiguity related to how to apply the section on the facts of the applications before the Minister, not on the meaning of the statute on its face.

81. The submissions of Mr. Perinchief, as refined for the purposes of arguing the Minister's appeal before this Court, on what meaning should be assigned to the crucial statutory words were fundamentally sound. Applicants for Bermudian status who rely upon that provision are required not simply to obtain naturalisation as British overseas territories citizens. Where they apply to the Governor for naturalisation with a view to obtaining status, the Minister must signify that the applicant is in fact pre-approved for the grant of status, if the applicant wishes to qualify for the grant of Bermudian status under section 20B(2)(b), in addition to obtaining a naturalisation certificate under the 1981 UK Act.

82. The local 1956 Act does not expressly prescribe the procedure for this pre-approval requirement; this is an essentially administrative matter for the Minister to prescribe, as in the case of other applications for Bermudian status. It is noteworthy, however, that the statute does not impose any positive obligation on the status applicant to seek pre-approval; it creates a requirement that pre-approval should be granted by the Minister before the naturalisation process is completed to enable the applicant to rely upon section 20B(2)(b). It is a requirement that is analogous to a procedural requirement in relation to legal proceedings, which may or may not take on a substantive character depending on the circumstances of the case in which non-compliance occurs.

83. This conclusion is also supported, in a general way, by the Explanatory Memorandum prepared in relation to the Bermuda Immigration and Protection Amendment Act Bill 1994, which explained that the practice at that juncture was for status and naturalisation

applications to be processed at the same time, rather than sequentially. The IAT did not have the benefit of this document, which was only found on the eve of the present appeal. However, the Memorandum was not strictly relevant to the interpretation of section 20B(2)(b) itself because:

(a) this provision had been first enacted in 1989 and was re-enacted in 1994 in its original form, and;

(b) the Memorandum explained the raison d'être for the provision in terms which were inconsistent with the legislative language approved by Parliament.

84. The conclusions reached on the meaning of the phrase "*having been approved for the grant of Bermudian status*" in section 20B(2)(b) are essentially based upon:

(a) the natural and ordinary meaning of the relevant words in their context within Part III of the Act; and

(b) the natural and ordinary meaning of the relevant words in the broader context of the legislative scheme of which section 20B(2)(b) forms part, in particular the Bermuda Constitution and the British Nationality Act 1981.

Ground 2 of the appeal: the IAT misdirected itself as to the relevance of Article 25 of the International Covenant on Civil and Political Rights ("ICCPR") to the appeal

The competing arguments of counsel

85. The following submission is advanced in the 'Appellant Minister's Skeleton Submissions' at pages 2-3 in support of the second ground of appeal:

> "*It is the respectful submission of the Appellant Minister that the operation and application of the principles of the International Covenant on Civil and Political Rights (the ICCPR) generally to the issues at hand, and particularly in respect of the engagement and application of Article 25 of this Covenant (and its purported relation or relevance to…section…11(5)(b) [belonger status] of the Bermuda Constitution Order 1968; does not arise in the context of this Appeal.*
>
> *It is the Appellant Minister's further submission that the ICCPR is non-applicable in its entirety in this Appeal, particularly in the light of* ***section 8 of BIPA*** *on the issue of which law should prevail or reign supreme when there is a conflict [please see paras. 20, 25 to 29 of the Ruling]. There is no question that the presence of section 8 of BIPA, domestic legislation, signifies the intent of the Bermuda Parliament* ***in***

paramountcy over *the ICCPR in its entirety where and when there is a 'clash' or conflict between the two laws.*"

86. In paragraph 20 of the IAT Ruling, Mr. Sanderson's submission that it was not permissible to rely on the strict words of section 20B(2)(b) in circumstances where the Respondents' rights under ICCPR Article 25 would be infringed is noted. The only subsequent paragraph which appears to adopt this submission is paragraph 29, which although reproduced above, merits setting out again:

