

IN THE SUPREME COURT OF BELIZE, A. D. 2018

CLAIM NO. 389 OF 2018

(WILLIAM MCKENZIE

CLAIMANT

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BETWEEN (AND

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(BELIZE TOURISM BOARD

FIRST DEFENDANT

(ATTORNEY GENERAL OF BELIZE

SECOND DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Andrew Marshalleck, SC, of Barrow and Co. for the Claimant

Mr. Darrell Bradley of Bradley, Ellis & Co. for the First Defendant

Ms. Briana Williams, Crown Counsel for the Second Defendant

J U D G M E N T

1. This is a Claim brought by the Claimant, William McKenzie, Retired Person, seeking consequential relief arising from the interpretation of provisions of the Retired Persons (Incentives) Act. The Claimant, William

McKenzie is a citizen of Belize having been born in Belize; he is also a citizen of the United States of America by virtue of having lived and worked in the United States of America. Mr. McKenzie is presently retired and living in Belize; he is 69 years old. The First Defendant, the Belize Tourism Board, is a statutory body existing under and by virtue of the provision of the Belize Tourism Board with capacity to sue and be sued in its own name and is the public authority in charge of the administration of the Belize Retired Persons (Incentives) Program in accordance with the provisions of the Retired Persons (incentives) Act of Belize for and on behalf of the government and people of Belize. The Second Defendant is sued as the legal representative of the Government of Belize pursuant to section 42 of the Belize Constitution.

Facts

2. In the summer of 2008, the Claimant was invited to a meeting in New York City with Prime Minister Dean Barrow and Foreign Minister Wilfred Elrington who spoke on their plans for moving Belize forward. The Belize Tourism Board (BTB) had a booth at the site of the meeting designed to encourage Belizean Americans to return to Belize to invest and/or retire. This booth was run by Ms. Laura Esquivel of the BTB and offered

assistance on how to apply to be designated a Qualified Retired Person (QRP) and promoting the benefits of doing so. The Claimant applied for QRP designation. He filled out all the required forms and provided all required supporting documentation including proof of income, police record and medical certificates and paid all required fees. His application was approved in 2009 and in November 2009, Mr. McKenzie at the age of 60 returned to live in Belize to enjoy his retirement and his new QRP status. Every year since 2009, the Claimant has complied with the renewal requirements and has paid all fees to have his designation renewed. His QRP status was repeatedly renewed by the BTB for and on behalf of the Minister of Tourism until 2017. On or about 27th August, 2017, the BTB wrote Mr. McKenzie in response to his application for renewal of designation under the QRP program and advised that there was no need for his application because the program was an offer to non-Belizeans who would like to retire in Belize. The BTB also suggested that Mr. McKenzie communicate with the Ministry of Foreign Affairs to review programs which assist and benefit Belizeans who are returning home. In November 2017, the Claimant's attorneys wrote to the BTB insisting that they consider his pending application for continued designation as a QRP.

The BTB responded saying that on a purposive construction of the Act, the QRP designation was not available to Belizeans citizens. The BTB has also issued and published an advisory that the QRP program is NOT available to persons born in Belize. The Claimant re-applied for designation in 2018; in response to the 2018 application the BTB referred to its previous letter sent to Mr. McKenzie's attorney and informed that it continues to hold to the position that Belizean citizens do not qualify for the program.

3. Mr. McKenzie therefore seeks the following relief:
 - i. A Declaration that citizens of Belize, such as the Claimant, who meet the requirements of the Belize Retired (Incentive) Program qualify for designation as Qualified Retired Persons pursuant to the provisions of the Retired Persons (Incentives) Act as citizens of a commonwealth country;
 - ii. An Injunction restraining the Defendants from denying the application of citizens of Belize, including the Claimant, from continued designation as a Qualified Retired Person under the Belize Retired Person (Incentives) Program pursuant to the

provisions of the Retired Persons(Incentives) Act on the basis of Belizean citizenship;

- iii. Such further or other relief; and
- iv. Costs.

Legal Submissions on behalf of the Claimant

4. Mr. Marshalleck SC submits on behalf of the Claimant that the Qualified Retired Persons (Incentives) Program (“the QRP Program”) is governed by the Retired Persons (Incentives) Act of Belize, No 11 of 199 (“ the Act”). The Act was passed on the 19th April, 1999 and was amended on the 25th August, 2001 by the provisions of the Retired Persons(Incentives) Amendment Act 2001 , Act No. 35 of 2001 (“the Amendment”). By the preamble to the Act, the Act was passed *“to encourage and promote the inflow of foreign capital into Belize by offering certain tax exemptions and incentives to Qualified Retired Persons...”*

This Amendment went on to repeal and replace schedule B. The new schedule B listed *“1. All Commonwealth countries; 2. The United States of America; and 3. Any other country not specified in 1 or 2,”* and introduced a general proviso as follows:

“Provided that the Minister may, in absolute discretion, refuse to grant the status of Qualified Retired Person to any person from any country.”

