In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 88

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT AND IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

AND IN THE MATTER OF A FAILURE OR REFUSAL TO CONSIDER AN APPLICATION FOR INDEFINITE RESIDENCY/NATURALISATION

BETWEEN:-

(1) MARCO TAVARES
(2) PAULA TAVARES

Applicants

-and-

(1) THE MINISTER OF HOME AFFAIRS
(2) THE GOVERNOR
(3) THE ATTORNEY-GENERAL

Respondents

JUDGMENT

(In Court)

Judicial review – whether the Minister's refusal pursuant to section 60(1) of the Bermuda Immigration and Protection Act 1956 to allow one of the applicants to work without restrictions was in breach of section 5(1) of the Human Rights Act 1981 – whether the Minister's decision was unreasonable or disproportionate –

whether the Minister's delay in communicating a decision to both applicants on their applications for indefinite leave to reside and to one of the applicants on his application for naturalised BOT citizenship was unlawful

Date of hearing: 28th June 2017
Date of judgment: 16th August 2017

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

Background

1. This is the latest in a growing number of decisions in which long term residents of Bermuda who do not have Bermudian status seek to challenge the restrictions imposed on them by the Bermuda Immigration and Protection Act 1956 ("the 1956 Act").

2. The Applicants, Mr and Mrs Tavares, are husband and wife. Mrs Tavares was born in Bermuda on 27th March 1976. Under section 4 of the British Nationality Act, 1948 ("the 1948 Act") she was a citizen of the United Kingdom and Colonies by birth. On 1st January 1983 she became a British Dependent Territories citizen. This was by operation of section 23 of the British Nationality Act 1981 ("the UK Act"). Then, on 26th February 2002, pursuant to section 2 of the British Overseas Territories Act 2002, she became a British Overseas Territories citizen. These types of citizenship were not held concurrently: each succeeded the other. The Acts which conferred them were all UK statutes.

3. If either of Mrs Tavares' parents had possessed Bermudian status then she, too, would have possessed Bermudian status. Section 18(1) of the 1956 Act provides that where a person is, after 30th June 1956 and before 23rd July 1993, born in Bermuda, he shall possess Bermudian status if he is a Commonwealth citizen and, at the time of his birth, one of his parents possessed Bermudian status. Although section 18(1) refers to "*he*" and

"*his*", section 9(b) of the Interpretation Act 1951 provides that in every Act words importing the masculine gender include females. But although Mrs Tavares was born in Bermuda during this timeframe she does not possess Bermudian status as neither of her parents possessed Bermudian status.

4. In December 1986 Mrs Tavares, aged 10, moved to the Azores with her parents. Her father returned to Bermuda in July 1989 and Mrs Tavares, now aged 13, and her mother returned in September 1989. Mrs Tavares completed her schooling in Bermuda, and, from 1995 – 2001, her higher education in Portugal and the Azores. Her parents left Bermuda in 2001.

5. Mrs Tavares married Mr Tavares, a Portuguese citizen, in the Azores in July 2001. He had been living in Bermuda on a work permit since 1998, where he worked as a landscape gardener. The couple returned to Bermuda after their marriage. They have two children, a son (date of birth: 6th November 2007) and a daughter (date of birth: 22nd March 2010) who were both born, and have been brought up, in Bermuda.

6. Mrs Tavares would like to work. However she states that her employment options are very limited because as matters stand she has to apply for a work permit. The relevant statutory provision is section 60(1) of the 1956 Act, which provides:

> "***General principle regarding regulation of engagement in gainful occupation***
>
> *(1) Without prejudice to anything in sections 61 to 68, no person—*
>
> *(a) other than a person who for the time being possesses Bermudian status; or*
>
> *(b) other than a person who for the time being is a special category person; or*
>
> *(c) other than a person who for the time being has spouse's employment rights; or*
>
> *(cc) other than a permanent resident; or*
>
> *(d) other than a person in respect of whom the requirements of subsection (6) are satisfied,*

shall, while in Bermuda, engage in any gainful occupation without the specific permission (with or without the imposition of conditions or limitations) by or on behalf of the Minister."

Mrs Tavares does not fall into any of categories (a) – (d).