> "*29. The IAT further finds that when interpreting statutory provisions connected to Bermudian status and citizenship it is appropriate and consistent with public policy as well as the aforementioned international treaty obligations to interpret such provisions broadly, and in the event of ambiguity, in favour of the applicant for Bermudian status. It is for Parliament to be clear and purposive in its drafting of legislation connected to citizenship. On any basis this language is unclear and ambiguous in its application. Therefore, the ambiguity in section 20B(2)(b) should be construed as far as possible so as to avoid domestic law creating a breach of Article 25 of the ICCPR*…"

87. The Respondents' counsel supported this portion of the IAT Ruling by making the following main submissions. Bermudian status confers the right to vote (Bermuda Constitution, section 55). Naturalisation as a British overseas territories citizen confers the right to belong Bermuda under section 11(5) of the Bermuda Constitution. Section 20B should be construed "*so far as possible*" in a way which does not result in a conflict with Bermuda's international obligations: *Boyce-v-R* [2004] 4 LRC 749 (PC). Construing section 20B(2)(b) in a way which permitted a naturalised British overseas territories citizen not to qualify for Bermudian status would clearly be inconsistent with Article 25 of ICCPR. This is because Article 25 provides that "[e]*very citizen*" shall have, *inter alia*, the right to vote and equal access to their country's public service. In addition, reliance was placed on *Piercy-v-MacLean* (1870) LR 5 CP 252 for the proposition that legislation conferring voting rights should be liberally construed in favour of granting such rights.

Approach to construing provisions relating to the grant of Bermudian status in the Bermuda Immigration and Protection Act

88. The IAT found firstly that the provisions of the Act dealing with Bermudian status should be interpreted "broadly". This appears to have been, in part at least, based on *Piercy-v-MacLean* (1870) LR 5 CP 252, which was a case concerning the interpretation of legislation which directly conferred voting rights. In my judgment there is a distinction between (a) legislation which directly confers fundamental rights, such as the right to vote, and (b) legislation which confers a status which will entitle eligible persons to

exercise fundamental rights. If an applicant for a work permit who is a citizen of an undemocratic country is granted a work permit under the Act, they will on arrival in Bermuda be eligible to enjoy most of the fundamental rights and freedoms protected by Chapter 1 of the Constitution. This indirect human rights benefit flowing from the grant of a work permit cannot justify construing the work permit provisions of the Act in a broad way.

89. No authority was cited by Mr. Sanderson which supported a finding that legislation dealing with citizenship or status should, in general terms, be interpreted in a broad manner. His submission was far more nuanced than this. I find that the IAT erred if it found, in effect, that the statutory provisions in the Act relating to Bermudian status should be construed generously in the same way that fundamental rights provisions must be given a broad and purposive construction. But any such finding was peripheral to the central findings which they made in this respect.

90. The central findings of the IAT were, however, entirely consistent with authority. It is well settled that when there are two ways of interpreting a statutory provision, one consistent with Her Majesty's international obligations and the other inconsistent with them, the former construction ought to be preferred. The Respondents' counsel aptly relied upon the following passage from the Judicial Committee of the Privy Council majority's judgment (delivered by Lord Hoffman) in *Boyce-v-R* [2004] 4 LRC 749; [2004]UKPC 32:

> "*25. The government of Barbados is still in dispute with the Inter- American Commission on the point (there is to be a reference to the Inter-American Court of Human Rights), but their Lordships feel bound to approach this appeal in the footing that the mandatory death penalty is inconsistent with the international obligations of Barbados under the various instruments to which reference has been made. This does not of course have any direct effect upon the domestic law of Barbados. The rights of the people of Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations. "So far as possible" means that if the legislation is ambiguous ("in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty]": see Lord Bridge of Harwich in* R v Home Secretary, ex parte Brind *[1991] 1 AC 696, 747) the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty.*" [emphasis added]

91. This rule of construction, in my judgment, may be engaged in two distinct legal contexts. Firstly, in resolving ambiguities about the meaning of the words of a statute on its face. And, secondly, in resolving ambiguities about how a statute ought properly to be applied to the facts of a particular case.

