In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2014: No 369

IN THE MATTER OF A RULING OF THE IMMIGRATION APPEAL TRIBUNAL DATED 26TH SEPTEMBER, 2014 MADE UNDER SECTION 13D OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN THE MATTER OF AN APPEAL AGAINST THAT RULING PURSUANT TO SECTION 13G OFTHE BERMUDA IMMIGRATION AND PROTECTION ACT 1956 AND ORDER 55 OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

NIGEL PAUL CLARK

Appellant

-v-

THE MINISTER OF HOME AFFAIRS

Respondent

-and-

JUDGMENT

(in Court)[1]

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

Appeal from Immigration Appeal Tribunal- application for Permanent Resident's Certificate-ordinary residence-nature of Minister's power to determine whether ordinary residence established in borderline cases-interpretation of section 31A Bermuda Immigration and Protection Act 1956-scope of appellate jurisdiction of Immigration Appeal Tribunal

Date of hearing: April 5, 2016
Date of Judgment: May 11, 2016

Mr Mark Diel, Marshall Diel and Myers Limited, for the Appellant
Mr Philip J Perinchief, instructed by the Attorney-General's Chambers, for the Respondent

Introductory

1. The Appellant applied for a Permanent Resident's Certificate ("PRC") on July 28, 2010 on the grounds that he had been ordinarily resident in Bermuda since on or before July 31, 1989. His application unusually relied upon his residence commencing from June 22, 1989 when he visited Bermuda with his wife at the expense of his prospective Bermuda-based employer and agreed to accept a job offer as an insurance executive subject to Immigration approval. Although he began demonstrably severing his UK ties by selling his family home and purchasing a rental property in the UK before July 31, 1989, the Appellant's work permit was not approved until August 14, 1989 and he did not actually take up physical residence in Bermuda until September 23, 1989.

2. By letter dated November 22, 2010, the Minister refused the application on the grounds that the Appellant's ordinary residence had not begun prior to July 31, 1989 as required section 31A of the Bermuda Immigration and Protection Act 1956 ("the Act") . After the Appellant's counsel complained that the November 22, 2010 letter did not set out the Appellant's appeal rights, the Minister's decision was confirmed by letter dated March 14, 2011 (the November 22 2010 and March 14, 2011 letters are together referred to as "the Minister's Decision"). In between these two letters, and before Immigration Appeal Tribunal ("the IAT") was created with effect from August 10, 2011[2], the Appellant appealed against the rejection of his PRC application by letter to the Cabinet Office dated December 16, 2010. On July 14, 2011, the Appellant was advised that his appeal would be heard by the IAT.

3. The IAT (Ms Kiernan Bell, Deputy Chair, Ms Belinda Wright and Mr Francis Mussenden) heard the appeal on May 23, 2014 and dismissed it on September 26, 2014 ("the IAT Decision"). Unlike the Minister, the IAT accepted that the Appellant's actions prior to his arrival in Bermuda to take up settled residence and prior to the approval of his work permit were potentially relevant to the date when his ordinary

[2] By the introduction into the Bermuda Immigration and Protection Act 1956 of section 13A.

residence commenced. But, reconsidering the matter, it was held that the facts and matters relied upon by the Appellant did not reach the requisite threshold.

4. By Notice of Motion dated October 16, 2014, the Appellant appealed to this Court against the IAT Decision. He issued a Summons for Directions on October 30, 2015, and directions were ordered by consent on December 1, 2015.

5. For reasons that are unclear and which were not adverted to in the course of the hearing, the IAT and its Deputy Chair were named as First and Third Respondent, respectively. No relief was ever sought against them. The IAT is an independent quasi-judicial tribunal exercising a jurisdiction similar to a court of summary jurisdiction[3]. IAT members ought, by analogy, to receive the benefit of immunity from suit in respect of the exercise of their adjudicative functions. The Minister was the only necessary and proper Respondent. Of the Court's own motion, I order that they should cease to be parties under the following provisions of Order 15 rule 6 of this Court's Rules:

> "*(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—*
>
> *(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party…*"

6. The factual basis of the Appellant's PRC application was not in dispute. The present appeal raises three main legal questions, each which has both narrower and wider aspects:

(1) applying the recognised legal test for establishing ordinary residence, was it potentially open to the Minister to find that the Appellant's ordinary residence in Bermuda commenced from a date earlier than when he took up actual residence, namely the date when he set in motion plans to take up ordinary residence here?

(2) is the Minister's statutory power to determine whether an ordinary residence claim has been made out under section 19(3) (a) as read with

[3] Section 13E of the Act provides:

"*For the purpose of conducting a hearing, the Immigration Appeal Tribunal shall have all the powers of a court of summary jurisdiction in relation to the summoning of witnesses, their examination on oath or otherwise and compelling the production of any document or thing relevant to the subject matter of the proceedings.*"

section 31A (1) (a)[4] of the Act constrained to construe the statutory requirements as to the qualifying period under section 31A (1) (a) in a strict manner, or is the Minister empowered to deal with marginal cases in a flexible manner?

(3) where the IAT and/or this Court determines that the Minister has misdirected himself in law or fact in reaching a determination on ordinary residence, is the appellate tribunal entitled to substitute its own decision, or ought the matter be remitted to the Minister for him to reconsider in accordance with law?

7. Issues (1) and (2) only seem likely to be potentially relevant to the present case (as regards PRC applications under the pre-2012 version of section 31A) and other types of ordinary residence application. It seems improbable that there are many (or even any) other outstanding PRC applications filed under the former version of section 31A by applicants who, like the Appellant, planned to move to Bermuda before July 31, 1989 but actually arrived shortly thereafter.

8. I invited Mr Perinchief, who appeared for the Minister, to file supplementary submissions explaining the legislative history of the original 2002 version of section 31A of the Act as it appeared to me to be somewhat ambiguous as to what approach should be taken by the Minister (restrictive or facilitative) to the ordinary residence requirement in the PRC context. Mr Perinchief in turn invited the Court to give guidance (beyond the confines of issue (3)) to clarify the broadly-expressed jurisdiction of the IAT.

9. Having received those supplementary submissions, I invited Mr Perinchief additionally to comment on my proposed finding that the legislative history suggested that the Minister could indeed adopt a flexible approach to deciding marginal cases as to whether ordinary residence had commenced by the last qualifying date. He invited the Court to address an issue which was not dealt with by the IAT and was only half-heartedly addressed in the course of oral argument before this Court. This was the question of whether or not the Appellant's pre-July 1989 visits were lawful or not, a point which can be dealt with very briefly.

Was the Appellant an 'unlawful visitor' because he sought employment while a visitor?

