IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2017: No. 14

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND THE BERMUDA CONSTITUTION

AND THE HUMAN RIGHTS ACT 1981

(1) THE COUNCIL OF AME CHURCHES

(2) THE REVEREND NICHOLAS GENEVIEVE-TWEED

Applicants

-v-

THE MINISTER OF HOME AFFAIRS

Respondent

JUDGMENT
(in Court)

Judicial review-challenge to legality of refusal of application for work permit and advertising waiver-function of Minister and Board of Immigration under Bermuda Immigration and Protection Act 1956 sections 13, 61-bias-procedural impropriety-right to be heard

Date of hearing: May 29-30, 2017
Date of Judgment: June 5, 2017

Mr Delroy Duncan, Trott & Duncan Limited, for the Applicant
Ms Lauren Sadler-Best, Attorney-General's Chambers, for the Respondent

Introductory

1. The Applicants' Skeleton Argument colourfully framed the central issue in the present case as follows. Mr Duncan submitted:

> "*No modern administrative court would have let Henry II determine any rights of Thomas a Beckett after he asked who would rid him of that turbulent priest. So, too, should openly expressed bias, bias expressed even in the House of Assembly disqualify the Minister of Home Affairs…having anything to do with determining the rights of Rev Genevieve-Tweed…*"

2. The full range of the issues raised by the present proceedings may best be viewed through the relief sought in the January 17, 2017 Notice of Application for Leave to Apply for Judicial Review, which prayed for the following substantive relief:

> (1) *An order of certiorari, quashing the decision refusing to allow the AME Church a work permit to employ the Rev Tweed.*
>
> (2) *An order of certiorari, quashing the direction that the Rev Tweed settle his affairs and leave Bermuda by 19 January 2017.*
>
> (3) *A declaration that Rev Tweed belongs to Bermuda within Chapter 1, Section 11 of the Bermuda Constitution.*
>
> (4) *A declaration that section 27A of the 1956 Act is inoperative to the extent that it imposes conditions upon Rev Tweed, as a husband, which are not imposed on his female counterparts is inconsistent with the Human Rights Act 1981 ("THE HRA") and, accordingly, a declaration that Rev Tweed complies with S.27 of the 1956 Act* [and] *is entitled to remain in Bermuda."*
>
> (5) *An order of mandamus, that the Immigration Board consider de novo the AME Church's work permit application for the Rev Tweed.*"

3. The two declarations sought were dealt with in the following way:

> (a) the application for a declaration that Rev Tweed belonged to Bermuda was not pursued;

(b) at the end of the hearing a declaration (pursuant to sections 29 and 30B of the Human Rights Act 1981) was granted to the effect that section 27A of the Bermuda Immigration and Protection Act1956 ("the Act") is inoperative to the extent that it imposes conditions on Rev Tweed as a foreign male spouse of a Bermudian which are not imposed on foreign female spouse of a Bermudian under section 27. This point was conceded as the Respondent sensibly did not attempt to persuade the Court to depart from its decision to grant a substantially similar declaration in *Griffiths and Griffiths-v-Minister of Home Affairs and Others* [2016] SC (Bda) 62 Civ (7 June 2016), a decision which the Minister had not appealed[1].

4. As it is not yet certain whether or not the 2nd Applicant will demonstrate that he qualifies for spouse's employment rights under section 27 of the Act, and those rights are residential rights only in any event[2], it is still necessary to decide the other aspects of the present application. The central complaint is that the refusal of the work permit application and the subsequent request that the 2nd Applicant leave Bermuda were tainted by actual or apparent bias and/or procedural unfairness.

Umbrella legal principles

5. The purpose of judicial review proceedings is not for the Court to substitute its view on the merits of an administrative decision but to ensure that statutory powers are exercised in a legally valid manner in the interests of promoting good administration. In *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 2 All ER

[1] Griffiths followed the earlier similar decision made in favour of a foreign same-sex partner of a Bermudian in *Bermuda Bred Company-v-Minister of Home Affairs* [2015] Bda LR 106.
[2] Section 27 provides:

"*27. Notwithstanding anything in section 25, and without prejudice to anything in section 60 (which section imposes restrictions on the engagement of such persons in gainful occupation) the wife and dependent children under eighteen years of age of a person who possesses Bermudian status shall be allowed to land and to remain or reside in Bermuda in connection with the residence therein of the person who possesses Bermudian status as if such wife or child were deemed to possess Bermudian status if all the following conditions are fulfilled—*

(a) the wife or dependent children must not land, or remain or reside in Bermuda, while the husband or father, as the case may be, is not ordinarily resident, or is not domiciled, in Bermuda;

(b) the wife must not commence to live apart from her husband under a decree of a competent court or under a deed of separation; and

