In The Supreme Court of Bermuda

Appellate Jurisdiction No 1 of 2015

IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION (APPEAL) RULES 2013

AND IN THE MATTER OF THE MINISTER OF HOME AFFAIRS' REFUSAL TO ISSUE THE APPELLANT A PERMANENT RESIDENCE CERTIFICATE

BETWEEN:

MEHYRAR SHARIFI

Appellant

-v-

THE MINISTER OF HOME AFFAIRS

Respondent

REASONS FOR DECISION

(in Court)[1]

Date of Judgment: July 27, 2015

Date of Reasons: August 14, 2015

Mr. Eugene Johnston, J2 Chambers, for the Applicant
Mr. Michael Taylor, Attorney-General's Chambers, for the Respondent

Background

1. By a Notice of Motion dated January 5, 2015, the Appellant appealed against the decision of the Immigration Appeal Tribunal (Timothy Marshall, Chair-"the

[1] The Judgment was circulated without convening a hearing to save time and costs.

Tribunal") dated December 22, 2014. The Tribunal, following a hearing on May 21, 2014 dismissed the Appellant's appeal against the Minister's original decision dated September 2, 2011 refusing the Appellant's application for a permanent residence certificate ("PRC").

2. It is a notorious fact that the Tribunal, established by section 13A of the Bermuda Immigration and Protection Act 1956 ("the Act"), experienced initial teething pains. These teething pains manifested themselves in a time-lag between the formal establishment of the Tribunal with effect from August 10, 2011 and the operational establishment of the Tribunal. This presumably explains why an appeal against a decision made in September 2011 was not heard until May 2014, nearly three years later. The connection between this delay and the present appeal arose in the following way.

3. Mr. Johnston, the Appellant's counsel, was instructed shortly before the initial hearing of the appeal from the Minister before the Tribunal. Because of the Appellant's frustration at the delay, he instructed his counsel to proceed with the appeal rather than, as the Tribunal seemingly favoured, giving directions and adjourning the effective hearing until a later date. The consequence of this 'short cut' was that the most significant aspect of the Appellants appeal, which could have been supported by evidence, was simply advanced in argument. Although the point was not challenged by counsel for the Minister, its significance was not appreciated by the Tribunal, which failed to consider it adequately or at all.

4. Mr. Johnston very properly conceded that the point he fully argued before me was not advanced with same degree of lucidity before the Tribunal. Mr. Taylor, for the Minister, very properly conceded that when the Appellant's counsel asserted to the Tribunal that his client had involuntarily left Bermuda because of the non-renewal of his work permit shortly before he had satisfied the qualifying period for making a PRC application, he (Crown Counsel) had not challenged this assertion. The only material issue in dispute in the appeal before the Tribunal was whether or not the Appellant had been ordinarily resident in Bermuda for the requisite period, and the circumstances in which he left Bermuda was central to this analysis. The most pertinent ground of appeal was Ground 2:

> "*The Immigration Appeal Tribunal…failed to ask themselves the proper question, namely whether there was a sufficient break in the Appellant's residence between April 2008 and July 2010 to make such residence less than 'ordinary'…*"

5. It was obvious at the end of the appeal that the Tribunal had erred in law in failing to consider a very material consideration. This was partly because the Tribunal was not adequately assisted by counsel; but counsel were themselves constrained by the fact that there had been considerable delays in fixing an effective hearing date for the

appeal, and attention was understandably focussed on treating the May 21, 2014 hearing as an effective hearing date, almost at all costs. It was equally clear (from the contents of a briefing note) that the Minister had considered the question of whether or not the requisite period of ordinary residence could be established by the Applicant without the benefit of a correct view of the law.

6. Against this background I allowed the Appellant's appeal on July 27, 2015, awarded him his costs and remitted the matter to the Minister to reconsider according to law. These are the reasons for that decision.

Findings: key facts

7. The key facts are not controversial. The Applicant is a British citizen of Iranian birth. His sister is Bermudian (and has been since 2004). He commenced residing in Bermuda on or about September 21, 1998 and left Bermuda in April 2008, when his work permit (held by a company controlled wholly or partially by his sister) was not renewed by the Respondent. Thereafter, he returned to Bermuda from time to time, while working and living with his family in London, where he had relocated after the non-renewal of his work permit. He entered Bermuda, save for one exception which is not material, as a visitor.

8. On July 22, 2010 the Appellant made his PRC application. He properly disclosed that he had between April 2008 and July 19, 2010 resided outside of Bermuda for the purpose of being with his wife and children. His application was sponsored by a Pastor and his wife and his referees were all respectable and respected Bermudians. The obvious question raised by his application was whether he had been ordinarily resident in Bermuda for the requisite 10 years immediately before his application. Attention logically focussed on the period between April 2008 and the date of his application.