Mr. Marshalleck SC submits that the amendment sought to expand the nationalities of persons who may qualify under the program. The removal of “Belize” from the list and the inclusion of “*all Commonwealth countries*” indeed alone has that effect. Belize has long since been a Commonwealth country and members of Parliament all know this. He also contends that the inclusion of the United States of America as well as the open ended reference to “*any other country not specified*” indeed makes the designation available to persons of every nationality, subject only to the exercise of the discretion of the Minister. He further says that the provisions of section 3 are clear and unambiguous and indeed obvious so that there is no need for any purposive or other special construction to be placed on them or the use of any aid to construction whatsoever. Learned Counsel reminds of the admonition of Byron CJ (as he then was) in ***Universal Caribbean Establishment v. James Harrison*** as cited by Belle J. in ***St. Kitts-Nevis- Anguilla National Bank v The Registrar of Titles*** SKBHCV 0167 OF 2005 as follows:

“The first principle to affirm is to recognize the separation of powers between the Legislature and the Judiciary. It is the province of Parliament to make the Law and for the Court to interpret, without basing its construction of the statute on a perception of its wisdom or propriety or a view of what Parliament ought to have done. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. It is only where the words of the Statute are not clear and unambiguous that it is necessary to enlist aids of interpretation...”

Mr. Marshalleck SC contends that the plain and ordinary meaning of the words used in section 3 of the Act fits completely within the entire scheme presented by the whole of the words of the statute and presents no uncertainty or ambiguity. It is also submitted that the position of the Defendants is perverse and ought never to be countenanced. The Court is therefore urged to grant the declaration and the injunction sought, and costs.

Legal Submissions on behalf of the First Defendant

5. Mr. Bradley argues on behalf of the BTB that the Schedule is not clear in its meaning as to whether Belize is included in the definition of “*all commonwealth countries*” and that on its true construction the legislators intended, and the law was meant to, and does, exclude permanent residents and citizens of Belize from applying as qualified retired persons. Secondly, Mr. Bradley contends that the proviso authorizes and enables the Minister of Tourism in his absolute discretion to refuse to grant the status to a person, in the position of the Claimant, who is a citizen or permanent resident of Belize. Learned Counsel relies on Section 65 of the Interpretation Act to aid him in this submission:

“65 The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provisions in question is reasonably possible, namely -

- (a) That a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not, and*
- (b) ...”*

Mr. Bradley submits that it is clear from the parliamentary proceedings and from the short title to the various versions of the Act that the intention of the legislation is to attract foreign currency into Belize. The Bill introduced in the House of Representatives of Belize captions as the short title: *“An Act to encourage and promote the inflow of foreign capital into Belize...”* This is the sole purpose of the legislation. He further submits that the Act is an immigration legislation introduced into Parliament by Minister Jorge Espot, the then Minister of National Security and Immigration and that is important to its interpretation. The Act is not a finance regulation as it was not introduced by the Minister of Finance, nor was it a tourism legislation as it was not introduced by the Minister of Tourism. The Act was meant to confer on persons, as its main benefit, an immigration status that permits a qualified retired person and his dependents to legally remain permanently in Belize. The structure of the Act flows from the basic premise that, as immigration legislation, the Act is meant to attract foreign currency into Belize by granting immigration status to QRPs who qualify under Section 3.

6. Mr. Bradley goes on to say that the benefit that the Claimant now seeks is not to remain permanently in Belize, but the Customs and Duty

Exemptions that flow from the legislation; these are secondary benefits to the Act (duty exemptions on household items and vehicles) which merely facilitate the primary benefit (the right to lawfully enter into and remain permanently in Belize). He says that the words of Section 4 of the Act make that clear where the words “*within one year of first entering Belize*” clearly shows the intention that the Act applies to foreigners and not to permanent residents or citizens of Belize. The purpose of the Act is to confer the immigration status to a foreigner and along with that status to provide duty exemption for the bringing in of certain personal items. This is given in exchange of the foreigner agreeing to bring into Belize an approved foreign currency. The interpretation urged by the Claimant would contradict Belize’s exchange control regime. Under the Act, a QRP is required to demonstrate that he is entitled to an annuity or a gratuity in an approved foreign currency; Mr. Bradley submits that under Belize’s exchange control regulations, Belizeans cannot be in possession of foreign currency and require Belizean citizens and permanent residents to surrender foreign currency to an authorized dealer such as a bank. He cites ***Chaudry v The State*** Crim Appeal No. AAU 0010 of 2014 where a former Prime Minister of Fiji failed to surrender \$1.5 million Australian to

an authorized dealer as required by a similar exchange control law. The Supreme Court of Fiji held that Chaudry was required to turn over the foreign currency to an authorized dealer and his failure to do so constituted a breach of the Exchange Control Act.