10. It was common ground that period of residence which were not in Immigration law terms unlawful could be taken into account: *Schurman-v-The Minister of Immigration*

[4] The relevant version of section 31A is the wording originally enacted by 2002:16 s.6 effective 30 October 2002. This provision was repealed and replaced by a new version of the provision with effect from January 1, 2012 (by 2011: 41), which was further amended by introducing new subsections (1) and (2) with effect from December 17, 2013 (by 2013: 38).

[2004] Bda L.R. 21 (Simmons J) at page 4, applying Lord Scarman's *dictum* on this issue in *R-v- Barnet LBC, ex parte Shah* [1983] 2 A.C. 309 at 348D-E. Lord Scarman opined that Immigration status was irrelevant:

> "*….unless it be that of one who has no right to be here, in which event presence…is unlawful, means no more than the terms of a person's leave to enter as stamped upon his passport*…."

11. The IAT declined to entertain this argument as a new point which had not been relied upon by the Minister in making the Decision. Mr Perinchief sought to revive the point before me, but was unable to substantiate it. The proposition was that because the Appellant negotiated a contract of employment while only a visitor, he was in violation of his visa and his presence was unlawful. This point could only be sustainable if one of two essential preconditions were met. Either:

    (1) there had to be a statutory provision in the Act prohibiting visitors from seeking employment; or

    (2) there had to be a stamp in the Appellant's passport restricting the Appellant from seeking employment during the July 1989 visits relied upon by him in support of his case on ordinary residence.

12. Mr Perinchief neither in his oral nor his supplementary submissions was able to identify any pertinent statutory provision or visa restrictions (the relevant passport stamps were before the Court). As I observed in the course of the hearing, Bermuda would resemble a "basket case" country if senior insurance executives could <u>not</u> be recruited in the manner which occurred in the present case. In relation to this point, the Minister's counsel bowled a bad ball which the IAT understandably 'hit for six'.

Can ordinary residence potentially begin prior to the claimant physically taking up a new place of ordinary residence?

13. It must be acknowledged at the outset that the Appellant's case was extremely counterintuitive. The day after the hearing of the present application, local photographer Ras Mykkal was quoted as saying: "*One of my favourite quotes is by Albert Einstein: 'The intuitive mind is a sacred gift and the rational mind is a faithful servant'*…"[5] The law is primarily a discipline of the rational mind but at its best, beneath the surface, the intuitive mind is afforded space to play. A starting assumption in construing section 31A (1) (a) would logically be that the Applicant's ordinary residence could not have begun earlier than when he arrived in Bermuda to

[5] Interviewed by Nadia Hall: '*Photographer's butterfly book takes flight*', The Royal Gazette, April 6, 2016.

take up residence in September 1989. However, the crucial paragraphs in the Appellant's attorneys' coherently and clearly articulated application letter of July 28, 2010 challenged that orthodox view:

> "*We are instructed that even though it would appear that prior to 31 July 1989 Mr Clark had not been granted permission to reside in Bermuda, that nevertheless prior to that date he had taken irreversible steps committing himself to residing in Bermuda. It is respectfully submitted that by no later than 25 June 1989, at which time Mr Clark contractually committed himself to living and working in Bermuda, he had an intention to reside in Bermuda, with a sufficient degree of continuity, to be described as settled.*
>
> *This is supported by the fact that as of 26 June 1989 Mr Clark had formally resigned his employment in the United Kingdom and taken steps to sell his family home. By June 1989 Mr Clark can be shown to have a settled intention to reside in Bermuda for the foreseeable future. As a matter of law we submit that this had the effect of ending Mr Clark's ordinary residence in the United Kingdom by June 1989. It therefore appears that the only other country in which Mr Clark could at that time be said to be ordinarily resident, is Bermuda.*
>
> *We respectfully refer the Minister to the case of Schurman v The Minister of Immigration…The ruling was to the effect that the applicant's status as a visitor alone was not a bar to qualifying…*
>
> *The evidence shows that on two occasions prior to the relevant date of 31 July 1989 Mr Clark lawfully entered Bermuda as a business visitor. On the second such occasion Mr Clark took the significant step of contractually committing himself to living and working in Bermuda. Not only did Mr Clark in June 1989 make concerted efforts to sever his ties with the United Kingdom, but he took all available steps to secure permission to reside in Bermuda. The application for permission to reside in Bermuda was lodged well in advance of the relevant date of 31 July 1989, and we respectfully submit that in respect of a senior executive position such as Vice President of Underwriting…in the prevailing climate in 1989, that there was every expectation that Mr Clark would be granted permission to reside and work in Bermuda...*
>
> *As previously submitted the Act specifically provides that where any question arises as to a person's ordinary residence in Bermuda the question shall be decided by the Minister. In all the circumstances of this matter we invite the Minister to determine that on or before 31 July 1989*

Mr Clark was ordinarily resident in Bermuda, and thereby grant the captioned application... "

14. The Minister's Decision rejected this elegant argument in very concise terms:

    (a) the November 22, 2010 letter, addressed to the Appellant personally, and making no reference to a decision by the Minister at all, after reciting the conditions specified in section 31A of the Act stated:

        "*Our records indicate that you first arrived in Bermuda on 23 September, 1989 and as a result you were not ordinarily resident in Bermuda on or before 31 July, 1989. Based on this fact, you are not eligible to apply under section 31A of the 1956 Act...*";

    (b) the March 14, 2011 letter, prompted by the complaint that the November 22, 2010 letter did not set out the Appellant's appeal rights, and addressed to the Appellant's attorneys, formally confirmed that the Minister had refused the section 31A application and specified the reason in substantially the same terms:

        "*The records of this department indicate that Mr. Clark arrived in Bermuda on 23 September, 1989. As a result he was not ordinarily resident in Bermuda on or before 31 July, 1989 therefore he does not meet the residency requirement necessary under section 31A of the 1956 Act.*"

15. Mr Diel fairly complained that the first letter merely reflected an administrative decision that the Appellant was "*not eligible to apply*". Only the second letter confirmed that the Minister had formally rejected the application on its merits because the ordinary residence requirement had not been met. However, looking at the Minister's Decision as a whole, it was self-evident that:

    (a) the Minister had implicitly decided that, as a matter of law and/or fact, the qualifying period of ordinary residence could only begin from the date of the Appellant's arrival on September 23, 1989; and

    (b) there was no evidence that the Minister had considered on their merits but rejected the facts and matters relied upon by the Applicant as potentially supporting an earlier commencement of ordinary residence.