(c) *the wife and dependent children must not, while residing in Bermuda, contravene any provision of Part V (which Part relates to engagement in gainful occupation), but if any of such conditions are not fulfilled, then the landing of such wife and dependent children, or their residence in Bermuda, shall be deemed to become unlawful except with the specific permission of the Minister.*"

257 at 266, Sir John Donaldson MR in a frequently quoted judgment articulated the first of two umbrella principles which this Court must always keep in mind:

> "*We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi-judicial principles. We have to approach our duties with a proper awareness of the needs of public administration….*
>
> *Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned….*"

6. The second umbrella principle upon which the merits of the application turn are best reflected in a judicial statement upon which Mrs Sadler-Best for the Minister relied. Lord Bridge famously observed in *Lloyd-v-McMahon* [1987] UKHL 5 (at page 10); [1987] AC 625:

> "*My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.*"

The statutory context

<u>The Minister and the Board</u>

7. Since the Minister and the Board of Immigration were both involved to some extent in the decision-making process, the starting point is to understand what their statutory functions are. The relevant provisions are the following:

- **Section 2(1)**: "*'Minister' means the Minister responsible for immigration, or such other Minister to whom responsibilities under this Act have been assigned;*"

- **Section 12**: constitutes a Board of Immigration which is appointed by the Governor, who is required to appoint a Chairman and Deputy Chairman. The Minister can, in his/her discretion, preside over Board meetings;

- Section 13: this section defines the functional relationship between the Minister and the Board:

> *"**Minister may consult with or delegate functions to Board of Immigration***
> *13. In the exercise of his powers and duties in relation to immigration affairs and related matters, the Minister may—*
>
> *(a) consult with, or take the advice of, the Board from time to time as he shall think fit but notwithstanding that the Minister has consulted, or taken the advice of, the Board on any matter he may act in his discretion on such matter; and*
>
> *(b) delegate to the Board such functions or class of functions within his responsibilities as he may by notice in the Gazette specify,*
>
> *and, in exercising any such functions delegated under paragraph (b) the Board shall act in accordance with any general or special directions issued by the Minister and shall for all purposes be deemed to be the Minister, but, notwithstanding the foregoing, the Minister shall remain responsible for the manner in which the Board exercises any such function.*" [Emphasis added]

8. It appears that the Minister has not delegated any or any relevant powers to the Board under section 13(b) of the Act and that the involvement of the Board in relation to the present matter was advisory only under section 13(a).

Permission to work

9. Applications for permission to work are primarily governed by section 61 of the Act:

> "***Grant etc. of permission to engage in gainful occupation***
> *61.(1) This section shall have effect in connection with the application of any person to the Minister for the grant to that person of any permission under section 60.*
>
> *(1A) Any such application shall be made on behalf of the applicant by his*

prospective employer who shall be responsible for ensuring that the application is complete and accurate in accordance with Guidelines issued by the Minister for the purposes of this section.

(2)Any such application shall, if so required by the Minister, be made on the prescribed forms.

(3)Without prejudice to anything in section 33 (which section relates to various powers of the Minister with respect to safeguards regarding permission to land or remain or reside in Bermuda) the Minister shall have the like powers with respect to applicants for the grant of permission to engage in gainful occupation; and section 130 (which section relates to the manner of dealing with deposits of sums of money made with the Chief Immigration Officer) shall apply and have effect accordingly.

(4)The Minister, in considering any application for the grant, extension or variation of permission to engage in gainful occupation, shall, subject to any general directions which the Cabinet may from time to time give in respect of the consideration of such applications, take particularly into account—

(a) the character of the applicant and, where relevant, of his or her spouse;

(b) the existing and likely economic situation of Bermuda;

(c) the availability of the services of persons already resident in Bermuda and local companies;

(d) the desirability of giving preference to the spouses of persons possessing Bermudian status;

(e) the protection of local interests; and

(f) generally, the requirements of the community as a whole,

and the Minister shall, in respect of any such application, consult with such public authorities as may, in the circumstances, be appropriate, and shall in particular, in the case of an application for permission to practise any profession in respect of which there is established any statutory body for regulating the matters dealt with by that profession, consult with that body.

(5)Any permission granted to a person by the Minister under section 60—

(a) may be limited in duration to a time specified in the permission; and

(b) may be granted subject to such conditions or limitations as the Minister thinks fit to impose and as are specified in the permission,

and any person who has been granted permission under section 60 shall not engage in any gainful occupation in such manner that there is a failure to comply with any such condition or limitation.

