In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016 No: 28

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 DATED 23 DECEMBER 2015 AND IN THE MATTER OF THE BERMUDA CONSTITUTION

LUIS CORREIA

First Appellant

-and-

CARLY MCQUEEN

Second Appellant

-v-

IMMIGRATION APPEAL TRIBUNAL

First Respondent

-and-

MINISTER OF HOME AFFAIRS

Second Respondent

JUDGMENT

(In Court[1])

Application for Bermudian status-refusal by Minister-appeal from further refusal by Immigration Appeal Tribunal-qualifying period of deemed Bermudian status- interpretation of Bermuda Immigration and Protection Act 1956 section 19 and First Schedule A

[1] The Judgment was circulated without a hearing in order to save costs.

Date of Hearing: October 11, 2017
Date of Judgment: October 25, 2017

Mr. Peter Sanderson, Benedek Lewin Limited, for the Appellants
Mr. Philip J. Perinchief, Attorney-General's Chambers, for the Respondents

Background

1. The Appellants by Notice of Motion dated January 28, 2016 appeal against the decision of the Immigration Appeal Tribunal (Timothy Marshall, Chair) ("IAT") dated December 15, 2015 (and received on January 8, 2016) dismissing their appeals against the Minister's refusal to grant them Bermudian status. The appeals were heard together, before the IAT and this Court, because although their applications were distinct they raised a common legal issue.

2. That common legal issue can be stated shortly. As persons who were deemed to be Bermudian under section 16 of the Bermuda Immigration and Protection Act 1956 ("the Act"), did section 19 as read with the First Schedule either :

    (a) merely require the Appellants to establish that they had been deemed to enjoy Bermudian status "at any time" during the 10 years preceding their applications for Bermudian status; or

    (b) require the Applicants to have the requisite deemed status throughout the said 10 year period?

3. The IAT found that relevant statutory provisions required the Appellants to meet the second of the possible requirements, which they were unable to meet. The Appellants sought to persuade this Court that the IAT reached the wrong conclusion. Despite the able efforts of Mr Sanderson on the Appellant's behalf, I am bound to find that the IAT reached the correct decision.

The relevant statutory provisions

4. The principal statutory provision is section 19 of the Act. It provides, so far as is material, as follows:

    "*19(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;

(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)…" [Emphasis added]

5. The First Schedule A provides as follows:

"*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[2];

(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;

[2] Section 16 of the Act provides:

"*(2)Any person who is under the age of twenty-two years and who—*

(a) is a child, or is a step-child or child adopted in a manner recognised by law, of a person who has Bermudian status; or
(b) [Deleted by 2002:36]

shall, for the purposes of this Act, be deemed to possess and enjoy Bermudian status."

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.

4. In considering an application under section 19 of this Act, the Minister shall apply the law in force at the time he is considering the application, whether or not that law is different from the law in force at the time when any event or circumstance forming part of the facts underlying the application occurred." [Emphasis added]

6. The key controversy is a very narrow one. Mr Sanderson essentially contended that the prefatory words "*at any time*" in paragraph 2 sub-paragraph A of First Schedule A prescribe the period the Appellants must have had the requisite qualifying connection, and trump the inconsistent provisions of paragraph 3. There is an ambiguity, he argued, and that ambiguity ought to be resolved in favour of the Appellants and in conformity with their international treaty rights. Mr Perinchief, in response, submitted that the words of the statute were plain and should be given effect to according to their terms.

7. As a matter of first impression, the construction contended for by the Appellant's appeared to require a less straightforward reading of the crucial words than the position contended for by the Respondent. Although the use of the words "*at any time*" in paragraph 2 seem somewhat odd in light of what follows in paragraph 3, there appears to be little ambiguity in light of paragraph 1 about the point that the paragraph 2 descriptions are intended to be "*subject to paragraphs 3 and 4*".