92. Was Article 25 of the ICCPR relevant to the appeal before the IAT? It is common ground that the United Kingdom Government is a party to the ICCPR and has signified its extension to Bermuda. It is also agreed that the ICCPR has not been incorporated into Bermuda domestic law and cannot be directly enforced under Bermuda domestic law. Article 25 provides as follows:

> "*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*
>
> *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
>
> *(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
>
> *(c) To have access, on general terms of equality, to public service in his country.*"

93. The fact that Bermuda law undeniably deprives British overseas territories citizens who do not also possess Bermudian status of the right to vote and equal access to the Public Service, is clearly inconsistent with Article 25 of the ICCPR. The relevance of this fact must be considered in relation to the two contexts in which section 20B(2)(b) fell to be construed by the IAT.

The relevance of Article 25 to the meaning to be assigned to the provisions of section 20B(2)(b) on their face

94. I have found above that (a) section 20B(2)(b), though initially difficult to construe, is not ambiguous on its face, and (b) that the option of construing a statute so as to conform to applicable international treaty obligations only arises in relation to ambiguous statutory provisions. It follows that I am bound to accept the Minister's submission that Article 25 has no relevance to a determination of the bare meaning of the words "*having been approved for the grant of Bermudian status*" in their legislative context.

95. Bermudian courts and other judicial tribunals are obliged to apply Bermudian domestic law, and Parliament (be it the Bermudian Legislature or the United Kingdom Parliament) may legislate in terms which are inconsistent with international law obligations, provided those terms are clear. As Ground CJ observed in *Simmons-v-Attorney-General* [2005] Bda LR 2 (at page 6):

"*I think it important to state that, in interpreting and applying any legislation (including the Constitution), the Bermuda Courts can and should strive to give effect to the ECHR and other internationally established human rights norms, and that includes respect for family life. That does not, however, allow me to strike down, ignore or override the clear terms of the Immigration Act.*"

96. Section 20B(2)(b), properly construed, can hardly be said to be inconsistent with Article 25 of the ICCPR, on the face of the provisions of the Act. On the contrary, its intent appears to be to reduce the prospects of an applicant for Bermudian status applying for naturalisation, and being granted a naturalisation certificate in the hope of subsequently obtaining status, when in fact the Minister is of the view that he does not qualify for the grant of Bermudian status. The provision requires applicants for Bermudian status to process both applications in tandem.

97. Bermuda's Parliament, in enacting section 20B, could not validly require the Secretary of State to handle naturalisation applications in any way; how those applications are handled falls within the remit of the United Kingdom Parliament and the 1981 Act. On the other hand, the Act can validly make it a requirement for obtaining Bermudian status that applicants not pursue their naturalisation applications (made with a view to obtaining Bermudian status) without first obtaining confirmation from the Minister that they will in fact be granted status, once the naturalisation requirement is satisfied. Implicit in this construction is the obvious practical requirement for the Minister to adopt an administrative framework within which such pre-approval can be sought and given. Interpreting section 20B(2)(b) as having this meaning is not only unambiguous. It is difficult to identify how this meaning even potentially conflicts with Article 25 of the ICCPR.

98. In my judgment, this conclusion can properly be reached without any need to rely on the section 8 of the Act, upon which Mr. Perinchief also relied. Section 8 is merely designed to give primacy to the provisions of the Act over the provisions of other local legislation:

"**Conflict with other laws**
8. (1) Except as otherwise expressly provided, wherever the provisions of this Act or of any statutory instrument in force thereunder are in conflict with any provision of any other Act or statutory instrument, the provisions of this Act or, as the case may be, of such statutory instrument in force thereunder, shall prevail."

The relevance of Article 25 to the application of section 20B(2)(b) by the Minister to the facts of the Respondents' case

99. In my judgment, Article 25 was relevant to the application of section 20B(2)(b) by the Minister to the facts of the Respondents' respective cases. The main issue which the IAT was charged with deciding, which perhaps was somewhat obscured by the way in which

the appeal was argued before the Tribunal, was whether the Minister had misapplied the law in dismissing the Respondents' status applications. This was not a question of law alone. It was a question of mixed law and fact.