(6) *The Minister may either withhold permission or grant permission subject to any duration, condition or limitation, without assigning any reason for that decision.*

(7) *For the avoidance of doubt, it is hereby declared that a decision of the Minister to withhold permission or grant permission subject to any duration, condition or limitation, is not subject to appeal to the Immigration Appeal Tribunal….*

(8)*The power of the Cabinet under subsection (4) to give general directions to the Minister includes the power to give him a direction that he shall approve, or that he shall reject, applications falling within a particular description specified in the direction; and the Minister shall comply with any such direction notwithstanding anything in subsection (4).*" [Emphasis added]

10. The following initial observations arise in relation to the provisions of section 61:

(1) subsection (1A) contemplates policy guidelines being issued by the Minister in relation to applications for work permits. Subsection (4) contemplates that the Minister may give policy guidance and that the Cabinet may give guidance to the Minister in relation to the factors taken into account when deciding particular classes of work permit application;

(2) by necessary implication advertisements of jobs can be required to ascertain, *inter alia*, if locals are available for a job being sought by a non-Bermudian. The ability to give preference to spouses of Bermudians (subsection (4)(d)), incidentally, can only apply to spouses who do not qualify for spouse's employment rights under section 60 (1)(c) of the Act. Persons with such employment rights do not require permission to work at all;

(3) the Minister is not required to assign reasons for his/her decision nor is a refusal subject to a right of appeal (subsections (6)-(7)). This suggests that a generous discretionary and/or policy jurisdiction is conferred on the Minister in relation to the grant and refusal of work permit applications. This is to be contrasted with the position in relation to revocation or restriction of permission already granted (subsections (7A)-(7D)).

The Policy context

11. The relevant policy rules are fond in the '*Ministry of Home Affairs Department of Immigration Work Permit Policy*' which became effective on March 12 2015 ("the

WP Policy"). The present case raised in my mind the need for clarity in terms of where the boundaries lay between the functions of the Board and the Minister, a clarity which the WP Policy does provide. The WP Policy states in the Introduction: "*The purpose of this document is to provide details about how the Department of Immigration ('the Department') and Board of Immigration ('the Board') administers the Act.*" The Board's role is not clearly explained.

12. There appear to be three main references to the Board. Firstly:

> "***1.4 Appealing a Decision of the Board of Immigration or the Minister***
>
> *Employers have the right to appeal to the Minister following any decision made by the Board or the Minister…The appeal must clearly specify the rationale for reconsideration of the application.*"

13. Paragraph 1.4 does deal with an appeal proper (i.e. an appeal from the Board to the Minister), and a request to the Minister to reconsider his/her own decision. Attaching the "appeal" label to what is in part at least a request for reconsideration by the decision maker of their own decision is somewhat confusing. It is using the word "appeal" in a way which is both inconsistent with the word's natural and ordinary meaning and its general legal meaning as reflected in the concept of an appeal under the Act.

14. The first noteworthy reference to the Board's substantive functions is of particular relevance to the present case. Paragraph 1.16 ("**Waivers of advertising**") provides as follows:

> "*Upon request of the employer and upon payment of the requisite fee, the Board/Minister may waive the requirement to advertise a position where a Short Term or Standard Work Permit is being applied for. A waiver of advertising may be appropriate where:*
>
> - *the person is uniquely qualified for the position; or*
> - *the position would not exist in Bermuda if it were not for the applicant filling the job; or*
> - *the success of the business would be detrimentally affected if the person were to leave the business (detrimentally affected means that jobs of Bermudians, Spouses of Bermudians or PRC holders would be put at risk); or*
> - *the employee is integral and key to income generation for the business by brokering deals or attracting/retaining clients or funds.*
>
> *Each request for a waiver of advertising will be decided upon by its merits. The decision of the Board/Minister may be appealed to the Minister (see section 1.4) upon payment of the requisite fee.*
>
> *Waivers are automatically granted in respect of:*

- *the post of CEO or other Chief Officer;*
- *the post of Resort Hotel General Manager at a hotel with greater than 175 beds;*
- *Periodic, Occasional, New Business, Global and Global Entrepreneur Work Permits;*
- *Permits granted pursuant to sections 7.3, 7.4 or 7.13 (subject to restrictions listed).*

Where an employer demonstrates that it has Bermudians, Spouses of Bermudians or PRC holders training abroad to gain international experience with the plan upon completion of a specified period not exceeding three (3) years to return to Bermuda, an employer may apply for an automatic waiver of advertising for guest workers that fall outside the aforementioned categories equal to the number of Bermudians, Spouses of Bermudians or PRC holders being trained abroad for the same length of time in similar positions of employment. Such proof shall include the identity of the selected Bermudians, Spouses of Bermudians or PRC holders training abroad as well as their respective statements of employment, training program details and company organizational chart. The Department reserves the right to request further information regarding the training of the Bermudians, Spouses of Bermudians or PRC holders." [Emphasis added]

15. The quoted statement of policy on waivers of advertising is, understandably, directed at business employers who presumably comprise the majority of work permit applicants. Accordingly the only broad statement of principle which clearly applies to the present application by a church is the underlined statement above: "*Each request for a waiver of advertising will be decided upon by its merits.*" Meanwhile, it is left unclear whether the Board or the Minister will make the operative decision: "*The decision of the Board/Minister may be appealed to the Minister (see section 1.4)*".