16. This conclusion is unequivocally confirmed by the Minister's Reply or Response to the appeal in which it was expressly submitted that the following legal question could only be answered in the negative:

> "*In law, can a person granted permission by the Minister for a specific time period to visit Bermuda on a 'three day business trip', be simultaneously determined to be ordinarily resident' for that period or otherwise; particularly for the purposes of a s 31A PRC application?*"

17. The IAT made no comment on the Minister's failure to engage with the Appellant's arguments on ordinary residence. However, the Tribunal implicitly accepted that matters occurring before the Appellant's September 1989 arrival might potentially qualify as ordinary residence. However, after analysing the evidence relied upon for the first time, the IAT found that it was insufficient:

> "*35. The IAT, however, like the Minister, must exercise its powers and interpret the meaning of the words 'ordinarily resident' in accordance with principles of statutory construction. The Minister made his decision on the basis of that the Appellant was not residing in Bermuda before the critical date.*
>
> *36. In this instance, despite clear evidence of the intention by the Appellant to move himself and his family to Bermuda prior to 31 July, we find that as a matter of fact the Appellant and his family had not become ordinarily resident by the relevant date of 31 July 1989. The IAT, applying Lord Scarman's test in Shah have concluded that the Appellant did not have a regular and habitual mode of life in Bermuda prior to July 1989…was insufficient to establish the start of a regular and habitual mode of life in Bermuda, notwithstanding the IAT accepts that the Appellant's settled intention to move to Bermuda was proved as of that date.*
>
> *37. The IAT distinguish the 'visits' by Ms Schurman in the Schurman case (which were sufficient to meet the test of being ordinarily resident) with the visit by the Appellant and his wife to Bermuda in June 1989. In Schurman the appellant was visiting her family home, albeit with an immigration status as a lawful visitor for Bermuda Immigration purposes. These visits were a regular and habitual part of her mode of life. In contrast, the June 1989 trip of the Appellant was not at that stage a regular and habitual course of the Appellant's life.*"

18. A frequent challenge for the common lawyer is the need to avoid the tendency to analyse key legal concepts through the lens of decided cases rather than through a focussed application of the governing general legal principles to the specific context of the case at hand. Depending on the nature of the legal principle which is engaged,

the way other cases have been decided on their facts may be more or less relevant. The facts of other cases are likely to be more instructive when exploring the circumstances in which a discretionary power may properly be exercised than when seeking to elucidate the parameters of the discretionary power itself. What is in issue in the present case is what constitutes the minimum legal requirements for demonstrating the beginning of a period of ordinary residence.

19. For instance, *Schurman-v-The Minister of Immigration* [2004] Bda L.R. 21 was rightly relied upon by the Appellant to prove that visits before a period of settled residence commenced could indeed be utilised as evidence of ordinary residence. The happenstance that in *Schurman* those visits were made to a family home does not automatically justify the implicit IAT conclusion that a short visit, in the absence of another family member having already established a Bermudian home, cannot qualify as evidence of the commencement of ordinary residence. The case does not purport to establish the principle that only visits to an established family home will qualify as a period of ordinary residence. It principally decides that any lawful visit potentially qualifies in circumstances where the merits of the ordinary residence issue were left for the Minister to decide.

20. Mr Diel fairly complained that the IAT failed to adequately grapple with the unique but central question arising in the present case. It is true that the principles pertinent to deciding when ordinary residence began for the purposes of the Appellant's section 31A application were supported by indirect persuasive authority. However neither counsel before the IAT appears to have assisted the Tribunal by making any, or any detailed, submissions on the relevance of the specific statutory context of section 31A as a whole for the purpose of deciding when the qualifying period should be viewed as commencing. Counsel's failure to adequately grapple with the potential impact of the statutory context for shaping the question of how flexibly or rigidly the commencement date question should be construed, was repeated in the appeal before this Court.

21. To my mind, the nuanced question of when ordinary residence should be found to begin for the purposes of a PRC application under section 31A of the Act, particularly in a borderline case, cannot sensibly be answered without taking into account a purposive construction of the relevant statutory provision.

22. I shall return to this topic when dealing with question (2) (is the Minister's power to determine when the specified period of ordinary residence begins to be exercised in a broad or narrow manner?) below. Shelving this broader question of statutory interpretation for the present, it is necessary to return to the narrower line of inquiry under present consideration. Can ordinary residence as a matter of general law begin before a 'proper home' is established? Mr Perinchief's submissions focussed on

contending that, whatever the broad legal position might be, the contention that ordinary residence was established on the facts of the present case was untenable[6].

23. Mr Diel relied on the speech of Lord Scarman *R-v- Barnet LBC, ex parte Shah* [1983] 2 A.C. 309 for his pronouncements on the relevance of the state of mind of the claimant (or the *propositus*) at page 344B-D. However, he prefaced these remarks with the following words (at 343G):

> "*Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view 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.*" [Emphasis added]

24. While what quality of residence qualifies as ordinary residence may well conform to a standard 'common law' definition, this general presumption is always subject to qualification by the statutory context in which the words are used and also, in my judgment, by what aspect of ordinary residence is in controversy. In *Shah*, the question was whether or not a student's residence in Britain qualified as ordinary residence. However, the following observations of Lord Scarman (upon which Mr Diel relied) were generally supportive of his client's reliance on the mental commitment he made before July 31, 1989 to residing in Bermuda:

> "*There are two, and no more than two, respects in which the mind of the 'propositus' is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.*
>
> *And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.*"

[6] When pressed to substantiate the argument that the Appellant could not lawfully enter a contract of employment subject to Immigration approval while a visitor in Bermuda, the Respondent's counsel sensibly abandoned this dubious argument. In further supplementary submissions, an attempt was made to resuscitate the point.

25. *Schurman-v-The Minister of Immigration* [2004] Bda L.R. 21, where Simmons J approved Lord Scarman's approach in *Shah*, the controversy centred on whether periods as a visitor qualified for the purposes of computing ordinary residence in relation to an application for Bermudian Status under section 20A of the Act. This case was of greater pertinence because it concerned visits made by the applicant to a home established by another family member before the applicant subsequently obtained permission to actually reside in Bermuda as opposed to merely visit. The issue was substantially the same one arising under a parallel statutory provision, whether or not ordinary residence commenced before July 31, 1989. The primary finding was that the Minister erred in discounting the pre-July 31, 1989 periods of residence when the applicant was only a visitor on a short-term visa.