9. By letter dated September 2, 2011, the Applicant was informed that the Minister had refused his application on the grounds that he had "*not been ordinarily resident in Bermuda for a period of ten years immediately preceding*" his application. The July 7, 2011 briefing letter to the Minister gave him little choice but to conclude that the ordinary residence requirement had not been met in the Applicant's case. It implied that he had (voluntarily) left Bermuda in 2008 and not returned until 2010. By lawyer's letter dated September 9, 2011[2], the Appellant appealed against the Minister's September 2, 2011 decision on the grounds that "*our client has in fact, on the basis of the evidence presented to us, been ordinarily resident in Bermuda for a period of 10 years from the 21st September 1998 until recently.*"

[22] Mark Pettingill, Charter Chambers.

10. The Minister's approach to the appeal was to demonstrate that after April, 2008, the Appellant was not "ordinarily" resident in Bermuda in the purely factual or physical sense. Two Affidavits were filed to support this central fact, neither of which made any mention of the circumstances in which the Appellant left: namely, following a non-renewal of his work-permit. The Minister's Response to the Appeal followed suit, implying that the Applicant had voluntarily left Bermuda in 2008 on an open-ended basis.

11. Nearly three years elapsed before the appeal was first heard. In the interim, there was a General Election. The Applicant's former attorney became a Government Minister in December 2012. How much warning the Appellant received of the Tribunal hearing which took place on May 21, 2014 is unclear. But no evidence, apparently, was filed by the Appellant; and Mr. Johnston was instructed to proceed with the appeal on the merits in the hope that a resolution would be more quickly achieved.

The Tribunal's Ruling

12. The Tribunal's Ruling clearly sets out the evidence before the Tribunal as well as the legal submissions. Paragraph 15 states as follows:

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

13. If the Immigration file formed part of the record, then no evidence was required to support Mr. Johnston's main point, recorded in paragraph 22 of the Ruling as follows:

> "*Immigration status is a consideration but does not override a true belief or intention that a person is ordinarily resident in Bermuda. Immigration status would only become relevant and defeat a claim of being ordinarily resident if the person was in Bermuda unlawfully.*"

14. The Tribunal acknowledged that this submission was based on the judgment of Lloyd LJ in *Grace-v-The Commissioner for Her Majesty's Inland Revenue Service* [2009] EWCA Civ 1082. It quoted this judgment in which Lloyd LJ opined that "*'Ordinarily resident' refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life*". However, in analysing the facts it appears that the Tribunal assumed that the Appellant voluntarily left Bermuda when his work permit expired to establish ordinary residence in the United Kingdom. It logically followed that the Appellant had a heavy evidential burden of proving that he did not give up his ordinary residence in Bermuda.

15. It ought to have been clear on the face of the record (i.e. the Immigration Department file) that the Appellant sought to renew his work permit and was refused. But this fact was studiously ignored in the Minister's evidence and submissions, based on an assumption (presumably) that this was irrelevant. It was also not mentioned in the Tribunal's Ruling. However Mr. Johnston expressly addressed this matter in his submissions which were recorded in the Chairman's notes. His "instructions"[3] were that in 2008 the Appellant's work permit was not renewed. He had been resident for nine years and some months and with the 10 year deadline approaching, Immigration "pulled his ability" to make the PRC application. The Immigration file ought to have provided clear evidence:

    (a) that the Appellant was ordinarily resident in Bermuda between 1998 and 2008; and

    (b) that he did not voluntarily surrender that ordinary residence.

16. Apparently ignoring this unchallenged submission (and, assuming the Tribunal had access to it, the evidence in the Immigration file which supported it), the Tribunal ruled as follows:

> "*Once a person has taken up residence in another country with his family, and is not a citizen of the country he has left and no right of residency that he can point to, there is a heavy evidentiary burden to demonstrate that he continues to be ordinarily resident in the jurisdiction.*"

17. Following this approach, the Tribunal, understandably, attached little weight to the Appellant's post-2008 visits to Bermuda.

Findings: merits of appeal

18. The Tribunal's approach could not be faulted if the true position was that the Appellant had voluntarily left Bermuda to return to the UK with no manifested intention of maintaining his ordinary residence in Bermuda. It was not helpful that the Ruling was delivered some seven months after the appeal hearing when recollections of the texture and nuances of the arguments would necessarily have dimmed[4]. Be that as it may, I found it to be clear, admittedly with the benefit of fuller argument than

[3] Since counsel referred to his "instructions" to support this point, it seems doubtful that all parties had access to the full Immigration file as part of an agreed record, despite the Tribunal's reference to file in its Ruling as forming part of the record. Mr. Taylor conceded that he did not contradict Mr. Johnston's assertions about the non-renewal of the Appellant's work permit in 2008 and indicated that he himself had no instructions on this issue. Even the Minister's counsel did not, it seems, have access to the Immigration file.