100. The salient facts which were agreed before the IAT may be summarised as follows:

(1) there was at all material times no prescribed procedure for dealing with applications for Bermuda status under (or relying upon) section 20B(2)(b), which section had fallen into disuse for several years;
(2) the Respondents applied for naturalisation with a view to subsequently applying for Bermudian status without obtaining prior approval for the grant of Bermudian status and/or disclosing to the Minister that the naturalisation application was made with a view to qualifying for the grant of status;

(3) the Minister consented to the naturalisation application, without taking steps to enquire whether or not the naturalisation application was being made with a view to a subsequent status application;

(4) the Respondents having been granted naturalisation certificates formally applied for the grant of Bermudian status;

(5) the Minister determined that the Respondents met all the requirements for the grant of Bermudian status under section 20B(2)(b), save that they had not been approved by the Minister for the grant of status before they obtained their naturalisation certificates.

101. In these circumstances the question of construction which arose and gave rise to two competing constructions was the following. Did Parliament intend that the failure to obtain pre-approval in circumstances where it was obvious that such pre-approval could not properly have been refused should disqualify the Respondents' from obtaining status altogether? Or should Parliament be presumed to have intended that a purely procedural and non-substantive failure to meet the requirements of the statute would not disqualify the Respondents and deprive the Minister of jurisdiction to grant the relevant applications? The obvious result of the application of the law based on these competing interpretations of how section 20B(2)(b) should be applied in practice would be as follows:

(a) if the statute was construed very strictly as disqualifying the Respondents altogether, they would be left quite literally as second class 'Bermuda citizens', unable to enjoy the rights proclaimed by Article 25 of the ICCPR; alternatively,

(b) if the statute was construed more broadly as requiring substantive and substantial compliance with the status qualifying conditions, rather than strict compliance, the Respondents would be granted Bermuda status and able to fully exercise their Article 25 rights on equal terms with first class 'Bermudian citizens'.

102. These are two possible interpretations of a statutory provision, one of which would result in an interference with the fundamental rights of the Respondents under an international treaty which extends to Bermuda, and the other which would not. In resolving this ambiguity, the IAT were in my judgment properly entitled to take into account the provisions of Article 25 of the ICCPR, applying the well-recognised rules of statutory interpretation upon which Mr. Sanderson relied[15].

103. Again, I reject the suggestion that section 8 of the Act applies. Section 8 may be used to resolve conflicts between the provisions of the Act and other local, statutory provisions. It does not purport to displace the various common law rules of statutory interpretation, and cannot be read as having such effect by necessary implication.

Relevance of the British Nationality Act 1981 to the question of whether strict compliance with section 20B(2)(b) is required in practice

104. The implications of the need to read the Act in a way which does not conflict with the 1981 UK Act did not receive the benefit of full argument. However, it is clear on the face of section 20B(2)(b), that one cannot obtain status in reliance on this provision of the Act without also obtaining naturalisation under the 1981 UK Act. I have found, accepting Mr. Perinchief's central thesis, that this subsection of the Act is designed to ensure that section 20B(2)(b) status applicants do not seek and/or obtain a naturalisation certificate with a view to qualifying for the grant of status without the Minister signifying that the applicant is pre-qualified for status. In other words, the two statutory regimes are intended, for status purposes, to be engaged in a synchronised application process.

105. If the two processes are intended to work together, and bearing in mind the fact that the Act must be read in a way which is not repugnant to the 1981 UK Act, a further factor which supports the view that strict compliance with the pre-approval aspects of section 20B(2)(b) is not required, is the approach adopted under the UK Act. Under section 18 of the 1981 UK Act, there are essentially three categories of qualifying condition:

(1) unrestricted residence rights in Bermuda;

[15] A local example of these principles being applied is the case of a failure of the Crown to comply with procedural time limits in relation to an asset forfeiture application made under legislation which implemented international treaty obligations applicable to Bermuda: *DPP-v- Roberts* [2006] Bda LR 19 at paragraphs 58-59, 72-74 (Kawaley J); *Roberts-v-DPP* [2008] Bda LR 37 at paragraph 19 (Stuart-Smith, JA).

