



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2015: No. 336

**BETWEEN:-**

(1) MICHAEL BARBOSA  
(2) CHRISTINE BARBOSA

**Applicants**

**-and-**

(1) MINISTER FOR HOME AFFAIRS  
(2) ATTORNEY GENERAL

**Respondents**

## JUDGMENT

**(In Court)**

*Application to enforce fundamental rights under s 12 of Constitution – whether persons who belong to Bermuda are residents of Bermuda for purposes of ss 25 and 2(3) of Adoption Act 2006 – whether damages for infringement of constitutional rights – quantum of damages.*

Date of hearing: 3<sup>rd</sup> May 2016

Date of judgment: 8<sup>th</sup> June 2016

Mr Peter Sanderson, Wakefield Quin Limited, for the Plaintiffs

Mr Philip J Perinchief, Attorney General's Chambers, for the Defendant

## **Introduction**

1. The Applicants, Mr and Mrs Barbosa, are husband and wife. They have applied to this Court for redress under section 15(1) of the Bermuda Constitution (“the Constitution”) on the grounds that their fundamental rights under Chapter I of the Constitution have been contravened.
2. On 4<sup>th</sup> March 2016 I issued a judgment ruling on certain aspects of their application. The factual background to the present hearing is set out in the judgment and I need not repeat it. However I deferred judgment on two issues until the Court of Appeal delivered judgment in a case which bore upon them, which it has now done. The case was Minister of Home Affairs v Williams [2016] CA Civ (Bda) 7.
3. The first outstanding issue is this. Mrs Barbosa has a niece in the Philippines whose mother has died. Mr and Mrs Barbosa would like to bring her to Bermuda in order to adopt her. However they have been advised that they cannot adopt her here as they are not residents of Bermuda within the meaning of the Adoption of Children Act 2006 (“the 2006 Act”). They seek a declaration that as persons who belong to Bermuda they should be classed as residents of Bermuda for purposes of the 2006 Act.
4. Mrs Barbosa, who was born in the Philippines, is deemed to belong to Bermuda under section 11(5)(b) of the Constitution as on 29<sup>th</sup> October 2014, pursuant to section 18 of the British Nationality Act 1981 (“the 1981 Act”), she was granted a certificate of naturalisation as a British Overseas Territories citizen by the Governor. Mr Barbosa, as I found in my judgment of 4<sup>th</sup> March 2016, belongs to Bermuda at common law.
5. The second outstanding issue is Mr and Mrs Barbosa’s claim for damages for infringement of their constitutional rights. This claim relates chiefly to the Government of Bermuda’s historic failure to recognise that Mr Barbosa belongs to Bermuda. In assessing damages a relevant consideration will be whether, as the Court of first instance found in Williams, persons who

belong to Bermuda have an implied right to seek employment in Bermuda without any restrictions and without being discriminated against.

### **The decision in Williams**

6. Mr Williams was a naturalised British Overseas Territories citizen. As such, he was deemed to belong to Bermuda under section 11(5)(b) of the Constitution. In March 2015 his employers terminated his employment on the ground that the Department of Immigration, for which the Minister had oversight, had notified them that his employment must cease immediately. He sought a declaration that as a person who belonged to Bermuda he had a right to engage in employment and business without discrimination pursuant to section 12 of the Constitution, and that he did not require the specific permission of the Minister to do so. Kawaley CJ found in his favour and awarded him damages including \$5,000 for breach of his constitutional rights.
7. The judgment of the Court of Appeal was given by Baker P, although it was one to which the other members, Bell JA and Hargun JA (Acting), had contributed. He rejected the submission, which Kawaley CJ had accepted, that freedom of movement included the right to seek employment without restriction. However at para 29 he accepted an alternative submission that section 12 of the Constitution gave rise to a free standing ground of complaint:

*“As was said by the Chief Justice the effect of the constitutional legislation had been to create two categories of ‘belongers’: those belongers who possess Bermuda status and are able to work without the requirement of a work permit and other belongers who do not and require a work permit to do so. As a matter of common sense, as noted by Lord Neuberger in Thompson [[2008] UKPC 33], the proportion of persons whose place of origin is not Bermuda who have Bermudian status is considerably smaller than the proportion of persons whose place of origin is Bermuda. As a result, the statutory requirement that those belongers who do not possess Bermudian status must have a work permit in order to engage in gainful employment has a disproportionately prejudicial effect on belongers whose place of origin is not Bermuda. This requirement is indirectly*

*discriminatory and there is no reason why belongers should be treated differently based upon the distinction as to whether their place of origin is Bermuda or a place other than Bermuda. No case has been advanced on the basis of justification.”*

8. As to damages, at para 31 Baker P considered the judgments of the Privy Council in Inniss v Attorney General [2008] UKPC 42, [2009] 2 LRC 546 and Merson v Cartwright [2008] UKPC 38, [2006] 3 LRC 264, and quoted the summary of the law given by Lord Hope at para 27 of the former case:

*“The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.”*

9. Baker P concluded at para 32 that each case depended very much on its own facts and that little was to be gained in looking at the amount of awards in other cases, particularly those in which the award was in a different currency. He stated that he could not fault the chief Justice’s approach, and that whereas \$5,000 was at the lower end of an appropriate bracket it was not wrong in principle or outside what was reasonable.