16. A third statement as to the Board's functions comes at the very end of the document:

"***14. Can I appeal to the Minister in respect of work permit decisions?***

Most work permit applications are decided upon by the Board as delegated by the Minister. Appeals on those decisions should be made to the Minister with the appropriate fee. Appeal must be submitted in writing to the attention of the Chief Immigration Officer." [Emphasis added]

17. This states what to my mind ought to be the position to avoid the Minister being embroiled in controversy over an individual work permit decision, a matter which is considered further below. In my judgment the failure of WP Policy to accurately reflect the legal functions which the Minister and the Board are performing is, whenever contentious decisions have to be made, a recipe for potential administrative law muddle and confusion which does a disservice to all involved in the work permit process. While the Act does not mandate that the Minister should delegate any functions at all to the Board, it clearly envisages that the Minister will wish to utilise

the delegation power which is conferred by section 13(b). The sort of policy matters which the Act explicitly envisages the Minister will be concerned with are:

(a) as regards the Board exercising delegated functions under section 13, "*general or special directions issued by the Minister*" (e.g. as set out in a policy statement);

(b) as regards work permit applications specifically, formulating work permit application guidelines (e.g. the WP Policy) under section 61(1A) and "*any general directions which the Cabinet may from time to time give*" under section 61(4) of the Act.

The scheme of the Act and the implied legislative intent that mundane matters should be delegated to the Board by the Minister

18. Mr Duncan persuasively argued that decisions relating to an individual work permit application should be a neutral non-political decision. However, Mrs Sadler-Best was bound to concede that the only way in which delegation of the Minister's functions could occur was by notice published in the Gazette under section 13(b) of the Act. No such delegation had in fact occurred, so the Minister was in legal terms making all work permit decisions and the Board, which the WP Policy contemplates will be actually making most decisions substantively, is only in legal terms performing an advisory function.

19. A Minister of Government, in my judgment, should be protected from deciding such mundane matters as whether an individual work permit applicant should be permitted to work while their application is being processed, and whether (under a policy which actually contemplates advertising waivers being granted) an employer should be granted a waiver or not. The same applies to the merits of an individual work permit application. The Governor in appointing persons to the Board must be deemed to be mindful of the fact that they will not simply be required to advise the Minister under section 13(a), but also (potentially at least) to exercise delegated functions under section 13(b) as well.

20. The fact that section 13 contemplates that even where delegation occurs the Minister "*shall remain responsible for the manner in which the Board exercises any such function*" merely means that any challenge to the legality of any decision made by the Board in relation to a delegated matter should not be brought against the Board which is not intended to be amenable to legal action. In my judgment the apparent failure to deploy altogether the delegation power which the Act expressly contemplates will be used is difficult to justify in good administration terms. In fairness, the WP Policy itself explicitly contemplates the desirability of such delegation occurring; the only problem is an apparent failure to take the formal legal steps necessary to delegate substantive decision-making authority to the Board.

21. The present case illustrates the folly of the apparently longstanding tradition of Ministers retaining the legal power to substantively decide individual work permit

applications. No doubt in the overwhelming majority of routine cases Ministers act on the advice of the Board. The Constitution contemplates that public authorities will act without discrimination on the grounds of, *inter alia*, political opinions (section 12). Whenever the Minister has to consider a work permit application in relation to an employer or employee who is a political opponent or outspoken critic, the potential for bias complaints to be made arises. The answer to this problem is not to say that, in effect, the rules of bias do not apply because the Minister has to decide (as counsel for the Minister argued), but rather for the Minister to exercise the delegation power and allow the Board to deal with individual applications. There may well be high-level one-off matters which the Minister must personally decide and cannot necessarily be expected to delegate to the Board. The present application did not appear to me to fall into such a category.

22. The most significant problem the present case highlights, however, is the potential for confusion on the part of the technical officers, work permit applicants, the Board and the Minister, if there is no clear dividing line between cases where the Board is making the substantive decision and where it is not. It is difficult to understand, for instance, why the Policy states that the Board exercises delegated authority in respect of "*most work permit applications*". The problem is not just that no such delegation has apparently ever legally occurred. Is it efficient and fair for the Minister to be able to depart from the usual practice on an ad hoc basis? What is politically seductive or administratively convenient is not necessarily consistent with the interests of good administration. As a matter of current administrative practice, the position appears to be that that the Board (despite no formal legal delegation) makes the substantive decision in most cases but that "*once there is a situation that requires a waiver or deviation of any kind from the normal policy, the Minister's approval is required*" (First Ming, paragraph 15). With respect, such an approach, literally applied, would reduce the Board's role to that of a group of automatons exercising no discretion at all. It would also blur almost to vanishing point the lines demarcating the boundaries between the Minister's high policy functions and the administrative functions of the Board and technical officers.

