In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 110

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

AND IN THE MATTER OF A DECISION OF THE IMMIGRATION APPEAL TRIBUNAL

BETWEEN:-

GILES TEMPLEMAN

Appellant

-and-

(1) CHAIRMAN OF THE IMMIGRATION APPEAL TRIBUNAL
(2) MINISTER FOR HOME AFFAIRS

Respondents

JUDGMENT

(In Court)

Appeal against decision of Immigration Appeal Tribunal – whether Appellant satisfied requirements of section 19 of the Bermuda Immigration and Protection Act 1956 read in conjunction with the First Schedule A para 2 D to that Act – meaning of "has had" – meaning of "Bermudian"

Date of hearing: 24th July 2017
Date of judgment: 1st August 2017

Mr Peter Sanderson, Wakefield Quin Limited, for the Plaintiffs
Ms Lauren Sadler-Best, Attorney General's Chambers, for the Defendant

Introduction

1. The Appellant was born on 4th May 1990 in Bermuda. On 19th September 2008 he was granted a permanent resident's certificate. On 25th November 2014 he applied to the Minister of Home Affairs ("the Minister") for the grant of Bermudian status pursuant to section 19 of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act") and for naturalisation as a British Overseas Territories ("BOT") Citizen under the 1956 Act. By a letter dated 25th March 2015 the Minister refused his application for Bermudian status. The Appellant appealed against this decision to the Immigration Appeal Tribunal ("IAT"). On 23rd February 2017 his appeal was dismissed. However his application for naturalisation was subsequently granted. By originating notice dated 28th March 2017 the Appellant appealed to the Supreme Court against the decision of the IAT. His appeal lay pursuant to section 13 G of the 1956 Act and Order 55 of the Rules of the Supreme Court 1985 and was by way of rehearing. This is the judgment on that appeal.

Statutory scheme

2. This appeal turns upon section 19 of the 1956 Act read in conjunction with the First Schedule A ("the Schedule") to that Act. Section 19 provides in material part:

"***Right of persons with Bermudian connection to Bermudian status***

(1) A person may apply to the Minister under this section for the grant of Bermudian status if—

(a) he is a Commonwealth citizen of not less than eighteen years of age; and

(b) he has been ordinarily resident in Bermuda for the period of ten years immediately preceding his application; and

(c) he has a qualifying Bermudian connection.

(2) The First Schedule A shall have effect for the purpose of determining whether a person has a qualifying Bermudian connection under paragraph (c) of subsection (1).

. . . . .

(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."

3. The Appellant relied upon para 2 D of the Schedule to establish a qualifying Bermudian connection. The relevant parts of the Schedule are set out below. I have included paras 2 A – C to provide context.

"***PERSONS WITH A QUALIFYING BERMUDIAN CONNECTION***

1. For a person to have a qualifying Bermudian connection under section 19 of this Act, he must fall within a class of a description set forth in paragraph 2; and those descriptions are subject to paragraphs 3 and 4.

2. The classes of persons referred to are—

A a person who at any time answered one of the following descriptions—

(a) he was deemed to possess Bermudian status under subsection (2) of section 16 of this Act;

(b) he was deemed to be domiciled in Bermuda under paragraph (e) of subsection (1) of section 5 of the Immigration Act 1937;

(c) he would have qualified under (a) or (b) above had he been a Commonwealth citizen.

B a person who at any time possessed Bermudian status under this Act, except where his claim to possess such status depends solely on his rights under subsection (2) of section 16 of this Act or under subsection (2) of section 4 of the Bermuda Immigration and Protection Amendment Act 1980;

C a person who at any time had been deemed to be domiciled in Bermuda under the Immigration Act 1937 by reason of residence in Bermuda for a number of years;

D a person who can show that he has had an honest belief that he is Bermudian and who, in the Minister's opinion, has conducted himself in everyday life as Bermudian and has been accepted by the community of Bermuda as possessing Bermudian status. In forming that opinion, the Minister must be of the view that the following conditions are satisfied in relation to that person, that is to say, that—

(a) although not in law possessing Bermudian status—

(i) he has worked in Bermuda free of control under Part V of this Act; or

(ii) he has obtained ostensible title to land without being required to obtain a licence from the Government; or

(iii) he has voted in a general election in Bermuda without being challenged; and

(b) there is other evidence indicating generally that he has been accepted as a person possessing Bermudian status by persons dealing with him.

3. The requirements specified in paragraph 2 must have been satisfied throughout the period mentioned in paragraph (b) of subsection (1) of section 19 of this Act."

Decision appealed against

4. The IAT (Chairman: Kiernan J Bell) summarised the Appellant's arguments and gave its reasons for rejecting them at paras 13 – 19 of its ruling:

"*13. Counsel for the Appellant urges the IAT to find that the appeal hinges on the question of the Appellant's honest belief and whether he has been accepted by the community as having Bermudian status.*

14. Counsel urged the IAT to find that the honest belief in being Bermudian is in a cultural sense as opposed to actually believing that one has Bermuda status.