7. Mr. Bradley argues that the Act itself reinforces that interpretation in Section 4(5):

“Qualified Retired Persons shall be deemed to be non-residents for the purposes of the Offshore Banking Act Cap. 267, The Exchange Control Regulation Act Cap. 52, the International Business Companies Act Cap. 270, the Trusts Act Cap. 202, the Immigration Act Cap. 156, and the Belizean Nationality Act Cap 161, and any other Act which relates or may hereafter relate to international financial services, directly or indirectly.”

It is Mr. Bradley’s contention that this section only makes sense when seeing the Act as solely immigration legislation. The Act creates a dichotomy by granting a Qualified Retired Person immigration status to remain in Belize for the purpose of attracting foreign currency, but at the same time treating that person as if he were not present in Belize for

purposes of law. Belizean citizens or permanent residents could never be considered non-residents of Belize, therefore this Act does not apply to them. In any event, Mr. Bradley argues that the proviso to the Second Schedule enables the Minister of Tourism to refuse to grant the status of a qualified retired person to any person from any country. The term “*any country*” is not qualified in any way and it is submitted that it is within the power of the Minister of Tourism, in his absolute discretion, to not approve the Claimant’s Application on the basis that Belizean citizens do not qualify under the program. The Second Defendant is asking that the Claim be dismissed with costs.

Legal Submissions on behalf of the Second Defendant

8. On behalf of the Attorney General, Ms. Williams submits that the Qualified Retired Person (Incentives) Program is governed by the Retired Persons (Incentives) Act, Chapter 62 of the Laws of Belize, R.E. 2011. Section 2 of this Act defines a retired person as any person who is at least forty five years of age. Section 3 of the Act states that:

“Any Retired Person may apply to be designated as a Qualified Retired Person if he

- (a) Is a citizen or legal permanent resident of one of the countries listed in the Second Schedule;*
- (b) Is the beneficial owner of a pension or annuity;*
- (c) gives a written undertaking to deposit for his own use in a bank, building society, credit union, or other licensed financial institution in Belize (i) by the 15th day of each month, the sum of two thousand dollars in an approved foreign currency; or (ii) by the 1st day of April of each year, the annual sum of twenty-four thousand dollars in an approved foreign currency; and*
- (d) satisfies such other requirements as the Minister may by regulations specify.”*

Initially, a Retired Persons (Incentive) Bill was introduced and read for the first time in the House of Representatives of Belize on 29 January, 1999. The Second Schedule to the Bill lists the qualifying countries as the United States of America and the United Kingdom of Great Britain and Northern Ireland. Ms. Williams makes the point that Belize is not listed as a qualifying country. On the second reading of the Bill on 16th March, 1999, Hon. Jorge Espat made a statement in the House of Representatives

which confirmed that the qualifying countries remained as listed in the original Schedule, but with the addition of Canada. The Bill became law when it was enacted on 19th April, 1999 as the Retired Persons (Incentives) Act, and when that law was passed, Belize was listed as one of the qualifying countries. An amendment was made to the Act removing Belize from the list of qualifying countries listed in the Second Schedule. The current version of the Act does not include Belize in the list of qualifying countries.

9. Ms. Williams submits that it was not the intention of the framers of the legislation that Section 3 of the Act makes provisions for Belizeans to qualify for the QRP program. The original wording of the Bill for the Act did not include Belize in the list of countries that an individual could be a citizen or legal permanent resident to meet the requirements of the QRP program. Nevertheless, through the drafting process, Belize was included in the QRP program. Ms. Williams concedes that under the amendment to the Act in 2001, as a result of Belize being a Commonwealth country, it could be interpreted that Belize is still included in the list of countries. She submits that notwithstanding Section 3, however, the remaining sections of the Act give an indication that Belizeans are not to be considered for