23. As this case also demonstrates, where the Minister is actually or potentially affected by representations made to her by third parties about an individual application, the applicant must be given an opportunity to meet such matters. This potentially clogs the work permit process by causing unnecessary delays. It may also be viewed as potentially diluting the political process by making the Minister (a) reluctant to listen to the concerns of constituents lest, the integrity of the Immigration process become tainted, and (b) anxious about engaging in frank debate in the House on matters of public importance and interest lest his or her remarks are used to challenge a subsequent work permit decision.

24. While this is of course a matter for the Executive branch of Government to decide upon, from an administrative law standpoint, there appear to be compelling reasons for deploying the valuable power conferred on the Minister by section 13(b) of the Act to delegate decision-making competence to the Board over work permit applications, either generally or certain categories or types of application. This would add valuable administrative and legal clarity to the respective roles of Minister and Board without requiring any significant disruption to the existing administrative operations.

25. The current Minister, of course, had no opportunity to consider these sorts of concerns or potential reforms. Because within weeks of being assigned responsibility for Immigration, she was handed the 'hot potato' of the Council of AME Church's application in relation to Rev Tweed.

The decision-making process

26. The events which I consider most significant to the validity of the impugned decisions are the following uncontroversial matters:

- **March 12, 2015:** the WP Policy comes into force with new advertising waiver rules;
- **September 11, 2015**: Minister Fahy places 'Red Card Alert' on 2nd Applicant's file;
- **November 18, 2015**: Anglican Church receives an advertising waiver for a minister (the Applicants only received information of this and other Church waivers after this Court ordered the disclosure of this information on February 9, 2017 herein);
- **February 2, 2016**: Anglican Church receives an advertising waiver for a minister;
- **March 16, 2016**: Centenary United Methodist Church receives advertising waiver for a minister;
- **May 18, 2016**: Anglican Church receives an advertising waiver for a minister;
- **July 13, 2016**: application by 1st Applicant for permission for 2nd Applicant to continue working while his work permit application was being processed supported by the fee;
- **July 18, 2016**: work permit renewal application filed;
- **July 19, 2016**: 2nd Applicant's work permit expires. 1st Applicant requests waiver of advertising requirement. Chief Immigration Officer ("CIO") advises 1st Applicant that the Minister has "*directed that the work permit application go through the normal channels; i.e. via the Immigration Board*";
- **July 20, 2016**: Minister grants permission to continue working while application is being processed, accepting the advice of the CIO, having stated

in an email to the CIO on the previous day: "*My gut says no but my heart may soften*";

- **July 29, 2016**: Minister advises CIO that she has had "*recent conversations with senior members of the denomination, the pulpit that is occupied by incumbent Rev. Tweed is the prize to which many local pastors aspire. It is my contention that the Bishop's appointment must not be made in isolation of the legitimate expectation of Bermudians to elevate to that position. As such, the position must be advertised and any applicants must be fairly considered*". In addition Minister raises concerns on points of detail relating to the 2nd Applicant's file and the Red Card Alert;

- **August 1, 2016**: CIO advises 1st Applicant that Minister has refused the application for a waiver of the advertising requirement, but not that this is based on conversations with "*senior members of the denomination*" (information only disclosed pursuant this Court's Order herein dated February 9, 2017. The 1st Applicant responds that the application is before the Board which should be permitted to adjudicate the matter;

- **August 22, 2016**: Minister still has file and seeks answers from technical officers to queries before the file is forwarded to the Board;

- **September 16, 2016**: Board recommends to Minister that the position should be advertised. CIO advises the 1st Applicant that the "*Board has instructed that the position of pastor be advertised*";

- **September 20, 2016**: 1st Applicant requests Board to "*review this matter de novo*";

- **September 21, 2016**: Board Minutes note that consultation should take place with the Minister before a "decision";

- **October 19, 2016**: Emmanuel Methodist Church receives an advertising waiver in respect of a minister;

- **October 21, 2016**:

  (a) CIO advises 1st Applicant:

  "*Permission has been refused for St. Paul AME Church to employ Rev. Nicholas Genevieve-Tweed as a Pastor, as a result of failing to comply with the Immigration Board's instruction to advertise the Pastor position. The Minister is also not satisfied that the information respecting the marital status of the applicant has been provided to the department on an accurate or consistent basis*", and

(b) CIO requires 2nd Applicant to settle his affairs and leave Bermuda without affording him an opportunity to be heard;

- **October 25, 2016**: 1st Applicant invites the Minister to reconsider her decision;

- **December 28, 2016**: Acting CIO confirms the Minister's refusal of the waiver application on the grounds that "*all other denominations have acted in accordance with the specified conditions*" and confirming the Minister's refusal of the work permit application itself on the basis of a failure to comply with the statutory requirement that "*applications are completed accurately and fully*".