(2) minimum residence term requirements; and

(3) good character.

106. Condition (1) is a purely legal status requirement. Condition (2) is an Executive discretionary requirement. Strict compliance with condition (2), which involves mixed questions of fact and law and considerable room for technical non-compliance, can expressly be waived under the 1981 UK Act. Section 20B does not expressly empower the Minister to waive strict compliance with subsection (2)(b), but does give the Minister discretion in assessing whether the residential requirements are met (section 19(3)). Section 19(4) obliges the Minister to refuse an application on character-related grounds, but it is left to his "opinion" to decide whether character objections exist (section 19(4)). The approach of the closely connected section 18 of the 1981 UK Act does, perhaps, provide a gentle steer away from construing section 20B(2)(b) strictly, and as disqualifying altogether an applicant who has failed to comply with its provisions in a purely procedural, technical and/or non-substantial sense. Overall, however, the 1981 UK Act is neutral in terms of shedding light on how section 20B(2)(b) of the 1956 Bermudian Act should be applied.

Summary: Ground 2 of Minister's appeal

107. Ground 2 of the Minister's appeal has merit to the limited extent that the implicit complaint that Article 25 of the ICCPR had no relevance to the construction of the general meaning of the crucial statutory words must be accepted. There was no ambiguity as to the meaning of the relevant words on their face which required resolution by reference to avoiding a conflict with Article 25. This point is of importance in terms of how the Act should be interpreted in general terms, but of limited practical import for the disposition of the present appeal.

108. However, the substantive question which the IAT had before them was how to determine what Parliament intended to be the consequence of a failure to comply with the strict requirements of section 20B(2)(b) on the essentially agreed facts of the Respondents' respective cases. There were two competing interpretations, one which would deprive the Minister of jurisdiction to grant the status applications, even where the statute had been substantially complied with because strict compliance was required. The other interpretation, consistent with avoiding a result which would interfere with the Respondents ICCPR rights, was that since on the facts the statutory requirements had been substantially met, the Minister could properly waive the essentially procedural irregularity, and grant the applications.

109. Article 25 was relevant to resolving that ambiguity as to how section 20B(2)(b) ought properly to be construed.

Ground 3: Did the IAT err in law and fact in finding that the Minister ought to have granted the Respondents' Bermudian status?

The IAT's appellate jurisdiction

110. Section 124 of the Act provides as follows:

> "*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.*"

111. It is common ground that the Minister's refusal of the Respondents' applications for Bermudian status is an appealable decision under the provisions of section 19 (8), as read with section 20B(4) of the Act. As the right of appeal is not limited to questions of law alone, a straightforward reading of section 124(1) suggests that appeals lie to the IAT on questions law and on questions of mixed fact and law. The effect of section 124 appears to be to create an alternative and more appropriate remedy to judicial review, although a residual public law supervisory jurisdiction is undoubtedly retained by this Court. This jurisdiction would only likely be needed to deal with 'pure' public law remedies, such as the doctrine of legitimate expectation, which cannot be pursued by way of appeal, unlike complaints based on errors of law.

112. In my judgment the power conferred on the IAT to "*determine any such appeal, and may make such order as appears to* [it] *just*" is reflective of the sort of power to grant relief which is typically conferred on an appellate tribunal. In substantive terms, it cannot sensibly be construed as empowering the IAT to make any decision which the Minister himself could not have made. In procedural terms, the IAT's jurisdiction is quite broad. Reference can briefly be made to some examples of other local statutory appeal provisions to illustrate this point. Section 12 of the Court of Appeal Act, for instance, provides as follows in relation to civil appeals:

> "*13. Upon the hearing of a civil appeal the Court may allow the appeal in whole or in part or may dismiss the appeal in whole or in part or may remit the case to the Supreme Court to be retried in whole or in part and may make such other order as the Court may consider just.*"

113. The Civil Appeals Act 1971, regulating appeals from the Magistrates' Court to the Supreme Court, provides:

> "*14. (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part or may remit the case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.*"

114. Another example of this Court's appellate powers is provided by the Development and Planning Act 1974, which provides as follows:

> "***Appeals to the Supreme Court***
> *61 (1) The Director or any party to proceedings before the Board—*
>
> > *(a) which have been the subject of an appeal under section 57;*
> >
> > *(b) where the decision of the Board in the matter has been varied by direction of the Minister in accordance with the powers vested in him by section 30, 48 or 60,*
>
> *who is aggrieved by the decision or direction of the Minister in the matter may appeal to the Supreme Court on a point of law within twenty-one days or such longer period as the Supreme Court may allow after receipt of notification of such decision or direction.*
>
> *(2) On any appeal under this section the Supreme Court may make such order, including an order for costs, as it thinks fit.*
>
> *(3) Section 62 of the Supreme Court Act 1905 [title 8 item 1] shall be deemed to extend to the making of rules under that section to regulate the practice and procedure on an appeal under this section.*

115. Finally, it appears that the present appeal is governed by Order 55 of the Rules of the Supreme Court, which applies to "*every appeal by or under any enactment which lies to the Supreme Court from any court, tribunal, or person*"(Order 55(1)). Order 55 rule 7 provides:

> "(7) *The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.*"

116. Although section 124(1) of the Act, somewhat like section 61(2) of the Development and Planning Act 1974, does not expressly limit the IAT's jurisdiction to, in effect, reversing, confirming or varying the Minister's decision, and granting such supplementary relief as may be just, construing the Tribunal's appellate jurisdiction in such a way is justified by necessary implication. Any broader powers would not be consistent with generally

recognised Bermuda law notions of an appeal. Although Mr. Perinchief fairly expressed concern about the lack of specificity about the IAT's appellate powers, in my judgment there are no grounds for suggesting that the Tribunal's appellate powers are broader than those which are customarily conferred on appellate tribunals under Bermudian law.

The IAT's decision

117. The IAT formulated its decision in the following concise terms:

> "*30. Finally, the IAT, in accordance with its statutory power and authority granted under section 124 of the Act, has determined that for the reasons cited in paragraphs 27-29 above that it is just that the Applicants be granted Bermudian status.*"

118. Mr. Perinchief complained that it was unclear on what basis the IAT had made its decision. Was it on the basis of a private law analysis, or was it on the basis of a public law analysis which was only permissible in the context of judicial review. Or, worse still, had the Tribunal simply plucked its own notions of what was "just" out of the air? The IAT panel was chaired by an experienced and able practising litigation lawyer, Ms. Kiernan Bell. This Court can have considerable comfort that the Tribunal decision was not based on vague and nebulous notions of what was "just" plucked out of thin air, but rather reflected the IAT's view of the decision which the Minister should have made, based on the facts of the case before them having regard to a correct view of the law.

Merits of decision

119. The agreed facts were that the Respondents met all the requirements for the grant of Bermudian status save that they had obtained their naturalisation certificates from the Governor without first being approved for the grant of Bermudian status by the Minister. This failure took place in circumstances where:

(a) the Minister had prescribed no formal procedure for the status applications in question;

(b) the Minister consented to the Respondents being naturalised, a process which arguably required them to meet more onerous character criteria than for the grant of Bermudian status;

(c) the failure to obtain pre-approval for Bermudian status before being naturalised made no difference to the merits of the applications because there was no suggestion by the Minister that the pre-approval would not have been given, had it been sought;

(d) the statutory non-compliance in question was, accordingly, wholly technical in nature, in all the circumstances of each Respondent's case.

120. The general scheme of section 20B (as read with section 19) of the Act is to entitle persons who believe that they meet the statutory requirements contained therein to apply for Bermudian status. The Minister is obliged to grant status when the requirements are met, but is also given considerable discretion to waive strict compliance. For example:

(a) Section 19(3) provides:

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

(b) where an applicant under this section has been ordinarily resident in Bermuda, and has then been absent from Bermuda for any period for the purpose of his education outside Bermuda, the Minister may count that period of absence as a period of ordinary residence in Bermuda if the Minister is satisfied that, but for that period of absence, the applicant would have in fact continued to be ordinarily resident in Bermuda";