QRP status. She cites Section 4 of the Act, which gives legal permission to a person who qualifies under the Act to remain in Belize and argues that it could never have been the intention of Parliament to permit Belizeans to remain in Belize since Belizeans already have that right by virtue of their citizenship or birthright. Section 5 of the Act also places a restriction on gainful employment which if it were to apply to a Belizean would be a breach of their fundamental constitutional right under Section 15 of the Constitution. Ms. Williams further submits that it is a well-accepted rule in statutory interpretation that statutes must be read as a whole. She quotes extensively from the CCJ decision of *Shelby v. Smith* [2017] CCJ 13 (AJ) to buttress her position, including the following paragraph from Sir Denis Byron's judgment at paragraph 12:

"In Rambarran v The Queen, we noted that when a court is called on to interpret legislation it is not engaged in an academic exercise. Interpretation involves applying the legislation in an effective manner for the well-being of the community. Giving words their natural and ordinary meaning does not necessarily produce a different result than would be produced if a purposive approach was taken in the process of interpretation. Both principles assist the court in performing its

primary task of giving effect to the intention of the legislature. Parliament's intention is discerned by understanding the objective of the legislation; what is the change that it is aimed to produce; what is its purpose. This often requires consideration of the social and historical context and a review of the legislation as a whole. But its intentions are also discerned from the words it uses. The underlying principle is that the court has a different function from Parliament. The court is ensuring that the legislative intent is properly and effectively applied. It is not correcting the legislative intent nor substituting its own views on what is a just and expedient application of the legislation."

10. In conclusion, Ms. Williams contends that the reasoning and principles of this case should be applied to the instant case. The history of the Act will clearly show that the intention of Parliament was never to include Belizeans in the QRP program. The purpose of the Act was to allow the influx of foreign currency into Belize, while making provisions to permit individuals the right to remain in Belize for an extended period of time who would not ordinarily be able to do so. She suggests that the ambiguity caused by listing all Commonwealth countries in the list of

countries qualifying for QRPP status, and not specifically excluding Belize, could be remedied with a simple amendment, thereby bringing the entire Act into harmony and properly effecting the true intention of Parliament. She urges the Court not to grant the relief sought.

11. Mr. Marshalleck SC filed submissions in Reply to those filed by the Defendants, stating *inter alia* that Retired Persons (Incentives) Act as originally enacted included Belize in the list of qualifying countries for participation in the program, and that the benefits of the program originally included the conferral of residence status to qualified persons, save that designated persons were deemed non-resident for the purpose of Exchange Control Regulations and Banking Laws of Belize. Learned Counsel submits that it was clearly intended that citizens of Belize should qualify for the program and no conflict was created by providing for Belizeans to so qualify; what resulted was an overlapping of rights i.e. right to residence by virtue of designation as a QRP in addition to right to residence by virtue of citizenship with no conflict or harm resulting. He also contends that there was no conflict with Exchange Control Regulations arising from allowing Belizean citizens to qualify under the program, as it would be only when those citizens began residing in Belize

that those regulations would then apply to them. In the case of the Claimant, at the time of his first application for the QRP status, he was born in Belize and had lived and worked in New York, USA for many years and had earned a pension there. The Exchange Control Regulations of Belize did not in any way affect his right to earn or retain his pension there. The regulations do not impact the right to an annuity in a foreign currency. It merely requires that when payments are received pursuant to an annuity in foreign currency, that foreign currency should be turned over to an authorized dealer or otherwise retained with the permission of the Controller, pursuant to the regulations. The Claimant also argues that since Belize has been a member of the Commonwealth since independence the provisions of Schedule B as amended readily include Belize. There is no ambiguity there. Nothing in the language of the Act supports the notion that Parliament intended to disqualify citizens of Belize from the program by virtue of the amendment to Schedule B of the Act. The relief sought by the Claimant should therefore be granted.

Supplemental Submissions filed by the First Defendant

12. On January 17th, 2019, Mr. Bradley in supplemental submissions filed on behalf of the First Defendant brought to the Court's attention that the Minister of Tourism has caused regulations to the Retired Persons (Incentives) Act CAP 64 to be amended to remove doubt that Belizean citizens and permanent residents of Belize do not qualify to be designated for status as qualified retired persons under that Act. This law was amended and gazetted on 8th December, 2018. Section 3 of the Act provides that any retired person may apply to be designated as a qualified retired person if he, *inter alia*, is a citizen or legal permanent resident of one of the countries listed in the Second Schedule. Section 7 of the Act provides that the Minister of Tourism may make Regulations for the better administration of the Act, and without prejudice to the generality of the foregoing, such Regulations may include Section (g) the power to amend Schedules to the Act. The Second Schedule to the Act originally provided the listed countries as follows:

1. *All Commonwealth countries;*
2. *The United States of America;*

3. Any other country not specified in Paragraph 1 or 2 of this Schedule

Provided that the Minister may in his absolute discretion refuse to grant the status of Qualified Retired Person to any person from any country.