27. I have excluded from consideration as important pieces of evidence the indirect criticisms the Minister made (while she held another portfolio) of the 2nd Applicant in the House of Assembly in December 2014 and June 2016 for two main reasons. Firstly, I accept Ms Sadler-Best's submission that what was said in December 2014 was too long ago and that what was said in June 2016 amounted to too little, standing by itself, to support a case for invalidating the impugned decisions on the grounds of actual and/or apparent bias alone in this particular statutory context. It was obvious that the personal and political differences between the Minister and the 2nd Applicant called for heightened scrutiny of the fairness of the decision-making process overall.

28. Secondly, and in large part as a result of information the Applicants only obtained as a result of discovery in the present proceedings, there are far more clear-cut and straightforward procedural errors which occurred which it make it unnecessary to analyse in any detail the more complicated apparent bias argument.

Findings: procedural impropriety

29. In my judgment it requires little analysis of the agreed facts to reach the conclusion that the impugned decisions are liable to be set aside because of procedural impropriety or unfairness. In summary:

(a) the procedure adopted was improper and/or unfair because, without adequate notice to the 1st Applicant, the "usual procedure" reflected in paragraph 14 of the WP Policy which it was represented would be followed was departed from. The Board was never delegated the power to make the relevant decisions and in fact only acted in legal terms in an advisory capacity. Even the initial decision letter of September 14, 2016 gave the distinct impression that the Board has "instructed" that the post be advertised when in fact the Board's own Minutes reflect a recommendation to the Minister. The 1st Applicant was clearly anxious about Ministerial involvement because of the obvious concerns about the Minister's personal and political differences with the 2nd Applicant. It was incorrectly misled into believing that the Board was making the substantive decision. It is not necessary to identify what specific prejudice flowed from the procedure

adopted in circumstances where the 1st Applicant was so seriously misled about the procedure which was being applied to its application. One notable example of indirect prejudice (which is probably enough by itself to justify setting aside the impugned decisions) is that the Minister clearly took into account representations from denomination members which the 1st Applicant was never given an opportunity to meet. It is possible, on the one hand, to view what happened as a breach of a legitimate expectation that the Board would substantively decide. But it is far simpler to find that what occurred in this particular case was significantly unfair. Mr Duncan relied upon the following extracts from '*De Smith's Judicial Review*' 7th edition (paragraphs 12-039-12-040) to support this aspect of the claim (Ground 4):

> "*There is surely merit in encouraging good administration which requires decision-makers to bear the normal consequences of their representations. But is this rationale based less upon the existence of a legitimate expectation than upon a general expectation of fairness, good governance, or a consistency in public administration? ...Clearly there should be an expectation that public officials will implement their own policies, but the use of the term 'expectation' in that context may not add anything to these general public law duties and indeed may dilute their essence…there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness…*";

(b) the procedure adopted was improper or unfair because the Minister dismissed the work permit application altogether based on non-compliance with the advertising requirements and administrative defects which the 1st Applicant was never given an adequate opportunity to address. Ground 5 (paragraph 9.6.1) complained that the "*reasons given by the Minister as to an incomplete form were a sham and or the result of finding a pretext, any pretext, on which to refuse the work permit application*." As I pointed out at the directions stage and repeated throughout the substantive hearing, the procedural error which occurred was far more basic than this perhaps understandably somewhat strident complaint. The application was filed on the clear understanding that it would not be considered on its merits until after either (1) an advertising waiver had been granted, or (2) if the waiver was refused, the advertisement requirement had been complied with. In the same letter of December 28, 2016, the 1st Applicant was advised both that (1) the waiver application was refused, and (2) the application was being dismissed, primarily because the advertising requirements had not been complied with and additionally because of defects with the application which the Applicants had not yet been asked to address. Elementary notions of fairness required that the 1st Applicant, having been notified that the last word was that the post had to be advertised, should be afforded an opportunity to comply with the advertising requirement and, also, to address any concerns about the completeness of the application;