26. This important judgment wholly undermined the main assumption underpinning the Minister's Decision, namely that until the Appellant arrived in Bermuda with permission to work and reside for an extended period, any temporary visits could be ignored. The facts do not appear very clearly from the judgment as seemingly only this legal principle was in controversy. But it is possible to extract from the result an at least implicit finding that temporary visits coupled with an intention to acquire Immigration permission to reside on a more stable basis at a later date, even if that date was over four years after July 31, 1989. Simmons J (at page 5) recorded the following extract from the evidence which shed light on the grounds on which the *Schurman* status application was refused:

> "*It is noted from your file that you obtained permission to reside in Bermuda on the 27th September 1993. There is no evidence that you had permission to reside in Bermuda prior to this. As a result you would not have been ordinarily resident in Bermuda on 31st July 1989. Therefore you do not meet the requirements to apply for Bermudian status under the provision of section 20A of the Bermuda Immigration and Protection Act, 1956.*"

27. This reasoning, that only the period after the applicant obtained permission to reside in Bermuda counted as ordinary residence, was expressly declared to be wrong by this court in *Schurman*. It seems self-evident that the basis of Simmons J's central finding was that the intention of the applicant to take up residence as soon as she could (to join her Bermuda-based family) was more important than her Immigration status. The IAT was, in an abstract technical sense, correct to distinguish that case from the present one in factual terms. Most importantly, that was a case where the motivation in establishing ordinary residence in Bermuda was the existence of family, rather than employment, ties. *Schurman* was a judicial review case; and neither the Minister nor this Court ever considered the merits of the ordinary residence issue. Simmons J expressed no view on the merits of the ordinary residence question, and

merely held that the Minister erred in law in declining to take temporary visits into account:

> "*Further, the Minister has failed to appreciate that ordinary residence can be of short or long duration as long as each period of residence is not inconsistent with the immigration status of an applicant at the relevant time.*
>
> *I find therefore that the Minister and the Cabinet have erred in law in rejecting the applicant's application for the reason only that she required specific permission of the Immigration Department to reside in Bermuda. For this reason Certiorari and Mandamus should go to the Minister.*
>
> *Accordingly, an Order of Certiorari is made to quash the refusal of the Minister, and an Order of Mandamus is made to require the Minister to reconsider the application according to law*."

28. Most importantly, and building on the foundations laid by reference to the cases just referred to, Mr Diel relied (before the IAT and this Court) upon *Macrae v. Macrae* [1949] P. 397, where the issue was jurisdictional (and matrimonial) in nature. Somerville, L.J. said (at p. 403):

> "*Ordinary residence can be changed in a day. A man is ordinarily resident in one place up till a particular day: he then cuts the connection he has with that place - in this case he left his wife, in another case he might have disposed of his house or anyhow left it and made arrangements to make his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone.*"

29. This was, carefully analyzed, very powerful and direct support for the Appellant's central thesis: that once he sold his house and visited Bermuda, putting in train before July 31 1989 arrangements to make Bermuda his home, he had become ordinarily resident here. It is a statement of broad principle which, subject to any distinctive nuances of section 31A and/or policy considerations properly relied upon by the Minister, is capable of supporting a finding that the Appellant's ordinary residence commenced before July 31, 1989. Regretfully, the IAT's decision does not expressly consider this authority or explain why the flexible principle it establishes was rejected as inapplicable to the facts of the present case. Again, it is important to distinguish the governing principle illustrated by a case from the application of those principles to its specific facts.

30. For instance, one aspect of the facts in *Macrae* is more supportive of a finding that the Appellant in the present was not ordinarily resident in Bermuda at the crucial point in time. *Macrae* was a Scotsman who left his wife in Manchester to return to Inverness where his family was. Here, the Appellant had no equivalent family ties in Bermuda. On the other hand, the English Court of Appeal in *Macrae* ignored as irrelevant the fact that there was no evidence that the propositus had obtained employment in Scotland and might possibly only stay temporarily there. This indirectly illustrates the point that employment ties may potentially provide valuable evidence of ordinary residence This aspect of the facts in the *Macrae* case, therefore, is supportive of the principle underpinning the Appellant's case. The Appellant has no family connection with Bermuda, but there is:

    (a) undisputed evidence that at the material time he had entered into a contract of employment Bermuda; and

    (b) although his initial trips to Bermuda were only short visits, he manifested an intention to reside in Bermuda indefinitely during his second visit and he did, in due course, subsequently reside in Bermuda for more than 20 years.

31. It was and potentially is open to the Minister as a matter of law to find that the Appellant's ordinary residence in Bermuda began prior to July 31, 1989 on the grounds that, before that date, he severed his ordinary residence in the United Kingdom, came to Bermuda and put in train arrangements to make his home here: *Macrae v. Macrae* [1949] P. 397. This may have been the same conclusion on the law which was tacitly reached by the IAT. However, I am bound to find that that the IAT erred in law and/or in the application of the law to the facts by failing to explicitly identify the correct legal test and/or to record findings which demonstrate that the correct legal test was applied to the facts of the Appellant's case.

32. This analysis of *Macrae* is based on the unarticulated assumption that the Minister can, when dealing with borderline cases, adopt a generous approach in deciding whether or not ordinary residence has been established as at the latest qualifying date. The IAT might have been assisted by an articulated analysis of why, as a matter of statutory interpretation, section 31A justified a liberal approach designed to enable the Applicant to take advantage of the PRC regime, rather than a restrictive approach tending to shut him out. It is to that question of statutory interpretation which I now turn.

Is the Minister's power to determine when the specified period of ordinary residence begins to be exercised in a broad or narrow manner?

Applicable rules of statutory construction

33. Why should the very flexible approach adopted by the English Court of Appeal in *Macrae* in relation to a jurisdictional question potentially apply with equal force in the context of determining when ordinary residence commenced for the purposes of a PRC application under section 31A of the Act? Should that question be approached in a broad and purposive manner favouring an amplification of the ability of applicants to benefit from the rights conferred by the statute, or in a more restrictive manner? These questions may be answered by reference to various well-recognised rules of statutory interpretation:

(a) '*Bennion on Statutory Interpretation*', Sixth edition (section 319, "*presumption that evasion not to be allowed*"), states:

> "*It is the duty of a court to further the legislator's aim of providing a remedy for the mischief against which the enactment is directed. Accordingly, a court will prefer a construction which advances this objective rather than one which attempts to find some way of circumventing it*";

(b) the presumption against evasion is typically engaged by statutory provisions imposing penalties or taxes, not creating rights. However, Bennion (section 303) also contends for adopting a purposive approach to the interpretation of all statutory provisions which (in contrast with adopting a broad and purposive approach to provisions impacting upon fundamental rights and freedoms) means little more than having regard to the object and purpose of the relevant provision:

> "*Parliament is presumed to intend that in construing an Act the Court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose. A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction*";

(c) in *Minister of Home Affairs-v-Carne and Correia* [2014] Bda LR 47; (2014) 84 WIR 163, in construing provisions of the Act relating to applications for Bermudian Status, the somewhat different question of whether procedural non-compliance invalidated an otherwise substantively

valid application was in issue. However, in that case I adopted the following rules of statutory construction which are of general application:

> "*90. 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*";