The Appellants' construction argument

8. Mr Sanderson's argument, rigorously scrutinised, entailed inviting the Court to prefer an overly loose and liberal construction of the statutory language over the natural and ordinary meaning of the words in their context. It was contended that:

- paragraph 3 only applied to sub-paragraph D of paragraph 2, because that sub-paragraph did not contain the words "*at any time*";

- the Appellant's rights under Article 25 of the International Convention on Civil and Political Rights ("ICCPR")[3] were engaged and a construction which favoured their applications being granted should be preferred over a construction which denied them access to their fundamental citizenship rights. Reliance was placed on my own decision in *Minister of Home Affairs-v-Carne and Correia* [2014] SC (Bda) 36 Civ[4] (at paragraph 94);

- the Respondent's construction was inconsistent with the reasoning of Hellman J in *Templeman-v-Minister for Home Affairs* [2017] SC (Bda) 61 Civ;

[3] Article 25 of ICCPR provides:

"*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."

[4] Also reported at [2014] Bda LR 47; (2014) 84 WIR 163.

- it would be impossible for many applicants (such as the Appellants) to meet the qualifying connection for the entire 10 year period, because they only fell within section 16(2) too late in time; and

- the Respondent's construction made qualifying connection 2A redundant (because anybody who qualified under qualifying connection 2A would more easily qualify under section 20 of the Act).

9. Mr Sanderson's reference to the ICCPR calls to mind the following *dictum* of Lord Hoffman in *Boyce-v-The Queen* [2005] 1 AC 400 which in an indirect sense illustrates the need to remember that there are limits to how far one can use fundamental rights and freedoms provisions as an aid to statutory construction:

> "*59. The "living instrument" principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with "international obligations", "generous construction" and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.*"

10. If caution is required when directly construing constitutional provisions which must be afforded a broad and generous interpretation, the need for restraint is even greater when indirectly deploying fundamental freedoms provisions as an interpretative aid for ordinary statutory provisions. Care must be taken to avoid permitting a fundamental rights provision 'tail' to wag the primary statutory meaning 'dog'. The emphasis the Appellants' counsel placed on the ICCPR seemed to bypass the first analytical step of deciding whether the provisions under consideration were ambiguous. Mr Perinchief rightly argued that these international treaty provisions, not incorporated into domestic law, could not override the clear terms of the Act. For present purposes, the crucial conclusion which I reached in *Minister of Home Affairs-v- Carne and Correia* [2014] SC (Bda) 36 Civ on the relevance of the ICCPR in relation to applications for Bermudian status was the following:

> "*94…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.*"' [Emphasis added]

11. Mr Perinchief forcefully submitted that it was as 'plain as a pikestaff' that paragraph 3 of First Schedule A applied to all of the qualifying connections, not just to sub-paragraph D which did not contain the prefatory words "*at any time*". I agree. Paragraph 1 states without qualification that "*must fall within a class of a description set forth in paragraph 2; and those descriptions are subject to paragraphs 3 and 4"* [emphasis added]. Clearly, the use of the phrase "*at any time*" seems at first sight redundant in light of the qualification in paragraph 3, because imposing a 10 year qualifying connection time requirement seems, on superficial analysis, to be inconsistent with "*at any time*".

12. However, on closer analysis, there is at least one potential reason why, as regards the sub-paragraph A (a) gateway the phrase "*at any time*", could serve a practical purpose. It could be read together with paragraph 3 so as to inform the meaning of the words "*throughout the period mentioned in paragraph (b) of subsection (1) of section 19 of this Act".* The period could be read as meaning the 10 year period of time excluding (for qualifying connection purposes) the additional requirement (articulated in section 19(1)(b) for ordinary residence purposes) that the period must also run "*immediately preceding his application*". It is admittedly not readily apparent why, if this was the draftsman's intention, "*at any time*" is omitted from sub-paragraph D, so this analysis is far from entirely straightforward. However it would not necessarily lead to absurd results if access to the sub-paragraph D gateway required the qualifying connection to be met for the 10 year period immediately preceding the application, and not merely "*at any time*".

