THE CLEAR PATH TO REGULARISATION: RESIDENCY AND BELONGER STATUS PROGRAMME (FAST TRACK PROGRAMME)
Audit Report

ADDENDUM

APRIL 3, 2023

This audit was performed by the Internal Audit Department of the Government of the Virgin Islands in association with the Office of the Auditor General and in accordance with recommendation B34 of the BVI Commission of Inquiry Report dated 4 April, 2022. The results of this audit are being transmitted in accordance with Section 20 of the Audit Act of 2003.

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In the Internal Audit Report dated March 9, 2023, I indicated that legal advice was sought from the Honourable Attorney General regarding issues surrounding the inclusion of belonger status by descent under the Immigration and Passport Act. I further indicated that an addendum to the report would be provided, as necessary, once the advice sought was received. The Honourable Attorney General's response dated March 20, 2023 was received by my office on March 23, 2023.

As the principal legal advisor to the Government of the Virgin Islands, the advice of the Attorney General is highly valuable and provides legitimate legal directions upon which public officers should consider and rely. As such, the following discourse is not intended to contradict nor challenge the advice provided. However, the advice does present new questions as well as requires an update to be made to the report as it relates to the number of persons who have been granted status for which they were not qualified as they did not meet the mandatory minimum legal requirements as set out in Section 16(3) of the Immigration and Passport Act Revised Edition 2013.

Basis for update of report

The Honorable Attorney General's advice affects the report in three areas. The advice does not contradict the findings of the original report. To the contrary, it provides greater legal clarity, which augments the number of applicants who were awarded belonger status that did not meet the minimum mandatory standard for which Cabinet could not vary. The three areas of significance are outlined as follows:

Residency and Belonger Statuses (Fast Track Programme)

Based on reliance of the advice of the Honorable Attorney General, the amended Section 16(5) of the Immigration and Passport Act effectively "changed the process and required an applicant to now satisfy the qualifying requirements in Section 16(3) of the Act, since it has not been provided for in Section 16(2) of the Act." As most of the applications were processed and approved under the provisions of the amended Section 16(5), applicants would not have been eligible to receive both statuses within the same calendar year. Section 16(3)(d) indicates that the person being granted belonger status must hold a certificate of residence granted under Section 18 for a period of not less than 12 months immediately preceding the date of the application. On this basis, the five hundred forty-one (541) applicants identified in 9.2.4 of the Report who were awarded both residency and belonger statuses would be deemed voidable. Fifty-four (54) of these applicants were already identified in 9.3.2 as not having met the 20-year requirement to qualify for the statuses awarded. Therefore, the remaining four hundred eighty-seven (487) applicants may also be voidable as such grants did not meet all of the minimum statutory requirements as outlined under Section 16(3) of the Immigration and Passport Act.

Residency Status (Immigration Board) and Belonger Status (Fast Track Programme)

Fifty-eight (58) applicants were identified as having received their residency certificates in 2019 prior to the Fast Track Programme through the operations of the Immigration Board. These same applicants were further granted belonger status under the Fast Track Programme. Again, noting the Honorable Attorney General's response as cited above, belonger status awarded to these applicants would be deemed voidable as they would have failed to meet the requirement laid out in Section 16(3)(d) of the Immigration and Passport Act for which Cabinet lacks the discretion to vary. Applicants granted belonger status in this manner would not have held a certificate of residence granted under Section 18 for a period at least 12 months immediately preceding the

date of the application as required by the Section. In 9.3.2.3 of the Report, ten (10) applicants were identified as awarded belonger status under the Fast Track Programme but did not meet the qualifying period of 20 years. Of these ten (10) applicants, five (5) received their residence certificate in 2019 and is included in the fifty-eight (58) applicants. Therefore, an additional fifty-three (53) applicants who received status in this manner would also be deemed voidable.

Belongership by descent

According to the Honorable Attorney General's advice "a grant by Section 16(5A) of the Amendment No. 2 Act requires an application to be made and is subject to the requirements in Section 16(3) of the Act. Hence, under Section 16 of the Act, there is no discretion to vary the requirements of "ordinarily resident" in the Territory and the minimum requirement must be satisfied." Additionally, the Honorable Attorney General's advice also states that the Act "also requires an applicant to make an application in the prescribed form in accordance with Section 16(1) of the Act and satisfy the qualification requirements in Section 16(3) of the Act for the grant of the certificate."