7. By a letter dated 12th October 2015, the Applicants' counsel, Peter Sanderson, wrote to the Department of Immigration in an attempt to remedy the work permit situation:

"*If Mr Tavares can naturalise, then he will be considered a belonger, and his wife will also be a belonger as the wife of a natuaralised person. This would enable them both to work freely. Although a somewhat odd result that Mrs Tavares' ability to work would be via her foreign-born husband, when she is the born citizen, it would give some measure of relief to them both.*

. . . . .

In order to naturalise as a BOT citizen it is, of course, necessary that Mr Tavares does not have any restrictions on the period for which he is allowed to remain in Bermuda. He therefore seeks a grant of indefinite leave to reside from the Minister of Home Affairs prior to a decision on his naturalisation application. He will then be eligible to naturalise under s. 18(2) of the British Nationality Act 1981."

8. The statutory provisions underpinning this request were as follows. Section 12(1) of the Constitution of Bermuda provides that subject to the provisions of *inter alia* section 12(4), no law shall make any provision which is discriminatory either of itself or in its effect. Section 12(4) provides that section 12(1) shall not apply to any law so far as that law makes provision with respect to the employment of persons who do not belong to Bermuda for the purposes of section 11 of the Constitution. Section 11(5) of the Constitution, read in conjunction with section 51(3) of the UK Act, provides that for the purposes of that section, a person shall be deemed to belong to Bermuda if that person is a citizen of the British Overseas Territories ("BOT") by virtue of the grant by the Governor of a certificate of naturalisation under section 18(2) of the UK Act (section 11(5)(b)); or the wife of such a person not living apart from him under a decree of a court or a deed of separation (section 11(5)(c)).

9. Schedule 1 to the UK Act provides at para 7(c) that one of the requirements for naturalisation under section 18(2) is that on the date of the application the applicant was not subject under the immigration laws to any restriction on the period for which he might remain in that territory. Under section 25(1) of the 1956 Act it is unlawful for a person other than a person falling within an exempted category to remain or reside in Bermuda without the specific permission of the Minister, with or without the imposition of conditions or limitations. The exempted categories, which overlap with some of the categories in section 60(1), include that of a person who possesses Bermudian status. However the subsection provides that the Minister, in his discretion, may dispense with the requirement for specific permission.

10. The application for a grant of indefinite leave to reside in Bermuda in the 12th October 2015 letter might be understood either as an application for leave to reside with the specific permission of the Minister but without any conditions or limitations, or alternatively as an application for leave to reside where the Minister has dispensed with the requirement of specific permission.

11. The 12th October 2015 letter also included applications from Mrs Tavares:

> "*… Mrs Tavares formally seeks confirmation of indefinite leave to reside in Bermuda and indefinite permission to work without having to seek specific permission each time.*"

12. However the Department of Immigration does not appear to have treated the letter as a formal application on her behalf. Thus in her affidavit filed in these proceedings, the Chief Immigration Officer ("CIO") states:

> "*It is important to note that as at October 2015, the application before the Minister was on behalf of Mr. Tavares. There was a brief reference in the October letter to the issue of Mrs Tavares' ability to work without restriction.*"

13. By a memorandum dated 28th November 2016, the Deputy Governor advised the Department of Immigration that she was unable to grant Mr Tavares' application for naturalisation unless and until the Immigration Department

determined that he was free from immigration control. As the Minister was not minded to grant indefinite leave to reside, this condition was not satisfied. On 1st December 2016, the 12th October 2015 letter containing Mr Tavares' applications was therefore stamped by the Ministry as having been "*Refused*". However the Minister wished to obtain guidance from the Attorney General's Chambers as to the precise terms of a response to Mr Tavares notifying him of the refusal. In the event, Mr Tavares was not informed of the outcome of his applications until one week prior to the present hearing. As the CIO did not consider that the letter contained an application from Mrs Tavares, in my judgment the refusal applied to Mr Tavares' application only.