(b) even though the Minister is required by section 19(4) to refuse the application if the character objections are found to exist, it is "the Minister's opinion" which determines whether or not the application should be refused;

(c) even where an application is refused, applicants are entitled to apply again, after the expiration of one year. Section 19 provides:

"(9) *Where a person's application under this section has been rejected, another such application by him need not be considered within 12 months of the date of the rejection.*"

121. The latter statutory provisions give a clear indication that the status scheme is designed to allow people to have a very important application, which potentially confers on them extremely important legal and political rights, adjudicated on substantive rather than technical grounds. Not only are the words "*having been approved for the grant of Bermudian status*" not expressed in terms of a mandatory requirement which an applicant must meet. The natural and ordinary meaning of the words conveys the sense that this is primarily an administrative step which the Minister must take, one which is very much subservient to the dominant status application as a whole.

122. Where, as here, such approval is not given in part because of the Minister's own failure to adopt and publish a formal procedure for section 20B(2)(b) applications, it is impossible to sensibly construe the statute as envisaging that the Minister cannot waive strict compliance with the approval requirement. This conclusion has greater force because, while it may be easy to make a subsequent application if certain residence requirements are met, once someone has been naturalised without being pre-approved, it is extremely

difficult (if not impossible) to undo the process with a view to re-applying pursuant to section 19(9) of the Act.

123. The crucial issue before the Tribunal, properly framed, was whether section 20B(2)(b) should be construed as imposing a requirement which had to be strictly adhered to, or alternatively, did it impose a requirement which had to be substantially complied with, even where the non-compliance complained of had no substantive relevance to the merits of the relevant application? For the reasons I have already set out above, there was only one proper answer to this question. Parliament cannot be presumed to have intended the Act to be interpreted in such a mechanistic way, depriving otherwise qualified applicants of the right to obtain status merely because the application process, due in part to Minister's own neglect, was administratively flawed. Against this background, as I put to Mr. Perinchief in the course of argument, for the Minister to refuse the applications for Bermudian status on the sole ground that the Respondents had not been approved for Bermudian status pre-naturalisation had an 'Alice in Wonderland' air to it. On the facts before the IAT, the Tribunal was bound to conclude that the Respondents had satisfied all applicable requirements for the grant of Bermudian status, including the requirements of section 20B(2)(b) of the Act.

124. The Minister's jurisdiction to deal with the application was crucially defined by the following provisions of section 19(4) of the Act, which form part of the section 20B regime:

> "(4) *The Minister shall not approve an application under this section if—*
>
> > *(a) the applicant has during the period mentioned in paragraph (b) of subsection (1) been convicted, whether in Bermuda or elsewhere, of an offence which, in the Minister's opinion, shows moral turpitude on the applicant's part; or*
> >
> > *(b) the applicant's character or conduct otherwise in the Minister's opinion disqualifies the applicant for the grant of Bermudian status,*
>
> *but otherwise the Minister shall approve the application if the requirements of this section have been satisfied.*" [emphasis added]

125. The Respondents having admittedly satisfied the requirements of section 20B, and the Minister not contending that status should be refused under either paragraph (a) or (b) of section 19(4), it follows that the Minister was under a positive duty to grant their applications. In these circumstances, there being no further discretion to be exercised, the IAT very properly decided to direct the Minister to do what he was legally required to do: grant the relevant status applications. I affirm the IAT's decision, albeit based on somewhat different grounds.

Conclusion

126. Section 20B(2)(b) provides a valid basis for the Respondents as PRC holders to apply for Bermudian status. Applications under section 20B of the Bermuda Immigration and Protection Act 1956 which rely upon subsection (2)(b) should ordinarily be made *in tandem* with the related naturalisation application. However, on the facts of the present case, which were not disputed by the Minister, the failure to follow the correct procedure was wholly technical and had no impact on the merits of the relevant applications. The decision of the IAT directing the Minister to grant the Respondents' applications for Bermudian status is accordingly affirmed.

127. I will hear counsel as to costs.

Dated this 2nd day of May, 2014

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IAN R.C. KAWALEY CJ