In application of this advice, the eighty-four (84) applicants awarded belongership by descent, as stated in 9.2.12 of the Report, under the Amendment Act were not eligible to receive such status as they did not fulfill all the requirements listed under Section 16(3). Specifically, fifty-one (51) applicants would not have been ordinarily resident in the Territory for the prescribed period as required under 16(3)(c) of the Act. None of the applicants would have held a certificate of residence as required under 16(3)(d) the Act prior to the grant of the certificate that a person belongs to the Territory. Furthermore, eight (8) applicants were under the age of 18 at the time of application contrary to the requirement set out under Section 16(3)(b) of the Act. As a result, all the grants of belongership issued under Section 5A of the Act may be voidable as they do not meet the mandatory minimum statutory requirements to be considered for such a grant.

In full consideration of the Honorable Attorney General's advice, I have found that an additional number of six hundred twenty-four (624) applicants did not meet the minimum statutory requirements to qualify for the statuses awarded. This would bring the total number of applicants who were ineligible for status to six hundred eighty-eight (688). The Honourable Attorney General's memorandum dated March 20, 2023 is attached for your information.

Having considered the advice of the Honourable Attorney General, there is the lingering question as to whether the amendments to the Act, as structured, had the desired effect of the intent. Clearly, in my humble opinion, the advice demonstrates that the intended effect was not achieved in this instance, as significant issue(s) of law and application were overlooked in the execution of the Fast Track Programme. Again, the issue of discretion is at the forefront in the execution of this Programme and based on the advice, it is clear that discretion was applied to vary certain requirements where there was no such authority.

Finally, this issue of misapplication of discretion has far reaching implications than just the Fast Track Programme. The practice brings into question the application of discretion in grants prior to the Fast Track Programme if such discretion was also erroneously applied. Such consequences could have lasting implications for a myriad of other subjects that are dependent on this tenuous situation.

Approval of applications under Section 2(4) of the Immigration and Passport Amendment Act, 2019

Out of an abundance of caution and in the spirit of full transparency and objectivity, I find it necessary to address alternative interpretations that may arise from matters addressed under Section 9.2 of the Report issued on March 9, 2023. As indicated therein, all Cabinet Papers submitted as part of the Fast Track Programme cited Section 2(4) of the Immigration and Passport Amendment Act 2019 as the basis for all awards under the Fast Track Programme. This Section reads as follows:

Where in exceptional circumstances of any case or for any other reason, Cabinet considers it fit to do so, it may in its own discretion grant a certificate referred to in subsection (1) to any person who applies for the same in the prescribed manner and who

(a) is of good character,

(b) is at the date of making the application for such a certificate, ordinarily resident in the Territory;

(c) has been so ordinarily resident for the period of not less than 7 years immediately prior to his or her application.

Although it was communicated during the audit, by the drafter of the Cabinet Papers that the citing of the above referenced Section as the basis for the awards was erroneous, the argument can be made that Section 2(4) of the Amendment Act was the legitimate basis on which Cabinet approved the applications and granted the awards. If this position is taken, additional deficiencies arise which must be reported.

1. The stated purpose of all Cabinet Papers prepared for the Fast Track Programme was "to allow for persons who have resided within the Territory for a period exceeding twenty (20) years to be granted Residence and Belonger Status." The application of Section 2(4) in deciding applications would be incongruent with the stated purpose of the papers and the Programme.

2. All Government Press Releases and Statements on the Fast Track Programme communicated that applicants were to meet a 20-year qualifying period to make an application. In none of the discourse was it communicated to the general public, personnel from the Ministry of Natural Resources, Labour and Immigration or the project team engaged for the project that applications could or would be considered under Section 2(4) of the amended Act. For Cabinet to consider and approve applications utilizing Section 2(4) where the qualifying period is seven (7) years would suggest that the Government intentionally or unintentionally did not inform the stakeholders that this avenue of qualification was available. This decision by Cabinet would be even more alarming especially after the Government engaged in Public consultations and announced that it was as a result of these consultations that the decision was made to increase the ordinarily resident period from fifteen (15) years to twenty (20) years. Consequently, this action may

have disenfranchised persons who may have qualified under Section 2(4) but who did not apply as they did not meet the 20-year requirement as was widely communicated.