(c) the procedure adopted was also improper or unfair because, as was also complained of under Ground 5 (paragraph 9.6.2), a "*failure to appreciate that a discretion might be exercised is unlawful in public law decisions*". The December 28, 2016 letter clearly demonstrates that the advertising waiver was refused on the basis that "*every denomination has complied with this requirement since the new policy was put into effect*". The undisputed evidence by the time of the hearing revealed that in fact since the WP Policy came into effect in March 2015, waivers of advertising had been granted to churches in respect of ministers on five occasions, one on October 19, 2016. Most surprisingly, this last waiver was granted only two days before the initial October 21, 2016 letter advising the 1st Applicant that the application was being refused outright because of a failure to comply with the advertising instruction of the Board. What the circumstances were in those five other cases was not addressed in evidence. The circumstances may well have justified a different approach. What was fundamentally unfair is that the Minister refused the 1st Applicant's application on a basis which was factually and legally wrong. In factual terms, the WP Policy rules on advertising waivers are not expressed in inflexible terms. The Policy explicitly states each "*request will be decided on its own merits*", and in fact other churches had been granted waivers. The Policy therefore conferred a discretion to decide waiver requests which might have been exercised in the 1st Applicant's favour. These circumstances required the Minister to explain (without of course disclosing confidential particulars) why the 1st Applicant's position was different to that of other churches who had been granted waivers. Even if the WP Policy could be read as permitting no exceptions for churches, this would not be a lawful policy approach to adopt. The Applicants' counsel established this well recognised principle by reference to *R (MP)-v-Secretary of State for Justice* [2012] EWHC 214 (QB), Lang J held:

> "*186….I am satisfied that an inflexible policy… was routinely applied, which did not permit of any exceptions. This was unlawful*".

Findings: breach of the rules of natural justice in requiring the 2nd Applicant to leave without affording him an opportunity of being heard

30. The decision requiring the 2nd Applicant to settle his affairs and leave Bermuda was arrived at in breach of the rules of natural justice because he was not given an opportunity to make representations before the final decision was made. Although it was conceded in the Respondent's evidence that such an opportunity to be heard ought to have been given, Mrs Sadler-Best bravely sought to convince the Court that this defect had no real significance because, unlike the position in *Re Haynes* [2008] Bda LR 75, the Minister here had not taken into account specific representations about the employee which he needed to meet. The employee being afforded an

opportunity to be heard in his own right about his residential status was clearly important here because he is the father of a Bermudian child and is very arguably entitled to reside in Bermuda as the spouse of a Bermudian, in light of the declaration this Court has now granted. These are matters which were highly relevant to the decision about his residence which his employers could hardly be expected to advance on his behalf. Their concern was his employment status. The opportunity to advance these arguments was as important to the 2nd Applicant as the opportunity to meet unknown allegations made against the former employee in *Re Haynes*.

31. The principle of fairness relied upon in *Re Haynes*, properly understood, was broader than the way in which the principle was factually applied in that case, and was articulated in its wider potential ambit as follows:

> "53. *There may be cases when the Department can deal with both work permit revocation or refusal and right to reside revocation or refusal in the same letter. But, this will usually be where the applicant is personally dealing with the Immigration Department, although copying the applicant with a letter addressed to the employer would probably generally suffice. It may also be appropriate in circumstances where all the Ministry is signifying is that at the end of an existing period of permission the applicant is expected to leave. What fairness requires in such circumstances (assuming section 34[3] is not engaged) will probably be different in cases where the Applicant has very tenuous Bermudian ties as opposed to cases where the connecting factors to Bermuda are stronger, as in the present case.*"

Findings: actual bias/apparent bias

32. In light of the findings I have recorded above in relation to procedural impropriety and breach of the rules of natural justice grounds of the present application, there is no need to make detailed findings on the bias complaints. In summary:

(a) the actual bias complaint was not made out. The Minister clearly attempted to deal with the work permit application in a principled manner. Despite the obvious and well-known tensions between herself and the 2nd Applicant, which she had frankly discussed in Parliament, she explicitly attempted to avoid actual bias. Mrs Sadler-Best rightly pointed to the early instance of her 'sleeping on' the request for permission to work while the application was processed, and not acting on her initial inclination to refuse it. Her statement "*My gut says no but my heart may soften*", apart from omitting any reference to her "head", in many ways reflects a judicial approach to a difficult decision. Judges ought ultimately to be governed primarily by cold logic and their heads, but are also in reality influenced by gut instinct and emotion as well;

[3] Section 34 deals with revocation of permission to land or reside.

(b) I make no finding on the more arguable apparent bias complaint. Analysing this complaint has served to demonstrate a small but significant institutional administrative law flaw, wholly unconnected with the personalities and politics involved in this particular case. The gap between what the WP Policy states is the usual practice and the legal reality (which only became clear in the course of the hearing) that no formal legal delegation has actually occurred, together with the resultant lack of clarity on the legal boundaries between the roles played, was the real root cause of the manifest unfairness which invalidates the advertising waiver and work permit refusal decisions. The importance of addressing this somewhat dry and technical but important issue in terms of promoting the interests of good public administration (this Court's primary concern) might also be overshadowed by an extensive and unnecessary foray into the more colourful and somewhat theatrical apparent bias issue;