(d) in *Carne and Correia*, the decision of the IAT to adopt a construction which would enlarge rather than constrict the opportunity to obtain Bermudian Status was approved by this Court because such a generous construction gave effect the citizenship rights protected by article 25 of the International Covenant on Civil and Political Rights ("ICCPR"). In the present case, the same principle (the need to adopt an interpretation which

gives effect to fundamental rights rather than negates them) is clearly engaged by another article of the ICCPR, the first paragraph of which mirrors the first paragraph of article 2 of Protocol No. 4 to the European Convention on Human Rights ("ECHR"). Article 12 of ICCPR provides as follows:

> "*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
>
> *2. Everyone shall be free to leave any country, including his own.*
>
> *3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
>
> *4. No one shall be arbitrarily deprived of the right to enter his own country.*" [Emphasis added];

(e) section 11 of the Bermuda Constitution, based on those international treaty provisions, affirms that "*no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Bermuda, the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion therefrom*" (section 11(1)). That is the primary fundamental right. The relevant limiting provision permits "*the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion therefrom of any such person*" (section 11(2)(d));

(f) in *Carne and Correia*, this Court also confirmed that it is permissible to have regard to the legislative history of a statutory provision, not just to resolve ambiguities, but also to shed light on its legislative purpose:

> "*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.”*[Emphasis added]

34. Before proceeding to consider the legislative history of section 31A, which created the PRC regime, it is not difficult to conclude that a variety of established and uncontroversial rules of statutory interpretation combine to provide a strong steer towards the conclusion that the Minister’s power to decide whether or not the ordinary residence requirements are met should be viewed as being a generous rather than a restricted one. It seems self-evident that the purpose of section 31A is to accord permanent residence rights to persons who have lawfully resided in Bermuda for 20 years. It is a provision designed to create rights. In this statutory context, construing the provision as conferring the power (but not, of course, an obligation) on the Minister to adopt a generous inclusive approach to marginal applications rather than a technical exclusionary approach is supported by the following canons of statutory interpretation. A generous approach is:

    (1) consistent with a purposive construction of the Act to grant a marginal application which, on a generous view of the facts and applicable law, meets the ordinary residence requirements;

(2) consistent with the fundamental freedom of movement and residential choice rights protected by section 11(1) of the Bermuda Constitution, article 12 of the ICCPR and article 2 of Protocol 4 to ECHR.

35. A generous approach assumes, of course, that an applicant in substance meets all statutory criteria and that no countervailing public policy interests are engaged which commend a more restrictive approach by the Minister in any individual case. Each time the question of ordinary residence has in previous cases been considered by this Court, the Minister's decision to adopt a narrow and rigid view of his statutory powers to determine whether an applicant for Bermudian Status or PRC meets the applicable ordinary residence requirements, without relying on any countervailing public policy dictates, has been held to be unlawful:

- *Whalley v Minister of Labour and Home Affairs*[1993] Bda LR 43 (Astwood CJ: Bermudian Status application-temporary absences did not break period of ordinary residence)

- *Schurman-v-The Minister of Immigration* [2004] Bda L.R. 21 (Simmons J: Bermudian Status application-visitor status pre-July 31, 1989 counted for beginning ordinary residence)

- *Sharifi-v-Minister of Home Affairs* [2015] Bda LR 78 (Kawaley CJ: PRC application-visitor status counted for ending qualifying period of ordinary residence).

Legislative history

36. There is in light of the foregoing analysis only a slight residual ambiguity about whether the Minister's power to decide whether a PRC applicant has met the ordinary residence on or before July 31, 1989 requirement may be exercised in a generous manner in marginal cases. Nevertheless, for completeness, it is helpful to seek confirmatory support for the now almost irresistible view that the posited question must be answered affirmatively by reference to the 'legislative history' of section 31A, broadly understood. As Bennion (section 209) observes:

> "*The interpreter cannot judge soundly what mischief an enactment is intended to remedy unless he or she knows the previous state of the law, the defects found to exist in that law, and the facts that caused the legislator to pass the Act in question.*"

37. Bennion further states (section 210):

> "*(2) Under the doctrine of judicial notice, the court is taken to know the law prevailing within its jurisdiction. This applies to both past and present law. Accordingly there can be no restriction on the sources available to the court for reminding itself as to the content of any rule of law which prevails, or has prevailed, within its jurisdiction.*"

38. It bears remembering that the legal provisions informing the PRC application in the present case (section 31A) were designed to reform the pre-existing law following, *inter alia*, a White Paper (pursuant to an earlier Green paper) presented to Parliament by the then Minister, Ms Paula Cox on July 13 2001 ('*Community for a New Millennium: Bermuda's Long-term Residents*'). The Introduction explained the legal and policy issues as follows:

> "*The mandate of the Department of Immigration is to ensure the adoption of policies that strengthen the fabric of the Bermuda community and that promote its economic viability.*
>
> *With the issue of long-term residency, therefore, the Government must ensure that the right balance is achieved. The Government must ensure that the ultimate decision taken is not only fair, just and equitable, but that it is also the right thing to do. The policy task is to harmonize as far as possible the hopes of people to become Bermudians by the grant of that status with the right of Bermudians to sustain themselves, to maintain their essential character and to meet the needs of the Bermuda community.*
>
> *The Government recognizes that there are significant numbers of non-Bermudians who feel that, to all intents and purposes, Bermuda has become their home. The Government is not indifferent to the need for some degree of permanence and stability for those who have over the years made Bermuda their home.*
>
> *Yet, the Government must also be mindful of — and must successfully manage –the legitimate needs and expectations of Bermudians, those who are Bermudian by birth and those who have already become Bermudian by grant...*"[7] [Emphasis added]

39. The proposed legislative changes were set out in the White Paper, significantly, under the heading '*Fairness and Human Rights*':

> "*The issue of how long-term residents should be treated has been considered in the context of fairness and humanity towards people, together with the need to ensure that Bermudians' interests are*

[7] Pdf page 10.

protected wisely. It is essential for the health and welfare of all the people of Bermuda that the Government determines what is right and does what is right.

In these circumstances, the Government has resolved to commit to the following policies:

- *to grant Bermudian status to that limited number of long-term residents who suffer particular hardship;*

- *to establish a policy that would grant security of employment and residence in Bermuda through a Permanent Resident's Certificate to persons who*

  had resided in Bermuda from before 1 August 1989;

  had resided in Bermuda for twenty years or more;

  in that period had been absent less than two years at any time;

  on application are at least forty years old; and

  must make application before 1 August 2010;

- *to extend the Permanent Resident's Certificate policy to:*

  those persons who had not yet resided in Bermuda for twenty years when this policy comes into effect. They can apply once they have fulfilled the residence requirements and all other conditions;

  siblings of Bermudians where those persons do not qualify for Bermudian status;

  parents of Bermudians and to divorced spouses of Bermudians with custody of Bermudian children; and

  spouses and working-age sons and daughters of Permanent Residents;

- *to allow Permanent Residents to purchase:*

  privately developed condominium units anywhere in Bermuda regardless of Annual Rental Value; and

  single-unit houses among the most valuable 20% of the housing market."[8] [Emphasis added]

[8] Pdf page 20.