14. Meanwhile, on 4th March 2016 the Supreme Court handed down judgment in Barbosa v Minister for Home Affairs [2016] Bda LR 21. I held that section 11(5) of the Constitution should be interpreted broadly to include common law belongers as well as the persons expressly identified in that section as being deemed to belong to Bermuda. I therefore granted the applicant a declaration that while in Bermuda he could engage in any gainful occupation without the specific permission of the Minister, and that section 60(1) of the 1956 Act was to be construed accordingly.

15. Mr Sanderson, who had represented Mr Barbosa, advised Mrs Tavares that as a result of this judgment she could work in Bermuda without any restrictions. In Mrs Tavares' words: "*This case meant freedom for me. The freedom to earn a pay check on my own terms in a job I wanted to do.*" She got a job working in a café as a cashier. She said that she liked dealing with people, so it was a great job for her.

16. The job lasted seven months. In November 2016 the Court of Appeal overturned the first instance decision in Barbosa, holding that for purposes of section 11(5) of the Constitution, only a person falling into one of the categories enumerated in the subsection counted as belonging to Bermuda. Thus only such a person attracted the protection from discrimination in relation to employment conferred by section 12(4)(b) of the Constitution.

Mrs Tavares belonged to Bermuda at common law but did not fall within any of the categories of belonger who were protected by the Constitution. She therefore had to give up her job immediately.

17. On 29th November 2016, Mr Sanderson wrote to the Minister on behalf of Mrs Tavares. He repeated his suggestion that if Mr Tavares' application for naturalisation as a BOT citizen were granted then Mrs Tavares, as the wife of a naturalised BOT citizen, would count as a belonger within the meaning of section 11(5) of the Constitution. Alternatively, he suggested that the Minister could exercise her discretion under section 60(1) of the 1956 Act and give Mrs Tavares specific permission to engage in gainful employment without the imposition of conditions or limitations. On 15th December 2016, the CIO replied to Mr Sanderson to inform him that the Minister, having considered the options presented in his letter, wished to advise that Mrs Tavares would continue to require a work permit in order to be gainfully employed in Bermuda.

18. On 3rd March 2017, Mr and Mrs Tavares applied for leave to issue an originating motion seeking judicial review of:

    (1) The refusal of the First Respondent, the Minister, to allow Mrs Tavares to work in Bermuda without restrictions; and

    (2) The failure or refusal of the Minister or the Second Respondent, the Governor, to consider Mr and Mrs Tavares' applications for indefinite residency, and Mr Tavares' application for naturalisation.

19. If leave were granted, Mr and Mrs Tavares intended to seek the following orders, together with costs:

    (1) An order quashing the Minister's refusal to allow Mrs Tavares to work in Bermuda without restrictions;

(2) An order mandating the Minister to reconsider Mrs Tavares' [application for] permission to work in Bermuda within a period to be fixed by the Court;

(3) An order mandating the Minister and the Governor to determine Mr and Mrs Tavares' applications for indefinite residency/naturalisation within a period to be fixed by the Court;

(4) An order declaring that sections 25, 27A and 60 of the 1956 Act unlawfully discriminate against BOT citizens who are not also Bermudian (and their husbands) contrary to section 5 of the Human Rights Act 1981 ("the 1981 Act") on the grounds of race, place of origin, ethnic or national origins, and declaring that those sections must be read so as to include BOT citizens.

(5) Further or other relief, which, Mr Sanderson has clarified, includes damages.

20. I have dealt with the material parts of sections 25 and 60 of the 1956 Act earlier in this judgment. Section 27A provides that notwithstanding section 25 and without prejudice to anything in section 60, the husband of a wife who possesses Bermudian status shall be allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status, provided that the following conditions are satisfied: (i) his wife must be ordinarily resident, or be domiciled in, Bermuda; (ii) he must not contravene any provisions of part V of the 1956 Act, which is headed "*Regulation of Engagement in Gainful Employment*"; (iii) he must not have a relevant conviction recorded against him, ie one which, in the Minister's opinion, shows moral turpitude on his part; (iv) the Minister must be satisfied that he is a person of good character and previous good conduct; and (v) the Minister must be satisfied that he and his wife are not estranged. The 1956 Act does not contain any parallel provisions regarding the wife of a husband who possesses Bermudian status.