13. There is no need to decide this sub-point in the context of the present appeal because neither Appellant claimed to have been deemed to possess and enjoy Bermudian status for any 10 year period in any event. Further this possible interpretation was not canvassed in argument. I mention it merely to demonstrate that Mr Sanderson's

submission to the effect that it was self-evident that the interpretation contended for by the Respondents results in absurdity, is not a sound one.

14. *Templeman-v-Minister for Home Affairs* [2017] SC (Bda) 61 Civ was a case where Hellman J held that the Appellant could not meet the qualifying connection requirements under sub-paragraph D of paragraph 2 of First Schedule A because the requisite connection had to exist "*during the ten year period immediately preceding the application for status*" (paragraph 16). The question of whether the 10 year period mandated by paragraph 3 applied to paragraph 2, sub-paragraph A (a) did not arise for determination. In these circumstances, I do not find that the following observations of Hellman J provide any meaningful support for how the Appellants contend the provisions under consideration should be construed:

> "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.*

15. Taking these *obiter dicta* at their highest, they amount to an acknowledgment that that it was potentially arguable that the ten year period did not apply to sub-paragraphs A-C where the words "*at any time appeared*". The Respondents' position in the present appeal cannot in any meaningful sense be viewed as inconsistent with any reasoned analysis by Hellman J as to the proper construction of sub-paragraph A (a) of paragraph 2 of First Schedule A.

16. The language of the relevant statutory words in their context is far too clear for their natural and ordinary meaning to be displaced by abstract speculation, in the absence of evidence, about how many or few people are likely to be able to pass through the relevant gateway. This is not an instance of a case where an interpretation which is contended for is clearly unworkable. Nor is there any sufficient basis for this Court to assume, as Mr Sanderson invited the Court to do, that section 20 would be entirely redundant if the Respondent's construction was adopted. Section 20 provides as follows:

"***Right of persons within s 16(2) to Bermudian status***
20. (1) A person who establishes to the satisfaction of the Minister that—

(a) he has reached the age of 18 years but is under the age of 22 years; and

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

(c) he has for the five years immediately preceding his application been deemed to possess and enjoy Bermudian status by virtue of section 16(2),

shall, on applying to the Minister, be entitled to have Bermudian status granted to him…"

17. The purpose of the "*at any time*" prescription under the First Schedule paragraph 2 sub-paragraph A arguably is to excise the "*immediately preceding the application*" element from the 10 year period during which the applicant must have been deemed to possess and enjoy Bermudian status for the purposes of a section 19 application deploying that gateway. This would mean that someone who meets the requirements of section 20(1) (a)-(b), but <u>not</u> (c), could conceivably be qualified to pass through the section 19 gateway because they were deemed to possess and enjoy Bermudian status for a 10 year period of time which did <u>not</u> include the 5 years immediately preceding the application.

Disposition of appeal

18. These appeals must be dismissed. In summarising why the Appellants' arguments have been rejected, I can do no better than to recite the lucid reasons given by the IAT (Timothy Marshall, Chair) for its decision which this Court hereby affirms:

"*23. In the context of this case, the Appellants must establish that they were deemed to possess Bermudian status throughout the 10 years of being ordinarily resident in Bermuda. The words 'must have been satisfied throughout the period' can bear no other interpretation. Requiring the person at any time to have the benefit of being deemed in possession of Bermudian status under sub-paragraph 2A (a) does not create any ambiguity or contradiction in circumstances where in paragraph 3 the person is told that he must also have possessed that status during the entire period of the ten year residency requirement. This is the creation of a qualification, not an ambiguity*

or inconsistency. The law and legislation often provides in one breath circumstances that are later tempered, modified or confined by a subsequent overriding or dominant provision and normally, the legislation gives a warning to the reader by saying in effect what you are about to read is 'subject to' or qualified by another section. This is exactly the warning or advisory that was given in paragraph 1 of the First Schedule."

19. I will hear counsel if required as to costs.

Dated this 25th day of October, 2017 _____

IAN R.C. KAWALEY CJ