[4] The delay, in hindsight, made a mockery of the Appellant's decision to proceed with the appeal without filing evidence with a view to getting the earliest possible decision, a motivation which might well not have been apparent to the Tribunal. Moreover, it is unrealistic to expect statutory tribunals whose members are appointed on a part-time basis to deal with cases at the pace expected of similar bodies with full-time staff.

was advanced below, that the Tribunal adopted the wrong legal approach to the evidence. The Applicant ought not to have been required to meet a "*heavy evidentiary burden to demonstrate that he continues to be ordinarily resident in the jurisdiction.*" It was legally impossible for the Minister to unilaterally bring the Appellant's ordinary residence to an end simply by failing to renew his work permit[5]. The proper question for the Tribunal and Minister to ask was whether, bearing in mind the Appellant's undoubted ordinary residence in Bermuda for over nine years, his involuntary 'decamping' back to the United Kingdom could fairly be viewed as bringing that prior undisputed period of ordinary residence to an end. The evidentiary burden on the Appellant ought properly to have been viewed as somewhat light rather than very heavy in all the circumstances of his case.

19. This Court has previously held that the mere fact that a non-Bermudian enters Bermuda as a visitor does not mean that such residence does not count as 'ordinary residence'. When a Minister discounted periods of residence when an applicant was a visitor when considering whether an ordinary residence requirement under the Act had been met, he was held by this Court to have erred in law by adopting the wrong legal approach to the facts: *Schurman-v-The Minister of Immigration* [2004] Bda L.R. 21. This is in substance the same error which the Minister and the Tribunal fell into in in the present case. Regretfully, neither the Minister in September 2011 nor the Tribunal in May 2014 was assisted by being referred to this decision. The reasoning of Simmons J in *Schurman* is most instructive and I had no hesitation in applying it to the present case. Firstly, Simmons J explained (at page 3) respective roles of the courts (as arbiters of the law) and the Minister (as arbiter of the factual elements of ordinary residence) under section 19 (3)(a) of the Act:

> "*One crucial issue of a legal character falls to be determined in this review, the court's consideration of the meaning of the words "ordinarily resident". Notwithstanding the Minister's power under section 19 (3) (a) of the Act to determine the issue of whether an applicant has been ordinarily resident, the meaning to be attributed to those words is a question of law.*
>
> *In other words whether on a proper consideration of the Applicant's case ordinary residence has been made out is a matter for the Minister on consideration of the facts; however the Minister must decide that issue on proper legal principles.*
>
> *I should make one distinction here. The court is not being asked to consider the Minister's discretion in determining whether any periods of absence from Bermuda for education purposes should be counted as periods of ordinary residence pursuant to section 19(3)(b) of the Act. This is a matter for the Minister and the policy by which he is guided, and it is not the Court's place to*

[5] The position may well be different if a work permit is expressly revoked or not renewed for cause and the work permit holder is either deported or otherwise made aware that they will no longer be permitted to even visit Bermuda.

launch any incursions into his territory unless it can be shown that the Minister has overreached his discretion. In this case no such argument has been made.

Suffice it to say, therefore, that notwithstanding the apparent wide ambit of the Minister's discretion, the discretion is not unfettered and is itself subject to review by the court if it is exercised unreasonably, or contrary to the spirit or letter of the Act, or for offending any other legal principle."

20. Having considered various authorities, Simmons J proceeded (at pages 4-5) to set out her legal findings on what 'ordinary residence' means for Bermudian Immigration law purposes:

"The Privy Council cases cited above must be taken to be authoritative, and the House of Lords decision on the point highly persuasive as the meaning to be given to the words 'ordinarily resident'. To that is to be added the weight of Astwood C.J's decision of this court in the Whallev case mentioned above.

The next question to be answered, in establishing the meaning of the words 'ordinarily resident' in Bermuda, therefore, is whether or not for immigration purposes it can be said that a different meaning can be given to the words. There are no words in the Act that can be said to qualify or otherwise ameliorate the ordinary meaning of the words. The answer to my mind must therefore be no, for the reasons stated below.

In his argument, Mr. Bourne suggested that the drafters of section 20A of the Act had in error omitted the qualifying words. He referred to the Act in Bill form as it had been tabled before the House. However on a perusal thereof there were clearly no qualifying words. He submitted that section 20A was aimed at 'certain' long term residents, and the Applicant, in his view did not fall into the category that the legislators had in mind when they amended the Act and include section 20A. Mr. Bourne sought to confine the category of persons who would qualify under section 20A to a particular group of persons originating primarily from one country; however he could present no authority for this proposition.