Mr. Bradley submits that the Minister of Tourism, in the exercise of the power granted to him under Section 7 of the Act to amend the Schedule to the Act promulgated the Retired Persons (Incentives) (Amendment of Schedule) Regulations 2018, which is Statutory Instrument No. 88 of 2018 on 7th December, 2018. This Statutory Instrument was gazetted on 8th December, 2018 amending the Second Schedule as follows:

“2. The Second Schedule to the principal Act is amended by deleting item 1 and substituting the following:

*‘1. All Commonwealth countries, **excluding Belize.**’”*

As the foregoing amendment makes it clear that the Act does not apply to citizens or permanent residents of Belize, the relief sought by the Claimant cannot be granted.

13. In response to this submission by the First Defendant, Mr. Marshalleck SC on behalf of the Claimant sent a brief submission dated January 21st, 2019 stating that the amendment of the schedule to the Act by the regulation of the Minister gazetted on December 8th 2018 does not seek to or in fact remove any doubt as to the entitlement of Belizeans to qualify under the QRP program, but is an implicit acknowledgement and acceptance of the Claimant's position that Belizeans indeed qualified under the program as citizens of a Commonwealth country. Learned Counsel says that while it may be doubtful that Parliament is indeed constitutionally empowered to delegate its law making function to permit a Minister to amend the Schedule to a substantive act, he concedes that the regulation gazetted and disclosed by the Defendant in its supplemental submissions appears on its face to disqualify the Claimant from qualification under the program on the basis of commonwealth citizenship. Mr. Marshalleck SC goes on to argue that in any event the Claimant's application for QRP status in 2017 and 2018 were denied on the basis that he was a Belizean, long before the amendment was effected so that the refusal of his application on that basis, was nevertheless unlawful at the time. More

importantly, the Second Schedule to the Principal Act as amended now reads as follows:

1. *All Commonwealth countries, **excluding Belize**;*
2. *The United States of America; and*
3. *Any other country not specified in paragraph 1 or 2.*

It is therefore argued that Belize, having now been excluded by the amendment from paragraph 1, now falls squarely within paragraph 3 of the schedule. The Claimant therefore seeks an amendment to the first declaration sought, in light of the recently passed regulation, as follows:

“A Declaration that citizens of Belize, such as the Claimant, who meet the requirements of the Belize Retired Persons (Incentive) Program qualify for designation as Qualified Retired Persons pursuant to the provisions of the Retired Persons (Incentives) Act as citizens of a commonwealth country, prior to December 8th, 2018 and as citizens of any other country under paragraph 3 of the Second Schedule to the Principal Act as amended thereafter.” [Emphasis added]

Decision

14. I am grateful to counsel for their submissions in this matter. Looking at the provisions of the Qualified Retired Persons (Incentives) Act, prior to the Amendment by Statutory Instrument No. 18 of 2018, it is quite clear from the plain and ordinary meaning of the language used in the Act that Belizeans qualified as Qualified Retired Persons under the Second Schedule to the Act by virtue of the indisputable fact that the country of Belize is a member of the Commonwealth. Mr. William McKenzie is a Belizean citizen by birth and an American citizen by naturalization, so to my mind, that means he would have qualified under either sections 1 or section 2 of the Second Schedule of the QRP Act, prior to the amending Statutory Instrument. It is also worthy of note to point out that qualifying under the Act does not automatically ensure that an Applicant will receive QRP status, since the Act clearly states that applications from any country listed in the Second Schedule will be granted, subject to the discretion of the Minister to refuse an application from citizens of any country. This recent amendment to the Second Schedule of the Act in December 2018 has removed all doubt that the intention of Parliament is to exclude Belizeans from qualifying for Qualified Retired Person status under the

Act. It is indeed extremely unfortunate that the investment of ambitious and productive Belizean American citizens such as Mr. Mackenzie appears to be, has been deemed not worthy of QRP status, and has in fact been specifically excluded by this recent piece of legislation. However, the role of the court is to interpret and apply the law in keeping with the intention of Parliament, even when the Court may not necessarily agree with that particular law. I understand that the Claimant is now seeking to amend the original declaration sought in the Claim, based on the recent amendment. In my respectful view, it is too late in the day for such an amendment, as submissions were all filed based on the original declaration sought by the Claim, which has now been overtaken by events. The relief sought by the Claimant is therefore not granted. The Claim is dismissed. Each party bears its own costs.

Dated this Wednesday, 24th day of July, 2019

**Michelle Arana
Supreme Court Judge**