21. On 16th March 2017, I gave Mr and Mrs Tavares leave to seek judicial review on those grounds, pursuant to which on 24th March 2017 Mr and Mrs Tavares issued a notice of motion seeking relief in the terms and on the grounds of their leave application. This is the judgment on their application for judicial review.

Discussion

The refusal of the Minister to allow Mrs Tavares to work in Bermuda without restrictions

Whether the Minister's decision breached the 1981 Act

22. Mr Sanderson submits that the Minister's refusal to allow Mrs Tavares to work in Bermuda without restrictions, which was communicated to him in the CIO's letter of 15th December 2016, constitutes unlawful direct discrimination on grounds of place of origin or national origins in the supply of services by a public authority contrary to section 5(1) of the 1981 Act. Although Mr Sanderson sought to persuade me otherwise, the Minister's decision did not address whether Mrs Tavares has a right to reside in Bermuda without restrictions. Consequently that question does not fall to be considered under this ground.

23. Section 5(1) of the 1981 Act provides in material part:

"***Provision of goods, facilities and services***

(1) No person shall discriminate against any other person due to age or in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner

and on the like terms in and on which the former normally makes them available to other members of the public.

(2) The facilities and services referred to in subsection (1) include, but are not limited to the following namely—

. . . . .

the services of any business, profession or trade or local or other public authority."

24. "*Discrimination*" is defined at section 2 of the 1981 Act, which provides in material part:

"*(2) For the purposes of this Act a person shall be deemed to discriminate against another person—*

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—

. . . . .

(i) of his race, place of origin, colour, or ethnic or national origins;

. . . . .

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—

(i) which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions of the person to whom it is applied; and

(iii) which operates to the detriment of that other person because he cannot comply with it."

25. In Thompson v Bermuda Dental Board [2008] UKPC 33 Lord Neuberger, giving the judgment of the Board, stated at para 26:

> "*In their Lordships' view, discriminating against someone because he or she is not Bermudian, or indeed on grounds of nationality or citizenship, is discrimination on grounds of 'race, place of origin, colour, or ethnic or national origins' within section 2(2)(a)(i) of the 1981 Act. A person's 'national origins' under the 1981 Act would include, but not be limited to, his present nationality or citizenship, and (where it differs) his past nationality or citizenship.*"

26. The present case is concerned with allegations of direct discrimination, as prohibited by section 2(2)(a) of the 1981 Act, and not indirect discrimination, as prohibited by section 2(2)(b) of the 1981 Act. However I have set out section 2(2)(b) because it assists in interpreting section 2(2)(a). Section 2(2)(b) provides in express terms that conduct which would otherwise be deemed discriminatory shall not be deemed discriminatory if it can be shown to be justifiable. There is no such proviso in section 2(2)(a). From this I infer that the legislature did not intend that discrimination, in order to contravene section 2(2)(a), must be unjustifiable.

27. In this respect the approach of the 1981 Act to direct discrimination differs from the approach of the European Convention on Human Rights ("the Convention"). Article 14 of the Convention prohibits discrimination in absolute terms:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"

28. However the caselaw of the European Court of Human Rights ("the European Court") has established that under the Convention the concept of unjustifiability is built into the definition of discrimination: if discrimination is justifiable then it is not discrimination. See Bah v United Kingdom [2012] EHRR 21 at para 36:

"*… in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 175, ECHR 2007-IV, and Burden, cited above, § 60). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.*"

29. I accept that in Bermuda there must be a difference in the treatment of persons in analogous, or relevantly similar, situations in order for an issue of direct discrimination contrary to section 2(2)(a) of the 1981 Act to arise. However the question of objective and reasonable justification is not applicable. As I stated in A and B v Director of Child and Family Services [2015] Bda LR 13 SC at para 13, the Court is simply required to engage in a factual inquiry as to whether discrimination on a prohibited ground has taken place. If it has, then that is an end of the matter: the discrimination was unlawful. Ms Lauren Sadler-Best, who appeared for the Respondents, expressed concern about the breadth of section 2(2)(a) if interpreted in this way. But the Court must take the section as it finds it.