(c) the critique of the Minister's seemingly over-zealous interest in the 2nd Applicant's file must also be looked at in its proper context. It was her predecessor, Minister Fay, whose direction resulted in the attachment of a red card alert to the file. On September 11, 2015, the former Minister directed: "*send all work permit applications for Rev. Nicholas Genevieve Tweed to Minister Fahy for review and decision.*" However, the CIO explained that the reason for the "red card warning" was merely two missing pieces of information which technical officers had noticed on the last work permit application form: (1) a legal address outside Bermuda; and (2) marital status. These were hardly matters of state which one would expect a Government Minister to be concerned about. Be that as it may, the important fact is that the current Minister in deciding that her personal involvement was required in the present work permit application, which was made shortly after she assumed responsibility for her portfolio, was merely respecting the judgment of her Ministerial predecessor that Ministerial involvement was not only appropriate, but required;

(d) it is unclear why the Minister was so adamant that the 1st Applicant was to be treated the same as all the other churches whereas it seems that they were not. In my judgment she should be given the benefit of the doubt. One possible explanation is that four[4] of the five waivers which were received by other churches after March 2015 were granted before the present Minister assumed her portfolio. As far as the October 19, 2016 waiver is concerned, it is entirely possible that this matter was dealt with by the Board in accordance with a practice of which the Board and the previous Minister were aware and which all parties concerned regarded as uncontentious. On that basis the application would not, according the CIO's evidence, have involved a departure from existing policy and would substantively (in fact if not in law) have been dealt with by the Board. It beggars belief that the Minister would have been

[4] The waiver granted in May was either granted before or very shortly after she became the Minister.

aware of such waivers and made "*One Set of Rules*" the title of her Press Conference statement on December 29, 2016.

Conclusion

33. The legal and policy basis on which work permit applications are dealt with would benefit from some narrow and focussed fine-tuning even though there is no cause for alarm about how the system works in practice in the overwhelming majority of uncontroversial cases. The WP Policy states that "*most work permit applications are decided upon by the Board as delegated by the Minister*". In fact, it was conceded in the course of the present proceedings, no such delegation (section 13(b) of the Act requires a gazetted notice to this effect) has occurred. The interests of good public administration in my judgment require the delegation power to be exercised to give the Board full legal competence to adjudicate politically neutral decisions on ordinary individual work permit applications. It is obvious that the informal delegation which prevails allows the Board to effectively decide most routine applications. Whether or not delegation should occur is ultimately a political question which, seemingly, generations of politicians have answered in favour of retaining political control rather than delegating it. Nevertheless, the delegation issue aside, it is unsatisfactory that the published WP Policy misrepresents the true legal position and that:

    (a) the Board has no legal authority to make substantive decisions on work permit applications; and

    (b) even if as a matter of practice the Board is the real decision-maker in most cases, in every case the Minister has the legal right to assume full command and control of an application, contrary to the legitimate expectations of applicants based on the wording of paragraph 14 of the WP Policy[5].

34. The Minister's involvement in the application process from the outset was not based on own her own idiosyncratic desire to "interfere", but because her predecessor had directed that any future work permit applications in relation to the 2nd Applicant should be decided by the Minister. Subsequently the 1st Applicant was expressly told that its application was going to be considered by the Board. In fact the Board only acted in an advisory capacity and the Minister made the substantive decisions. This legal and factual confusion infected the entire process which culminated in the Minister refusing the applications for an advertising waiver and a work permit without the work permit application being considered on its merits. This institutional bug caused procedural irregularity and unfairness which obliges this Court to grant an Order of certiorari quashing the Minister's decisions to refuse the advertising waiver and the work permit application and remitting the matter to the Minister for reconsideration. Subject to hearing counsel, I would be inclined to merely indicate

[5] The Policy which governed the present case came into force on April 15, 2015. Paragraph 14 of the March 2017 Work Permit Policy is unchanged from the earlier document.

(rather than to formally order) that it would clearly be desirable if in relation to any reconsideration, the Minister acted on the advice of the Board.

35. The Minister also decided that the 2nd Applicant should settle his affairs and leave Bermuda. This decision ought not to have been made without first allowing him to make representations to the Minister about his personal residential connections with Bermuda. Those connections are not insignificant as he is the father of a Bermudian child and the foreign husband of a Bermudian wife, albeit living part from her. On May 30, 2017 at the end of the hearing, the Minister was unable to oppose my granting a declaration under section 29 of the Human Rights Act 1981 that, in effect, the 2nd Applicant was potentially able to claim under section 27A of the Act residential rights in Bermuda on the same terms as the foreign wife of a Bermudian male under section 27 of the Act. The decision that 2nd Applicant must settle his affairs and leave must also be quashed and remitted for reconsideration on the same basis as the work permit decision.

36. I will hear counsel as to the terms of the final Order and as to costs.

Dated this 5th day of June 2017 _____
IAN RC KAWALEY CJ