15. The IAT, though sympathetic to the plight of the Appellant, finds as was also found in Appellant U and the Minister of Home Affairs (no. 1: 2015) that belief in being Bermudian as required by the First Schedule A, 2D means a belief that you either have Bermudian status by birth or by grant under the 1956 Act.

16. The IAT accepts that the Appellant has been treated by the community as Bermudian, called up by the Regiment on the basis that he was Bermudian, has close family ties, and culturally identifies in every way with Bermuda. The IAT accepts that the Appellant believed he was Bermudian until his teenage years.

17. Nonetheless, the IAT finds that the Appellant does not satisfy the stringent requirements of section 19(1)(b) as read with the First Schedule A of the 1956 Act. In particular the IAT finds that whatever his belief at any particular point in time, certainly at the time he was applying for a PRC he could not have had the belief that he was Bermudian. First Schedule A paragraph 3 requires that the requirements of paragraph 2 have been satisfied throughout the 10 year period immediately preceding the application.

18. It is clear that at the very least from 2008, when the Appellant obtained his PRC, he did not have 'the honest belief' that he was Bermudian.

19. In the premises, the IAT denies the appeal and finds in favour of the Respondent."

Grounds of appeal

5. The issue on appeal is whether the Appellant has a qualifying Bermudian connection, as required by section 19(1) of the 1956 Act. It is common ground that he satisfies the requirements of section 19(1)(a) and (b) and paras 2 D (a) and (b) of the Schedule. The live question is whether he has satisfied the requirements of para 2 D by showing that he has had an honest belief that he is Bermudian.

6. The Appellant, through his counsel, Peter Sanderson, has advanced two grounds of appeal. Para 3 of the Schedule read in conjunction with section 19(1)(b) provides that the requirements of para 2 D must have been satisfied throughout the period of ten years immediately preceding the application for status. Mr Sanderson submits that the requirement in para 2 D that the Appellant "*has had*" an honest belief that he is Bermudian means merely that he must have had that belief at some point – any point – prior to the commencement of the ten year period. It does not mean that he must have had such a belief for the duration of the ten year period. It follows that the belief may have been very short lived, although it is common ground that in the Appellant's case it was not.

7. As his second ground, the Appellant submits that that an honest belief that he is "*Bermudian*" in para 2 D means an honest belief that he is culturally Bermudian and not that he has Bermudian status. It is common ground that, as the IAT appears to have accepted, the Appellant has had an honest belief that he is culturally Bermudian for the duration of the ten year period immediately preceding his application.

8. The Appellant submits that if, contrary to his primary submissions, section 19 and the Schedule are ambiguous, then the Court should construe them in light of Bermuda's treaty obligations under the International Covenant on Civil and Political Rights ("ICCPR"). This is in accordance with 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. See Boyce v R (2004) 64 WIR PC *per* Lord Hoffmann at para 25.

9. This statement of the principal was cited by Kawaley CJ in Minister of Home Affairs v Carne & Correia [2014] Bda LR 47 SC at para 90. He went on to find at para 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.*"

10. The Appellant submits that the construction of section 19 and the Schedule for which he contends is the one that best meets the requirements of Article 25. By making him eligible for the grant of Bermudian status, it would give him a means to access the full measure of rights which would accrue to his BOT citizenship were Bermuda to comply with its obligations under the ICCPR but which, as Bermuda is in breach of those obligations, he would otherwise be denied.

11. The Appellant further submits that, as the 1956 Act stands, his preferred construction of section 19 and the Schedule is necessary to ensure that his fundamental rights under the Constitution are not breached. I found Mr Sanderson's submissions on this point quite hard to pin down, but his one submission to carry any force or conviction was as follows.

12. Section 18 of the 1956 Act provides that where a person is, after 30th June 1956 and before 23rd July 1993, born in Bermuda, he shall possess Bermudian status if he is a commonwealth citizen and, at the time of his birth, one of his parents possessed Bermudian status. But for the fact that, at the time of his birth, neither of the Appellant's parents possessed Bermudian status (although they both do now), the Appellant would qualify for Bermudian status under section 18. The fact that he does not, the Appellant submits, means that section 18 unlawfully discriminates against him on the ground of place of origin as it treats him less favourably than someone at

least one of whose parents possessed Bermudian status at the time of his birth.

13. In Barbosa v Minister for Home Affairs [2016] Bda LR 21 at paras 44 – 45 Hellman J found that the prohibition in section 12 of the Constitution against affording different treatment to someone attributable wholly or mainly to description by place of origin, such that he is subjected to disabilities or restrictions to which persons of another place of origin are not subject, extends to affording different treatment of that nature to someone by reason of his parents' place of origin. The judge drew support for this conclusion from the analogous case of Brenner v Canada (Secretary of State) [1997] 1 SCR 358 in the Supreme Court of Canada. Although Barbosa was overturned on appeal, that was on another point.

