



IN THE MATTER OF THE HUMAN RIGHTS ACT 1981
BEFORE THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

[REDACTED]

Complainant

-v-

THE MINISTER FOR ECONOMY AND LABOUR

Respondent

DECISION

Quorum: Ms. Fiona Badá, Chair
Ms. Elaine Butterfield, Panel Member
Mr. Chris Cunningham, Panel Member

Counsel: Mr. Peter Sanderson, for the Complainant
Ms. Lauren Sadler-Best, for the Respondent

In Attendance: Ms. Alberta Dyer-Tucker, Human Rights Tribunal Clerk
Dr. Dannette Ming, Chief Immigration Officer

UPON the referral of this matter to the Human Rights Tribunal pursuant to Section 18 of the Human Rights Act 1981;

AND UPON Hearing counsel for the Parties via videoconference on March 27, 2024,

IT IS HEREBY DECIDED as follows:

Introduction and Background

1. This matter involves a complaint filed with the Human Rights Commission on November 16, 2021 on behalf of [REDACTED] (**Complainant**) and referred to the Tribunal by letter dated September 5, 2023 in connection with a request made by letter to the Department of Immigration on August 4, 2021, to provide formal confirmation that the Complainant is deemed to "belong" to Bermuda as that term is defined by section 11(5) of the schedule to the Bermuda Constitution Order 1968 (**Constitution**). As a minor, the Complainant is deemed to belong to Bermuda under section 11(5)(d) of the Constitution as a dependent of her parents who are both naturalized British Overseas Territories citizens, Bermuda.

2. By the letter, a request was made that the Department of Immigration (i) provide a letter confirming the Complainant's immigration status and (ii) affix a stamp stating that she belongs to Bermuda in her Canadian passport.
3. On February 9, 2022, the Department of Immigration provided the Complainant with the letter as requested but informed the Complainant that they were unable to affix a stamp in her passport as no such stamp was in existence and, further, that the obtaining and application of such a stamp would have to be approved by the Minister of Economy and Labour (**Respondent** or the **Minister**) who has responsibility for immigration in Bermuda.
4. At the hearing of the Human Rights Tribunal (**Tribunal**) held on January 26, 2024, counsel on behalf of the Respondent submitted that the Tribunal's jurisdiction to hear the complaint should be determined as a preliminary issue on the basis that Section 5 of the Human Rights Act does not apply to the performance of "distinctly governmental functions".
5. This decision is made upon application of the Respondent to address the preliminary issue.

Jurisdiction of the Human Rights Tribunal

6. Section 5(1) of the Human Rights Act provides as follows:

"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."
7. Section 5(2) of the Human Rights Act provides that "facilities and services" include, amongst other things, "services of any business, profession or trade or local or other public authority". The term "public authority" includes government departments, courts and tribunals and any persons whose functions are functions of a public nature.
8. Section 2(2)(a)(i) of the Human Rights Act provides a definition of what amounts to discrimination pertinent to this case stating "[F]or the purposes of this Act a person shall be deemed to discriminate against another person if he treats him less favorably 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, color, or ethnic or national origins". Other headings of discrimination are listed but they are not relevant

in this instance. The Claimant is alleging discrimination on the basis of her place of origin.

9. Section 31 of the Human Rights Act deals with the application of that Act to the Crown and persons acting in the course of service to the Crown. Section 31(1) states that the Human Rights Act applies "*to an act done by a person in the course of service to the Crown in a civil capacity in respect of the Government of Bermuda or in a military capacity in Bermuda or 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.*"
10. The Minister is a person holding "statutory office" under section 31 of the Human Rights Act. In this case, he or she derives his or her powers from the Bermuda Immigration and Protection Act 1956 and is granted specific powers by statute to make decisions regarding persons' immigration status.
11. In *Re Amin* [1983] 2 AC 818, Lord Fraser of Tullybelton provided some helpful guidance on the interpretation of the equivalent of section 31. He stated that:

"it applies only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person. It does not mean that the Act is to apply to any act of any kind done on behalf of the Crown by a person who is holding statutory office. There must be acts... done in the course of formulating or carrying out government policy, which are quite different in kind from any act that would ever be done by a private person, and to which the Act does not apply... These exceptions will no doubt be effective to protect acts which are of a kind that would otherwise be unlawful under the Act. But they do not in my view obviate the necessity for construing [section 31] as applying only to acts which are at least similar to acts that could be done by private persons."
12. This position was confirmed in the case of *Minister of Home Affairs et al v Marco and Paula Tavares* [2018] Bda LR 47 where it was held that the Minister's actions could not be regarded as supplying facilities or services of a public authority within the natural or ordinary meaning of those words. As the Human Rights Act is stated only to apply to those acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person, acts in pursuance of government policy or the performance of distinctly governmental functions do not fall within the ambit of the provision of services.
13. Not all acts carried out on behalf of the Crown therefore qualify. A distinction must be made between the provision of a service and regulatory functions.
14. In *Savjani v Inland Revenue Commissioners* [1981] EWCA Civ J0121-4 it was shown that the functions or services offered by a government department may take more than one form. In that case it was recognised that the functions of Inland Revenue were several: there was a duty to collect the correct amount of revenue as well as a service to the taxpayer through the provision, dissemination, and implementation of

regulations to inform the taxpayer to enable them to satisfy the requirements placed on them.

15. An analogous situation can be said to occur in this instance whereby the Department of Immigration, as a division of the Ministry of Economy and Labour, performs different functions: the assessment and determination of a person's immigration status and a service of providing information through, amongst other things, the confirmation of factual statements to the public.

Nature of the Requested Action

16. A determination must be made as to whether stamping of a passport in the manner requested by the Claimant is a facility or service under section 5 of the Human Rights Act or a governing, regulating or controlling function which would exclude it from the scope of the Human Rights Act.
17. The function of determining or designating a person's immigration status is the responsibility of the Minister and is evidenced by the issue of documentation including certificates of Bermudian status, permanent residency certificates, and work permits. The provision of factual information includes the issue of letters confirming immigration status, and entry and exit stamps in passports.
18. Lord Fraser in *Amin* noted that the that acts must be similar to acts that could be done by private persons and accordingly, in this case, since the entry clearance officer was not providing a service for would-be immigrants but only performing his duty of controlling them, the refusal of a special voucher was not unlawful discrimination within the Act.
19. It has been argued that affixing the stamp in the Complainant's passport is akin to the provision of information as that term is understood and explained in *Savjani* however the policy of affixing a stamp in a passport has no statutory basis and no rules have been published defining the conditions on which stamps will be issued or given. Acts done on behalf of the Crown must be of a kind similar to that might be done by a private person, referred to as a "marketplace" activity in the case of *Kassam v Immigration Appeal Tribunal* [1980] 1 WLR 1037.
20. Ministerial powers may be delegated in certain circumstances to other persons for the effective execution of immigration functions for example, immigration officers at ports of entry such as the airport have the power to permit or deny entry to into the Territory. This delegated power is derived through the Minister.
21. The Complainant refers to "governmental officials" in their pleadings using the term interchangeably however a distinction must be made between the statutory powers granted to, and in some limited circumstances delegated by, the Minister and the work carried out by civil servants employed in the Department of Immigration whose duties and decision-making powers may not be as broad.

22. The Complainant suggests *Savjani* indicates that "a government official can be providing a mixture of regulatory functions and services" however not every person employed by the Department of Immigration has the power or authority to carry out governmental functions. The Tribunal is of the opinion that a distinction must be made between actions or decisions that can be regarded as determining immigration status which is a regulatory or controlling function, and those that represent statements of fact which would be a facility or service under the Human Rights Act.
23. Affixing a stamp in a passport that denotes a person's immigration status cannot be equated with stamps that are affixed for factual purposes such as those indicating the date of a person's arrival and departure from a territory, or their visa status.
24. A stamp in a passport that indicates whether a person has Bermudian status or belongs to Bermuda is akin to the issue of a formal document and has broader implications including whether a person is entitled to live, work and in some cases vote. In this regard, the Tribunal is of the opinion that affixing the stamp in the Complainant's passport is a governmental function equivalent to a decision of the Minister. As such, the act or omission of the Department of Immigration in this case did not amount to a facility or service and it therefore falls outside the purview of the Human Rights Act.
25. We find in favour of the Respondent and hold that the Tribunal does not have jurisdiction to hear this case.
26. No decision as to the level of any compensation or award for hurt feelings has been considered.

DATED this 7th day of November 2024.



Fiona Bada
Chair

Human Rights Tribunal