40. Accordingly, the previous legal position was that long-term residents had no ability to acquire security of residence in Bermuda. The White Paper proposed a PRC scheme that would be responsive to the human rights of long-term residents. On the other hand, it is true that Appendix 4 to the White Paper explained the rationale behind the proposal to require PRC applicants to have become ordinarily resident on or before July 31, 1989:

> "*Government abolished the discretionary grant of Bermudian status for anyone arriving in Bermuda after 31 July 1989. This Government believes that that action removed any obligation, moral or otherwise, to those who have arrived in Bermuda since then, should such persons choose to remain in Bermuda for a long time. Government has placed that position on record.*"[9]

41. Accordingly, there can be no basis for any suggestion that the requirement for ordinary residence commencing on or before July 31, 1989 is wholly arbitrary and may be ignored altogether. The commencement date for ordinary residence was linked to the legal reality that after that date, discretionary grants of Bermudian Status were no longer possible. Persons who were ordinarily resident in Bermuda on July 31, 1989 thereafter lost the right to obtain Bermudian Status and so the Government proposed to accord such person who had nevertheless continued to reside in Bermuda for 20 years legal stability in Bermuda through the grant of permanent residential rights.

42. It is against this background that the Explanatory Memorandum to the Bermuda Immigration and Protection Amendment Bill 2002, helpfully supplied to the Court by Mr Perinchief after the hearing, stated as follows:

> "*The new section 31A deals with the first category of persons who may apply for permanent resident's certificates. A person may apply under this section if he was ordinarily resident in Bermuda on or before 31 July 1989, he has been ordinarily resident in Bermuda for a period of twenty years preceding the application, he is not less than forty years of age on the date of the application and he applies before 1 August 2010. Periods of continuous ordinary residence of twelve months or more can be aggregated for the purpose of calculating twenty years.*"

43. The legislative history, broadly viewed, confirms rather than undermines the strong provisional view that section 31A was predominantly intended to give effect to the human rights aspirations of long-term residents by in Bermuda rather than to take such rights away. The legislative history accordingly supports a finding that section 31A in general terms confers a generous rather than a restrictive power on the

[9] Pdf page 36.

Minister when he is deciding whether or not the requirements of ordinary residence have been made out[10].

44. Mr Perinchief made the important point in his further supplementary submissions that this aspect of the legislative history is only relevant to the version of section 31A in force for the purposes of the present appeal. An entirely new section 31A was enacted in 2013 informed by quite distinct policy concerns.

The ordinary residence requirements of section 31A in their statutory context

45. Having decided that the Minister is entitled in general terms to adopt a flexible approach to the ordinary residence requirements in marginal cases, it is necessary to clarify what role those requirements play in the scheme of section 31A as a whole. Section 31A (1) requires PRC applicants to meet the following qualifications:

(a) ordinary residence in Bermuda on or before July 31, 1989;

(b) ordinary residence for at least 20 years;

(c) ordinary residence for the two years immediately preceding the application;

(d) not less than 40 years of age on the date of the application;

(e) application to be made before August 1, 2010.

46. The section was enacted with effect from October 30, 2002, thirteen years after the latest date on which ordinary residence is required to begin and applicants must be at least 40 years of age before the date of their application. The range of potential applicants covers persons who were at least 40 on October 30, 2002 (around 27 years of age on July 31, 1989) or at least 40 on July 31, 2010 (at least 19 on July 31, 1989). The target group excludes persons who were not adults on July 31, 1989, and will necessarily predominantly embrace expatriate workers who established ordinary residence before the qualifying date. One important aspect of the statutory scheme further supports the finding that the Minister may adopt a generous approach to determining whether or not the ordinary residence requirements are met in the Appellant's case. Section 31A (4) applies section 20C (3)-(4), enacted as part of the same amending Act, to PRC applications. Section 20C(3) provides that:

"(3)*... where—*

[10] Because this issue was not canvassed in argument, I afforded Mr Perinchief an opportunity, on or before May 9, 2016, to file supplementary submissions to meet the proposed finding set out in this paragraph. He availed himself of this opportunity.

(a) a person who was working in a company in Bermuda has been absent from Bermuda for any period for the purpose of working in another country in a wholly-owned subsidiary or branch, or the parent company, of the company which employed him in Bermuda; and

(b) the Minister is satisfied that but for that period of absence the person would have in fact continued to be ordinarily resident in Bermuda,

the Minister may take into account a period of ordinary residence immediately before and after such absence…"

47. That is an express statutory power, available both in the PRC application context and in the related Bermudian Status application context, designed to assist applicants working in the international business sector, in particular, to retain their ordinary residence despite periods of employment with affiliated companies abroad. This provision only makes sense if it is viewed as part of a statutory scheme primarily designed to enable long-term residents who have made a valuable contribution to the main pillar of Bermuda's economy to meet the minimum statutory criteria to enter the PRC gateway.

Practical application of a flexible approach to determining whether ordinary residence had commenced on or before July 31, 1989

48. The specific question raised by the present appeal is, in effect, what are the minimum requirements for establishing that an applicant was ordinarily resident in Bermuda "*on or before*" July 31, 1989. The facts of the Appellant's case may be viewed in the context of a range of hypothetical marginal scenarios, some of which were embryonically canvassed in the course of argument:

(1) A, an Antiguan, is hired by a Bermudian employer subject to Immigration approval in mid-June June following a brief trip to Bermuda as a visitor. On July 3, 1989 she is granted a three year work permit commencing on Monday July 31, 1989. She immediately resigns from her St. John's job and gives notice to terminate his tenancy. She is booked to fly to Bermuda on Saturday July 29, 1989, but is asked by her employer to attend an important business meeting in Tortola on July 31, 1989 and to travel to Bermuda later in the week. She arrives in Bermuda on August 3, 1989 where she resides for the next 20 years. She applies for a PRC on the grounds that on July 31, 1989 she was ordinarily resident in Bermuda;

(2) B, a Briton, is hired in London by a Bermudian employer subject to Immigration approval in early June 1989. Told that the work permit is

likely to come through, he vacates his London apartment at the end of June and moves back in with his parents. In mid-July he travels to Bermuda to look for potential accommodation. While there, as a visitor, his work permit comes through with a start date of August 1, 1989. He is booked to travel to Bermuda on July 31, 1989 but his flight is cancelled due to technical problems and he does not land in Bermuda until August 1, 1989, where he resides for the next 20 years. He applies for a PRC on the grounds that on July 31, 1989 he was ordinarily resident in Bermuda;