14. What the Appellant in effect submits is that, in his case at least, the construction of section 19 and the Schedule for which he contends provides a remedy for the discriminatory effect of section 18.

Discussion

15. The purpose of section 19 was considered by the IAT in Appellant U v Minister of Home Affairs (Case No 1 of 2015) (Chairman: Timothy Marshall). Responding to the same submissions from Mr Sanderson about Article 25 of the ICCPR as he made in the present case, the IAT stated at para 30:

> "*Section 19 is not a designated gateway for a BOT citizen to gain Bermudian status and rights to participate in the public affairs of the country. Section 19 as read with First Schedule A, paragraph 2 D is to address a rare injustice when a person honestly believes she is a Bermudian, is believed to be a Bermudian by the community and conducts herself as a Bermudian and then discovers that she is not or may not be a Bermudian.*"

16. This is an accurate and succinct statement of the mischief at which section 19 is aimed. The Appellant's construction of "*has had*", in which a person need not have believed themselves to be Bermudian at any time during the

ten year period immediately preceding the application for status, or for any length of time prior to that, would not advance this legislative purpose.

17. I have considered whether there might be an intermediate position where the Appellant was required to have held a belief that he had Bermudian status for part of the ten year period but not for its entire duration. But had that been what the legislature intended, para 2 D would, like paras 2 A, B and C, have included the words "*at any time*", so that it read "*has at any time had*". It does not.

18. I am therefore satisfied that, to qualify under para 2 D of the Schedule, a person must show that throughout, ie for the duration of, the ten year period immediately preceding his application he has had an honest belief that he is Bermudian. This is subject to a grace period to allow him to apply for status promptly on discovering that he is not in fact Bermudian as there would inevitably be a hiatus between that discovery and the making of the application while legal advice is taken and the application is prepared.

19. In my judgment, it also flows from the mischief at which section 19 and para 2 D of the Schedule are directed that "*Bermudian*" means "*a person possessing Bermudian status*" and not "*culturally Bermudian*". You could discover that you are not or may not be a person possessing Bermudian status but it is not clear to me how (short, hypothetically, of being persecuted to the point where you no longer identify culturally with Bermuda) you could discover that you are not culturally Bermudian (as opposed to discovering that, culturally, you are not *only* Bermudian) or how the grant of Bermudian status would make you culturally Bermudian if you were not so already. Thus in para 2 D "*Bermudian*" and "*Bermudian status*" are used interchangeably.

20. I find support for this construction in the fact that, whereas "*Bermudian status*" is defined in the 1956 Act (at section 4), "*Bermudian*" is not. It would be surprising if the draftsman had used "*Bermudian*" to mean something that is not defined in the statute but this difficulty vanishes if it is

instead a synonym for a defined term. "*Bermudian*" is also used in this way in the heading to Part VI of the 1956 Act, "*Protecting Land in Bermuda for Bermudians*": section 73 states that the purpose of Part VI: "*is to protect land in Bermuda for ownership by individuals who possess Bermudian status*".

21. As, in my judgment, section 19 and para 2 D of the Schedule are clear and unambiguous there is no need to have recourse to Article 25 of the ICCPR. Even if Article 25 had been engaged, I am not sure whether, given the narrow and specific mischief at which section 19 is aimed, I should have found it of any more assistance than did the IAT in the Appellant U case.

22. As to the constitutional argument, I am satisfied that section 19 and para 2 D of the Schedule do not breach section 12 of the Constitution. Indeed Mr Sanderson did not advance any intelligible argument that they do. Rather, the Appellant's real complaint is that section 18 of the 1956 Act, or possibly the provisions of the 1956 Act for obtaining Bermudian status considered as a whole, breach section 12 of the Constitution. I express no view on the merits of such a complaint, but it is not one which properly falls for determination within the narrow ambit of this appeal.

Conclusion

23. I have every sympathy for the Appellant. He was born and grew up in Bermuda; has a right of permanent residence in Bermuda, which is his home; and is a BOT citizen by reason of his connection with Bermuda. Yet he is denied the full rights of citizenship which would be his due were Bermuda to honour its treaty obligations.

24. However the fact that the Appellant held an honest belief that he had Bermudian status prior to and possibly for part of the ten year period immediately preceding his application for Bermudian status is not sufficient to satisfy the requirements of section 19 of the 1956 Act read in conjunction

with para 2 D of the Schedule. Neither is the fact that throughout that period and to this day he has identified culturally as being Bermudian.

25. This appeal must therefore be dismissed as the Appellant has failed to show that throughout, ie for the duration of, the qualifying ten year period he has had an honest belief that he was Bermudian in the sense of having Bermudian status.

26. I shall hear the parties as to costs.

DATED this 1st day of August, 2017

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Hellman J