30. The 1981 Act applies to acts done by the Crown in all its emanations. Section 31(1) provides:

"***Application to Crown etc***

(1) This Act applies—

(a) to an act done by a person in the course of service of the Crown—

(i) in a civil capacity in respect of the Government of Bermuda; or

(ii) in a military capacity in Bermuda; or

(b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office,

as it applies to an act done by a private person."

31. Mr Sanderson relies upon sections 29 and 30B of the 1981 Act as requiring the 1956 Act to be read subject to the 1981 Act:

"***Power of Supreme Court***

29 (1) In any proceedings before the Supreme Court under this Act or otherwise it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act.

(2) The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions.

Primacy of this Act

30B (1) Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.

(2) Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."

32. The relationship of the 1981 Act to the 1956 Act was considered by Kawaley CJ in Bermuda Bread Company v Minister of Home Affairs [2015] Bda LR 106 SC. His findings included that the 1981 Act: (i) applies to acts done by Government Ministers (para 32); (ii) prohibits discrimination in the provision of immigration services (para 59); and (iii) by reason of the doctrine of implied amendment, has primacy over the 1956 Act, notwithstanding section 8(1) of the 1956 Act, which provides that except as otherwise expressly provided, where the provisions of the 1956 Act are in conflict with any provision of any other Act, the 1956 Act shall prevail (para 68).

33. The Bermuda Bred case concerned the treatment of same sex partners under the 1956 Act. It was applied by Kawaley CJ in Griffiths v Minister of Home Affairs [2016] SC (Bda) 62 (Civ) (7th June 2016), which concerned the treatment of husbands under the 1956 Act. I shall apply it in the instant case.

34. Mr Sanderson submits that the refusal of the Minister to allow Mrs Tavares to work in Bermuda without restrictions discriminates against her on grounds of place of origin or national origins in that a person possessing Bermudian status can work in Bermuda without restrictions. He relies upon the statement of the Board in Thompson v Bermuda Dental Board that discriminating against someone because he or she is not Bermudian, which I take to mean does not have Bermudian status, is discriminating against them on a prohibited ground. In asserting that persons possessing Bermudian status are in an analogous or relevantly similar situation to Mrs Tavares he relies upon the fact that Mrs Tavares is a BOT citizen by reason of her birth in Bermuda and is therefore a common law belonger in that Bermuda is the constitutional unit to which her citizenship relates; that Bermuda is her home and she has lived here almost all her life; and that the vast majority of persons possessing Bermudian status are also BOT citizens. I agree.

35. Further, Mr Sanderson submits that the Minister's refusal unlawfully discriminates against Mrs Tavares on the ground of place of origin in that it treats her less favourably than someone at least one of whose parents possessed Bermudian status at the time of his birth. I agree with this submission too. In my judgment, treating someone less favourably than others on grounds of place of origin includes treating that person less favourably because of their parents' place of origin. In so holding, I apply to the 1981 Act reasoning similar to that which I applied to the Constitution in Barbosa at paras 44 – 47, for which I found support in the decision of the Supreme Court of Canada in Benner v Canada (Secretary of State) [1997] 1 SCR 358. Although Barbosa was overturned on appeal, the Court of Appeal did not disturb or criticise my reasoning on this point.

36. I therefore reject Ms Sadler-Best's submission that Mrs Tavares has not been treated differently to other persons in analogous or relevantly similar situations because all other BOT citizens living in Bermuda who do not have Bermudian status (and do not fall within any other exempted category in section 60(1) of the 1956 Act) are also subject to employment restrictions. That, to take an extreme example, was like arguing that the race laws under apartheid did not discriminate against any given black South African because they applied to all black South Africans. It is no answer to a claim that a person is discriminated against to assert that she belongs to a class of persons who are treated no differently than her if that class of persons is also discriminated against on the same basis as the complainant.

37. I also reject Ms Sadler-Best's submission that the immigration regime under the 1956 Act does not contravene the 1981 Act because it does not contravene the Constitution. That is, with respect, a *non sequitur*. The regimes under the 1981 Act and the Constitution are separate and distinct. The fact that a piece of legislation complies with the one instrument says nothing about whether it also complies with the other. Kawaley CJ rejected the same submission in Griffiths at para 43, for the reasons, with which I respectfully agree, which he set out at paras 39 – 42 of his judgment. I need not repeat them. It is high time that this submission was given a decent burial and I trust that it will not be resurrected in future cases.