(3) C, a Canadian, is offered employment subject to work permit approval and a formal contract in early July, 1989 by a Bermudian employer following an interview in Toronto in mid-June. She travels to Bermuda in mid-July, signs a contract subject to Immigration approval and picks up rental listings from several local realtors. On July 30, 1989, she learns that her work permit has been approved with effect from September 5, 1989. On July 31, 1989 she hands her Canadian employer a resignation letter and gives one month's notice to terminate her lease. She arrives in Bermuda at the end of August, where she resides for the next 20 years. She applies for a PRC on the grounds that on July 31, 1989 she was ordinarily resident in Bermuda;

(4) D, a Dane employed in New York on a contract due to expire on July 31, 1989, is offered employment subject to work permit approval and a formal contract in early July, 1989 by a Bermudian employer following an informal interview in Bermuda in mid-June. He travels back to Bermuda in mid-July, signs a contract subject to Immigration approval and picks up rental listings from several local realtors. He immediately gives to quit to his landlord and repeatedly calls his prospective employer for progressive reports on his work permit application. Although his prospective employer intended to submit the application to Immigration in early July, this did not happen until July 28, 1989 because the personnel officer concerned was on jury duty. In late August he finally learns that his work permit has been approved with effect from September 19, 1989. He arrives in Bermuda in mid-September 1989, where he resides for the next 20 years. He applies for a PRC on the grounds that on July 31, 1989 he was ordinarily resident in Bermuda;

(5) E, an Eritrean recruited by a Bermudian employer from Nairobi, is granted a three year work permit commencing on Monday July 31, 1989. He arrives in Bermuda on the preceding Saturday, moves into his apartment and reports for work on Monday. Due to unexpected developments, he is told that he will be posted to affiliate office in Boston for three months. He spends a week in Bermuda, leaves for Boston and does not return to Bermuda until October.

49. According to the Respondent's initial theory of how the law relating to ordinary residence applies to section 31A of the Act, only E would be able to establish ordinary residence. The other hypothetical applicants would not. However, if one discounts as

legally irrelevant the question of Immigration status, the Respondent's modified position appears to be that unless you have established a home in Bermuda or are visiting family in Bermuda by July 31, 1989, ordinary residence cannot have commenced by the requisite date. In my judgment once one goes further and accepts the proposition that the Minister is entitled to adopt a flexible and enabling approach to borderline ordinary residence commencement cases, it is difficult to draw a clear dividing line between any of the five hypothetical applicants.

50. There is no meaningful distinction between an applicant who is engaged to work in Bermuda and makes a preparatory visit before July 31, 1989, but only actually arrives to commence work six weeks later (the Appellant's case), and an applicant who actually arrives to commence work on July 31, 1989, assuming all other PRC eligibility requirements are met.

51. In his supplementary submissions Mr Perinchief invited the Court to adopt a more rigid approach to the Minister's powers on the basis that his functions under the Act were primarily of a policing character. I do not doubt that many powers conferred upon the Minister can be characterised in that manner. Section 31A is not an enforcement provision but an enabling provision designed to primarily to confer rights rather than to take them away. Construing the section as giving the Minister a flexible power to deal with borderline cases of ordinary residence cuts both ways: the Minister may for good cause adopt a restrictive approach to exclude an undeserving applicant; but he may also adopt a more generous approach to include a deserving applicant.

52. It is in light of this particular and distinctive statutory contextual background, that the general legal test for ordinary residence must be applied The relevant legal test established in *Macrae v. Macrae* [1949] P. 397 rests on the following proposition:

> "*Ordinary residence can be changed in a day. A man is ordinarily resident in one place up till a particular day: he then cuts the connection he has with that place - in this case he left his wife, in another case he might have disposed of his house or anyhow left it and made arrangements to make his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone.*"

53. In my judgment that legal test, applied to the specific context of section 31A of the Act, affords the Minister sufficient flexibility to determine that any of the hypothetical applicants, as well as the Appellant, was in fact ordinarily resident in Bermuda on or before July 31, 1989. This is because, as a matter of law, ordinary residence

potentially commences when one visits a place, with the intention of making that place home, and makes arrangements to move there, irrespective of:

(a) one's formal legal Immigration status; and

(b) whether or not an applicant has completed the physical process of establishing a Bermudian home.

54. While the above analysis may well be potentially applicable to other provisions of the Act (including the current version of section 31A[11]) where ordinary residence is a qualifying requirement for some residence-linked right (and indeed generally), it is important to emphasise that section 31A in the form considered in the context of the present appeal is no longer in operation. The latest date for PRC applications under the original 2002 version of section 31A was August 1, 2010. Mr Perinchief was unaware of any other cases similar to the Appellant's, and conceded that there was no basis for fearing that a liberal approach in this case would open any floodgates.

Is the appellate tribunal entitled to substitute its own decision, or ought the matter to be remitted to the Minister for him to reconsider in accordance with law?

55. Understandably, having regard to the fact that the Appellant's PRC application has been outstanding for almost six years, Mr Diel invited the Court to not only find that the IAT erred in upholding the Minister's decision. Mr Perinchief embraced the provisional view I expressed, based on a recent decision of this Court on this point, that the temptation for this Court to make a decision Parliament had arguably intended should be made by the Minister should be resisted. For reasons which are elaborated when dealing with question (3) below (is the appellate tribunal entitled to substitute its own decision, or ought the matter to be remitted to the Minister for him to reconsider in accordance with law?), in my judgment it is not for the IAT or this Court to decide, <u>for the first time</u>, the merits of an ordinary residence issue. I accordingly decline the Appellant's invitation to substitute my own view of the merits for that of the IAT, and indeed the Minister.

56. Mr Perinchief invited the Court to give guidance on the scope of the jurisdiction of the IAT. The relevant provisions of the Act, somewhat confusingly, are found in two entirely different sections. The substantive general right of appeal and power to dispose of appeals provision is as follows:

"*124 (1) <u>Without prejudice to anything in section 10</u>, where a person is aggrieved by any decision of the Minister in respect of which an appeal is*

[11] This creates a PRC gateway for persons ordinarily resident in Bermuda for 10 years who have been designated under the Economic Development Act 1968.