Mr. Bourne also argued that the legislators could not have had someone in the country on a visitor's visa in mind when amending the legislation. The authorities do not support this contention. In his judgment in the Shah case referred to above, Lord Scarman reasoned that immigration status means no more than the terms of a person's leave to enter a country as stamped on their passport.

He stated further that immigration status cannot be the decisive test of what is meant by ordinarily resident, and amounts to no more than a guide to a person's intention in establishing a residence in a country. Lord Scarman was of the view that the only significance to immigration status was whether or not a person's presence in the country was lawful because if their presence was unlawful they could not claim to be ordinarily resident there.

I find therefore that the Applicant's immigration status as a visitor alone is not a bar to qualifying under section 20A of the Act unless on the facts it call be shown that she violated one or more of the conditions of her entry for example by overstaying the restricted period in anyone or more instances of her visits. Mr. Bourne admitted that on the facts before the Minister there was nothing to suggest that the Applicant's presence in Bermuda over all of the relevant periods was illegal.

I find therefore that there is nothing expressed in the Act or to be inferred from the statutory framework or to be gleaned from the intention of Parliament that points to adopting anything other than the natural and ordinary meaning of the words 'ordinarily resident'. I therefore adopt the meaning provided by Lord' Scarman that 'ordinarily resident' 'refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.'[6]

In the judgment of the court in the Shah case it was said that the essential element of 'settled purposes' could comprise a specific limited purpose, for example for education, business, pleasure or to be with family, to name but a few. Accordingly I must reject Mr. Bourne's contention that a person's presence in Bermuda during school holidays with family is not capable of establishing settled purposes."

21. The decision of Simmons J in *Schurman* is the leading modern authority on the meaning of "ordinary residence" in the Bermuda Immigration and Protection Act 1956 context. Those advising and deciding questions of 'ordinary residence' under the Act would do well to have a copy of her Judgment close at hand. It demonstrates that 'ordinary residence' is a multi-layered legal and factual concept which does not simply turn on where, in an Immigration or even a purely physical sense, a person spends most of their time living.

22. More recent persuasive authorities, such as *Grace-v-The Commissioner for Her Majesty's Inland Revenue Service* [2009] EWCA Civ 1082 (to which Mr. Johnston also referred), confirm that determining whether ordinary residence has been established, retained or lost is a far more nuanced legal task than reviewing entry and departure logs and Immigration status. Yet that is precisely the narrow lens through which the Applicant's PRC application has been considered, by both the Tribunal and the Minister, failing to give due weight to the fact that the Applicant:

    (a) had demonstrably been ordinarily resident in Bermuda for a few months' short of the requisite ten year qualifying period (which was not in dispute); and

[6] *R-v-Barnet LBC, ex parte Shah* [1983] 2 A.C. 309 at 343G.

(b) had only left Bermuda involuntarily when his work permit was not renewed virtually on the eve of his qualifying for PRC status.

23. Mr. Taylor did not seek to defend the validity of the approach adopted by the Tribunal once it became clear that he could not contest the proposition that the decision was clearly based on a materially flawed view of the relevant facts (i.e. the implicit assumption that the Applicant had voluntarily left Bermuda). It also appeared to be common ground, to the extent that this is relevant at all[7], that relevant time period for assessing whether the ordinary residence requirements had been met was up to, but not after, the date of the PRC application. This appeared to me to be an uncontroversial submission, fortified as it was by reference to the Hong Kong Court of Final Appeal unanimous decision of *Ali-v- Director of Immigration*, FACV No.17 of 2011, judgment dated March 25, 2013 (per Hartmann NPJ at paragraph 8).

24. Section 31B(3) of the 1956 Act applies the provisions of section 19(3)-(9) to PRC applications. Section 19(3)(a) provides:

> "*Whenever any question arises as to a person's ordinary residence in Bermuda, that question shall be decided by the Minister.*"

25. As Parliament has assigned to the Minister the jurisdiction to decide whether or not ordinary residence has been established for the purposes of the 1956 Act, it would be wrong for this Court to attempt to decide that question for him. Mr. Johnston, having formally sought an Order directing the Minister to grant his client's PRC application, was bound to concede the difficulties in his formally pleaded position.

26. I accordingly set aside the decisions of the Minister and the Tribunal and remitted the matter to the Minister to be dealt with according to law and awarded the costs of the appeal to the successful Appellant.

[7] The Tribunal's Ruling did make passing reference to the Appellant's residential status after the date of his application. However, it is doubtful that this had any material impact on the substance of the decision.

Conclusion

27. For the above reasons on July 27, 2015 I allowed the Appellant's appeal against the Tribunal's December 22, 2014 dismissal of his appeal against the Minister's September 2, 2011 refusal of his PRC application.

Dated this 14th day of August, 2015 _____

IAN R.C. KAWALEY CJ