38. In the circumstances, I find that, contrary to section 5(1) of the 1981 Act, section 60(1) of the 1956 Act unlawfully discriminates against Mrs Tavares as a BOT citizen who was born in Bermuda but does not have Bermudian status in that it prohibits her while in Bermuda from engaging in any gainful occupation without the specific permission by or on behalf of the Minister. I grant a declaration to that effect.

39. I further declare, pursuant to section 29 of the 1981 Act, that section 60(1) of the 1956 Act is inoperative insofar (but only insofar) as it prohibits BOT citizens for whom Bermuda is the constitutional unit to which their citizenship relates, whether because they were born in Bermuda or for some

other reason, from engaging in any gainful occupation without the specific permission by or on behalf of the Minister.

40. I therefore find that the Minister's refusal to allow Mrs Tavares' application to work in Bermuda without restrictions discriminates against her contrary to section 5(1) of the 1981 Act. I quash the Minister's decision and, pursuant to Order 53, rule 9(4) of the Rules of the Supreme Court 1985, remit the matter to the Minister with a direction to reconsider the application and reach a decision in accordance with the findings of the Court, ie a direction that the Minister allow the application.

Whether decision was unreasonable and/or disproportionate

41. Mr Sanderson made an alternative submission that, in the event that the Minister's refusal to allow Mrs Tavares to work in Bermuda without restrictions did not breach the 1981 Act, it was nonetheless unreasonable and/or disproportionate in light of Bermuda's treaty obligations under the Convention and the International Covenant on Economic, Social and Cultural Rights. As Mr Sanderson has succeeded on his primary submission I need not consider his alternative submission further.

42. However I should like to raise one matter. One of the factors to be taken into account when deciding whether the Minister's decision was unreasonable and/or disproportionate would have been its likely impact upon Mrs Tavares' ability to find suitable employment. But there was no evidence of its likely impact put before the Minister, merely a bald statement in Mr Sanderson's 12th October 2015 letter that Mrs Tavares would like to work but that the requirement to have a work permit placed obstacles in the way of this.

43. Similarly, Mrs Tavares did not put any evidence before the Court of the likely impact of the Minister's decision upon her employment prospects, or any evidence that the Minister should have appreciated what the likely impact would have been. She merely stated that her employment options

had always been very limited, due to the necessity of applying for a work permit, meaning that she could not do any work where there were suitable Bermudian applicants. One might have expected to see evidence that she had applied for various jobs but been turned down because of the requirement of a work permit, but no such evidence was adduced.

44. When temporarily free of employment restrictions, Mrs Tavares obtained a job working in a café. It is well known that many employees in the catering industry are working in Bermuda on a permit. Thus it is not self-evident that the Minister's refusal to allow her to work in Bermuda free of restrictions has in fact prevented her from getting a job in this, her chosen field.

45. In short, there was no material before the Court from which I could: (i) ascertain the likely impact of the Minister's decision upon Mrs Tavares' employment prospects, or (ii) properly conclude that the Minister knew or ought to have known of its likely impact. In the premises, and irrespective of Bermuda's treaty obligations, it is difficult to see how, had it been necessary to determine the issue, I could properly have concluded that the Minister's decision was unreasonable or disproportionate.

The failure or refusal of the Minister or the Governor to consider Mr and Mrs Tavares' applications for indefinite residency, and Mr Tavares' application for naturalisation

46. Mr Sanderson's letter of 12th October 2015 contained applications from Mr Tavares for naturalisation and indefinite residency and an application from Mrs Tavares for indefinite residency and indefinite permission to work.

47. As noted above, it was not until one week before trial that the CIO notified Mr Tavares that his applications had been dismissed. The CIO did not appear to appreciate that the 12th October 2015 letter contained any applications on behalf of Mrs Tavares. Her application for indefinite permission to work was repeated in Mr Sanderson's letter of 29th November 2016 and rejected in the CIO's letter of 15th December 2016. It is not

material to this particular ground for seeking judicial review. She has still not been notified of the outcome of her application for indefinite leave to reside.