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." [Emphasis added]

57. The apparently broad disposal powers conferred on the IAT by section 124(1) must be read in conjunction with section 13D of the Act. The appellate jurisdiction of the IAT is further defined by the following provisions of section 13D:

> "13D (1)*On an appeal of the Minister's rejection of an application under section 19 to 20B, 20D to 20F, 31A or 31B or of the Minister's refusal to grant any permission under section 25(1) or of the Minister's decision regarding conditions or limitations imposed under section 25(1), the Immigration Appeal Tribunal may—*
>
> *(a) confirm the decision of the Minister; or*
> *(b) quash the decision and direct the Minister—*
>
> *(i) to issue a certificate of Bermudian status under section 21(1) or to grant a permanent resident's certificate under section 31A or 31B, as the case may be, where the appeal is in respect of an application under section 19 to 20B, 20D to 20F, 31A or 31B;*
> *(ii) to grant specific permission to land in, or having landed to remain or reside in Bermuda, where the appeal is in respect of a refusal of permission under section 25(1); or*
> *(iii) to dispense with, vary or modify the conditions or limitations as the Tribunal sees fit, where the appeal is in respect of a decision of the Minister regarding conditions or limitations imposed under section 25(1).*

58. Reading the two sections together, the IAT is expressly empowered to confirm or quash the decision of the Minister under, *inter alia*, section 31A and to direct him to issue a PRC (section 13D(1)) and to make any other order the IAT thinks just (section 124(1)). It is not made explicit whether decisions can only be quashed on the grounds of errors of law and or mixed questions of law and fact or, alternatively, whether the IAT is entitled to conduct a full re-hearing. However, section 13E provides:

> "(1) *For the purpose of conducting a hearing, the Immigration Appeal Tribunal shall have all the powers of a court of summary jurisdiction in relation to the summoning of witnesses, their examination on oath or*

otherwise and compelling the production of any document or thing relevant to the subject matter of the proceedings.

(2)A decision of the Immigration Appeal Tribunal may be reached by a majority of the members of that Tribunal but any question of law shall be decided by the Chairman of the Immigration Appeal Tribunal or in his absence, the Deputy Chairman.

(3)The Immigration Appeal Tribunal may regulate its proceedings as it thinks fit and shall not be bound by the rules of evidence in civil or criminal proceedings.

(4)The Minister may be represented before the Immigration Appeal Tribunal by any public officer or by a barrister and attorney and an appellant may be represented by a barrister and attorney.

(5)Where a vacancy occurs in the membership of the Immigration Appeal Tribunal during the hearing of any matter, the Tribunal may continue to act notwithstanding the vacancy."

59. The right of appeal to this Court is governed by the following provisions of the Act:

> "***Right to appeal decision to the Supreme Court***
> *13G Where a person is aggrieved by a decision of the Immigration Appeal Tribunal, he may lodge an appeal with the Supreme Court within 21 days from the date of the decision of the Immigration Appeal Tribunal.*"

60. This Court's powers in relation to hearing such appeals are not dealt with by the Act at all. Order 55 of this Court's Rules applies, subject to exceptions which are not material, to "*every appeal which by or under any enactment lies to the Supreme Court from any court, tribunal or person*" (Order 55 rule 1(1)). Although such appeals are said to be by way of "*rehearing*" (Order 55 rule 3(1)), a full rehearing rarely takes place. The rules contemplate a rehearing on the record without oral evidence: "*The Court shall have power to draw any inferences of fact which might have been drawn in the proceedings out of which the appeal arose*" (Order 55 rule 7(3)). Order 55 contains the following most important rules as far as this Court's power to dispose of appeals from the IAT is concerned:

    (a) "*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.*" (Order 55 rule 7(5));

    (b) "*The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless*

in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned." (Order 55 rule 7(7))

61. While the IAT's jurisdiction appears to be more generous than this Court's, that discrepancy can be cured if the IAT makes rules governing appeals pursuant to section 13F(2) of the Act.

62. My provisional inclination to remit the matter to the Minister for determination was primarily informed by a similar course I adopted in a case decided after the IAT decided the present appeal: *Sharifi-v-Minister of Home Affairs* [2015] Bda LR 78. That was also a section 31A application, although the application was refused by the Minister, in that case, based upon a finding that visits at the end of the 20 year qualifying period could not be taken into account. Having found that the IAT and the Minister erred in law and remitted the matter to the Minister to reconsider according to law, I explained my reasons for this decision as follows:

> "*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 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.*"

63. In *Sharifi*, I did not advert to the fact that the IAT had the express general power, in effect, to make any decision which the Minister could have made when disposing of an appeal. However, even taking that general power into account, in my judgment it is wrong in principle for an appellate tribunal to make primary factual findings on an issue Parliament has expressly mandated the Minister to determine. Section 19(3)(a) of the Act would be rendered nugatory if the determination of ordinary residence was treated as reviewable on appeal on precisely the same basis as other statutory criteria which are not expressly required to be "*determined by the Minister*". To give due deference to the clear legislative intent that the Executive should primarily determine

whether ordinary residence has been established on the facts of any particular case, it is necessary to distinguish two categories of case where ordinary residence is in issue:

(a) an appeal where the Minister has made factual findings and taken relevant evidence into account but adopted a legally flawed approach or drawn impermissible inferences in concluding that a case for ordinary residence has not been made out (in which case the IAT and/or this Court may decide the merits of the ordinary residence issue); and

(b) an appeal where the Minister has not considered the relevant evidence at all and not made any factual findings on the merits of the ordinary residence issue (in which case the IAT and/or this Court ought ordinarily[12] only remit the matter to the Minister for reconsideration of the ordinary residence issue according to law).

64. For the reasons set out above, I find that the Minister erred in law in failing to consider potentially sufficient evidence in support of the Appellant's PRC application on the ordinary residence issue. The IAT also erred both in its approach to the law and the facts, but more importantly, in making its own decision on the ordinary residence issue rather than remitting the matter to the Minister to decide.

65. It is impossible to conclude that no substantial miscarriage of justice occurred. Based on the material presently before the Court, and in light of the generous scope of the Minister's discretion when dealing with marginal cases for the legal reasons explained above, it is not easy to conceive on what basis a reasonable Minister, properly directing himself, would refuse the Appellant's PRC application.

66. I should add that the IAT's erroneous decision to resolve the ordinary residence issue itself is entirely understandable for two reasons. Firstly, both counsel arguing the case before the Tribunal sought to deliver a 'knockout punch' and seemingly did not address the scope of the IAT's appellate powers. Secondly, the IAT made its decision on September 26, 2014. This Court's decision in *Sharifi-v-Minister of Home Affairs* [2015] Bda LR 78 was handed down on August 14, 2015.

[12] It is possible that the Minister may validly waive the right to make primary findings as to ordinary residence, by way of a formal concession.

Conclusion

67. The appeal is accordingly allowed, the decision of the Minister and the IAT set aside and the matter remitted to the Minister to be reconsidered according to law on the limited issue of whether or not the Appellant was ordinarily resident in Bermuda on or before July 31, 1989. The Appellant's PRC application was based on an elegant but counterintuitive legal analysis which advanced, from the outset, a potentially valid case on ordinary residence which was never fully understood. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the Appellant's costs of the appeal shall be paid by the Minister in any event, to be taxed if not agreed.

Dated this 11th day of May, 2016 _____
IAN RC KAWALEY CJ