3. Again, based on the citation in the Cabinet Papers, all applications were approved under Section 2(4). The application of this Section in approving applications would render the amended Sections 5 and 18 of the Immigration and Passport Amendment Act 2019 unnecessary. Furthermore, as Section 2(4) of the Amendment Act does not place a requirement for an applicant to hold a certificate of residence, requiring applicants to apply and pay for a certificate of residence as part of the Programme was unreasonable, unjust and inappropriate.

4. As indicated in 9.1.4 of the Report, both senior personnel within the Ministry of Natural Resources, Labour and Immigration as well as the project supervisors engaged for the project, informed that the awarding of status was largely dependent on applicants satisfying the 20-year requirement as this was the basis communicated in the project briefing. Accordingly, applications were assessed by the project team on this basis and applications that did not satisfy this requirement were deemed ineligible and were not advanced for Cabinet's consideration. As a result, the forty-six (46) applicants outlined in 9.2.10 of the Report may have been disenfranchised as some may have been eligible to be granted the status under Section 2(4) if Cabinet so desired. Additionally, the four (4) applicants stated in 9.3.3 of the Report that were referred by Cabinet to the regular process would also be disenfranchised as they too would have qualified under Section 2(4).

5. There were no established criteria to determine which applications would be evaluated using Section 2(4) or 2(5) of the Amendment Act, if it was the intent to use both sections in processing applications. As such, the process was left to the desires of Cabinet to determine which applications would be considered using Section 2(4). In the absence of such criteria, inequity and bias may have been introduced in the process where, as indicated in 9.3.2.5 of the Report, spouses and significant other of members of the House of Assembly were approved for status while other applicants of similar standing were denied.

In the totality of literature available on the Fast Track Programme as well as information collected through interviews from persons who were intimately involved in the execution of the project, there are no indications that applications could or would be considered using the 7-year rule specified in the amended Section 2(4). The House of Assembly passed and the Governor assented to this Amendment on June 12, 2019 removing the Immigration Board. In the same Amendment Act, Section 5 was amended to include the 20-year requirement. Despite this fact, no mention of this amendment (Section 2(4)) was made in the public statements of June 2 and July 22, 2019. The introduction of this amendment at such an early stage in the process suggests that there was a clear and intentional purpose for its inclusion. However, that intention has yet to be clearly articulated in the context of the execution of the Fast Track Programme. As part of the process, Government held a series of public consultations in an effort to find consensus on this Programme. In his June 2, 2019 statement the then Premier stated that "we are pleased to have adjusted course, and found common ground that is in the best interest of every Virgin Islander." He further stated that "initially, we had envisaged considering people who were here for 15 years or more. But coming from the consultations, and having listened to you, the people, we have lifted that ceiling for consideration to 20 years." In his July 22, 2019 statement the Premier reiterated that "your Government listened to the comments from members of the public who attended the

public meetings, wrote emails and letters, aired their views through the media and provided feedback in other ways, and we amended the policy to reflect the wishes of the people." Further in the statement he enumerated the wishes of the people, one being "the ceiling for consideration for Belonger Status was increased from our initial proposed time of 15 years to 20 years. And only persons who have met the existing criteria and who have been making good contributions to our society will qualify for consideration." Based on these statements and in consideration of the amendment at Section 2(4), it would be deceitful to have communicated one thing to the public, 20-year requirement, while covertly doing to the contrary by utilizing the provisions of the amended Section 2(4) which only requires 7 years for eligibility, as the basis upon which all applications were approved.

Despite all indications, to the contrary by persons charged with executing the Programme, if this Section was used as intended by Cabinet as reflected in the Cabinet Papers, awarding grants on this basis, all applications approved under the Programme, save one, would have met the 7-year requirement and thus be valid. However, the issues highlighted under the Section 'Belonger by descent' above remains for grants made under Section 5A of the Amendment Act.