48. Mr Sanderson submits that the delay on the part of the authorities in considering Mr and Mrs Tavares' applications for indefinite leave to reside and Mr Tavares' application for naturalisation was unreasonable. He relied upon Oliviera v Attorney General of Antigua and Barbuda [2016] 4 LRC 691; [2016] UKPC 24. The case concerned delay in the determination of the appellant's application for citizenship. Sir Bernard Rix, giving the judgment of the Board, held at para 40 that the application must be determined within a reasonable time. On the particular facts of that case, the Board held at para 42 that a period of one year from application to determination was in general the outside limit of a reasonable time, and that delay beyond that time, absent special considerations, was likely to be unlawful.

49. I am satisfied that an application relating to a person's immigration status, such as an application for indefinite leave to reside or an application for naturalisation, should be determined within a reasonable time and that failure to do so is likely to be unlawful. I appreciate that Bermuda is not Antigua. But I have heard no evidence to suggest that absent exceptional circumstances it would not be reasonably practicable to determine such an application within 12 months.

50. In Mr Tavares' case, it took 20 months (from mid-October 2015 to mid-June 2017) to determine his applications for indefinite leave to reside and naturalisation. If he had not brought this action it is probable that he would still be awaiting notification of their outcome. In Mrs Tavares' case, as at the date of the hearing her application for indefinite leave to reside had yet to be determined after 20 months. The Respondents have adduced nothing approaching an acceptable justification for these delays. The delays were in my judgment unlawful. I shall make a declaration to that effect.

51. Going forwards, I direct that the Minister should advise Mrs Tavares of the outcome of her application for indefinite leave to reside within 28 days of the date of this judgment. Should the Minister disallow the application, section 25(2) of the 1956 Act provides a right of appeal to the Immigration Appeal Tribunal ("IAT"). However, the basis of an appeal by Mrs Tavares against an adverse decision would be that section 25(1) of the 1956 Act unlawfully discriminates against her as a BOT citizen who was born in Bermuda on grounds of place of origin or national origins. Under section 29 of the 1981 Act only the Supreme Court (or higher) has jurisdiction to make such a finding. Her argument in support of this submission would be *mutatis mutandis* much the same as her successful argument in relation to the discriminatory effect of section 60(1) of the 1956 Act.

52. That is also the basis on which Mr Tavares seeks to challenge the Minister's decision refusing his application for indefinite leave to reside. In addition, both Mr and Mrs Tavares submit that section 27A of the 1956 Act unlawfully discriminates against them on grounds of place of origin or ethnic or national origins contrary to section 2(2)(a)(i). This is on the basis that section 27A provides for husbands of Bermudians to be treated as special status husbands, but makes no corresponding provision for husbands of BOT citizens.

53. In the premises it would be sensible to await the outcome of Mrs Tavares' application for indefinite leave to reside. If her application is unsuccessful, it would be sensible to deal with her challenge to the Minister's decision, should she wish to mount one, and Mr Tavares' challenge, at the same time. As the IAT would not have jurisdiction to deal with the points which they would wish to raise, but this Court would, I shall allow Mr Tavares, and Mrs Tavares if so advised once the outcome of her application is known, to amend the Notice of Motion to deal with the grant of indefinite leave to reside. Both the Applicants and the Respondents should have the opportunity to put in further submissions on that point if they so wish. Given its similarity to the section 60(1) point, I should be willing to determine it on the papers, although if any party wishes to make oral

submissions on the point they shall have the opportunity to do so. However, Mr Sanderson's submission to the contrary notwithstanding, the point does not properly fall for determination in the present judgment.

54. Depending on the outcome of Mr Tavares' challenge to the Minister's decision on indefinite leave to reside, it will be open to him to renew his application to become a naturalised BOT citizen.

55. I shall determine the question of costs and damages once the Court, if required to do so, has resolved the question of indefinite leave to reside.

56. I invite the parties to agree directions for the future conduct of this matter, as to which, I shall hear them if need be.

DATED this 16th day of August, 2017

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Hellman J