### **Adoption**

10. The adoption issue turns on the interaction between sections 25 and 2(3) of the 2006 Act. Section 25 provides that the court has jurisdiction to make an adoption order in various circumstances, including at (c) if the applicant is “*a resident of Bermuda*”. Section 2(3) provides:

*“For the purposes of this Act, a resident of Bermuda is a person who, under the Bermuda Immigration and Protection Act 1956—*

*(a) possesses Bermudian status;*

*(b) is deemed to possess Bermudian status or is the spouse of a person who possesses Bermudian status; or*

*(c) holds a permanent resident's certificate.”*

11. Mr and Mrs Barbosa accept that the right to adopt is not a necessary incident of the right to belong to Bermuda. However they submit that the definition of “*resident of Bermuda*” in section 2(3)(a) discriminates against both of them indirectly on grounds of place of origin. They invite me to remedy the situation by amending the subsection to read: “*possesses Bermudian status or belongs to Bermuda*”. Neither of them qualifies as a resident of Bermuda under subsections (b) or (c).

12. They rely upon section 12(1) of the Constitution, which provides that:

*“... no law shall make any provision which is discriminatory either of itself or in its effect.”*

13. As Lord Neuberger observed in Thompson, the proportion of persons whose place of origin is not Bermuda who have Bermudian status is considerably smaller than the proportion of persons whose place of origin is Bermuda. I therefore conclude that defining residence in terms of Bermudian status discriminates indirectly against people who are resident (in the sense of ordinarily resident rather than the section 2(3) sense) in Bermuda who were not born in Bermuda. For this reason, the requirement discriminates against Mrs Barbosa on the ground of place of origin as she was born overseas.

14. The requirement of Bermudian status also discriminates against Mr Barbosa on the ground of place of origin, even though his place of origin is Bermuda. The reason why the requirement discriminates against him on this ground is more subtle. As I explained in my judgment of 4<sup>th</sup> March 2016:

*“46. Because Mr Barbosa was born in Bermuda he acquired British Overseas Territories citizenship by birth and is therefore ineligible to apply for a grant of Bermudian status under section 20B(2)(b) of the 1956 Act. If he had been born outside of the Commonwealth, eg in the Azores, and had acquired British Overseas Territories citizenship by naturalisation then, provided that he was ordinarily resident in Bermuda on 31<sup>st</sup> July 1989, he could have applied for a grant of Bermudian status under section 20B(2)(b). Thus section 20B(2)(b) discriminates against him on the ground of his own place of origin.*

47. *To be clear, Mr Barbosa has been afforded different treatment due wholly or mainly to his parents' place of origin (section 20B(2)(a)) and his place of origin (section 20B(2)(b)) whereby he has been subjected to a disability or restriction to which persons having parents of another place or origin (section 20B(2)(a)) or persons having another place of origin (section 20B(2)(a)) have not been made subject."*

15. That is not quite the end of the matter. Section 12(1) of the Constitution is expressed to be subject to the provisions of section 12(4). This provides that section 12(1) shall not apply to any law so far as that law makes provision, *inter alia*:

*"whereby persons of any such description as is mentioned in subsection (3) of this section [including by place of origin] may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."*

16. The Respondents submit that, if and insofar as it is discriminatory, the requirement of Bermudian status in section 2(3)(a) is justified in that it is not in the public interest to create a class of adopted children who do not have a clear pathway to Bermudian status as this would tend to undermine social cohesion.
17. Mr and Mrs Barbosa reply that the justification is simply wrong in that it is not currently the case that adopted children can necessarily acquire Bermudian status; and misconceived with respect to persons who belong to Bermuda in that their children will acquire belonging rights, which are sufficient to enable real and substantial involvement in Bermudian society.
18. "*Reasonably justifiable*" is an objective test. In light of Mr and Mrs Barbosa's critique, I find the Respondents' justification unconvincing. I am therefore not persuaded that the discriminatory provision which the Respondents seek to uphold is reasonably justifiable in a democratic society.
19. In summary, I find that the definition of "*resident of Bermuda*" in section 2(3) of the 1996 Act discriminates against both Mr and Mrs Barbosa

indirectly on grounds of place of origin and that such discrimination is not reasonably justifiable in a democratic society. It is therefore contrary to section 12(1) of the Constitution. In order to remedy this situation, and thereby enforce Mr and Mrs Barbosa's constitutional rights to protection from discrimination, I declare, pursuant to section 15 of the Constitution, that section 2(3)(a) of the 2006 Act should be construed so as to read: "*possesses Bermudian status or belongs to Bermuda*".

### **Damages**

20. The quantum of damages necessary to vindicate Mr and Mrs Barbosa's constitutional rights is very much a question of first impression. As Baker P stated in Williams, each case turns on its own facts and the amount of damages awarded in previous cases affords the court little assistance. Having regard to the principles summarised in Williams, I shall award damages in the sum of \$8,000.
21. I shall hear the parties as to costs.

DATED this 8<sup>th</sup> day of June, 2016

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Hellman J