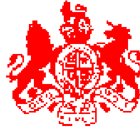

The Court of Appeal for Bermuda

CIVIL APPEAL No 16 of 2015

Between:

THE ATTORNEY-GENERAL OF BERMUDA

THE CHAIRMAN OF THE PAROLE BOARD

THE MINISTER OF NATIONAL SECURITY

THE MINISTER FOR HOME AFFAIRS

Appellants

-v-

LEIGHTON GRIFFITHS

Respondent

Before: **Baker, President**
Bell, JA
Hargun, JA (Acting)

Appearances: Mr. James Guthrie, QC and Ms. Wendy Greenidge, Attorney-General's Chambers, for the Appellants
Mr. Eugene Johnston, J2 Chambers, for the Respondent

Date of Hearing: **9 March 2016**

Date of Judgment: **1 April 2016**

JUDGMENT

Section 12 of the Bermuda Constitution Order 1968 - Section 27A of the Bermuda Immigration and Protection Act 1956 - Section 10(1) of the Prisons Act 1979 – Jamaican national being special status husband under section 27A of 1956 Act - Convicted of serious offences - Effect of likely deportation order on the grant of parole - Whether indirect discrimination on grounds of place of origin under section 12(2) of the Constitution

HARGUN, JA (Acting)

Introduction

1. This is the Judgment of the Court, to which all its members have contributed, on an appeal by the Appellants against the decision of Kawaley CJ, contained in a Judgment dated 13 August 2013, declaring that the Respondent's fundamental rights had been infringed in that the provisions of the Prisons Act 1979 relating to parole, as applied to him as a Jamaican national, discriminated against him on the grounds of his place of origin in contravention of his rights under section 12 of the Bermuda Constitution.

2. The Respondent was born in Jamaica on 22 March 1976 and is a Jamaican citizen. On 7 April 2001 he married Rodericka Peterson, a person possessing Bermudian status within the meaning of the Bermuda Immigration and Protection Act 1956 ("BIPA 1956"). As a consequence of his marriage to Ms. Peterson, the Respondent obtained confirmation from the Department of Immigration on 3 May 2001 that the Respondent was a "special status husband" within the meaning of section 27A of BIPA 1956. As a consequence of being a "special status husband" the Respondent was allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status under BIPA 1956. Section 27A provides:-

> "*Special provisions relating to landing etc of husbands of Bermudians*
>
> *27A (1) Notwithstanding anything in section 25 and without prejudice to anything in section 60, but subject to subsection (4), the husband of a wife who possesses Bermudian status (a "special status husband") shall be allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status, if the conditions specified in subsection (2) are fulfilled in relation to him.*

(2) The conditions to be fulfilled in relation to a special status husband are as follows-

(a) his wife must be ordinarily resident, or be domiciled, in Bermuda;

(b) he must not contravene any provision of Part V;

(c) he must not have a relevant conviction recorded against him;

(d) the Minister must be satisfied that the special status husband is a person of good character and previous good conduct;

(e) the Minister must be satisfied that the special status husband and his wife are not estranged.

(3) In relation to a special status husband "relevant conviction" in subsection (2)(c) means a conviction, whether in Bermuda or elsewhere, of an offence which, in the Minister's opinion, shows moral turpitude on the special status husband's part.

(4) If a condition specified in subsection (2) is not fulfilled in relation to a special status husband, his landing or remaining or residing in Bermuda shall be deemed to be, or, as the case may require, to become, unlawful except with the specific permission of the Minister."

3. On 12 July 2007, the Respondent was convicted of offences under the Misuse of Drugs Act 1972 and sentenced to a term of 14 years imprisonment. This sentence was reduced to one of 12 years imprisonment by the Court of Appeal on 12 March 2008.

4. The sentence imposed upon the Respondent was for a fixed term and subject to remission of one third for good conduct under section 10(1) of the Prisons Act 1979. Section 10(1) confers a right to be considered for parole and the Parole Board decides whether an applicant is suitable to be released on licence, on parole.

5. On 24 June 2009, the Respondent's wife wrote to the then Minister of Labour Affairs and Housing requesting that he be allowed to go on work release and allowed to reside in the matrimonial home. By letter dated 29 July 2009, the Minister advised that as the Respondent was convicted of "*a most serious offence and as such there is little chance that as a foreign national, he will qualify for work release. With regard to parole – he would be eligible for such but, again as a foreign national, he would be ineligible to be granted parole. It is also unlikely that he will be allowed to remain in Bermuda when he is ultimately released*".

6. The Respondent made an application for parole on 29 January 2011 and was interviewed by the Parole Board on 16 May 2011 where his application was reviewed. At that time his application was deferred pending the confirmation of his immigration status. On 5 August 2011, the Parole Board was advised by the Chief Immigration Officer that the Respondent was likely to be deported from Bermuda upon release in accordance with section 27A of BIPA 1956. Upon receiving this advice, the Parole Board advised the Respondent on 10 August 2011 that "*the law does not provide for the parole of foreign inmates without permission to reside being granted by the Minister responsible for Immigration*". The end result was that as the Respondent did not have the necessary immigration approvals to work and reside in Bermuda, he was not granted parole at that time.

7. In relation to foreign prisoners section 14A of the Prisons Act 1979 does provide that where the Minister is satisfied that reciprocal provisions have been made by the law of any of the countries listed in the schedule for the release of prisoners on licence or parole, the Minister may transfer from a prison in Bermuda, a prisoner who is a citizen or permanent resident of any of the listed countries. Whilst Jamaica is a listed country for the purposes of section 14A, the Jamaican authorities have advised the Bermudian authorities that they will not accept inmates released on licence or parole from Bermuda.

8. In these proceedings the Respondent alleged that his constitutional rights had been infringed in that the denial of parole contravened his rights under section 12(2) of the Constitution. This section provides:-

> "*Protection from discrimination on the grounds of race, etc*
>
> *12 …*
>
> *(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
>
> *(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made*

> *subject or are accorded privileges or advantages which are not accorded to persons of another such description.*"

Judgment of the Chief Justice

9. The Chief Justice considered that the evidence clearly established that the applicant was qualified for parole in all respects save for the fact that, as a convicted foreign national, he had no unrestricted right to work in Bermuda. The Chief Justice also considered that it was clear that the supervisory aspects of parole, as found in the Prisons Act 1979, contemplated release on licence within Bermuda only and that it was arguable at least that by necessary implication, the regime established by section 12 of the Prisons Act 1979 is only, in practical terms, accessible by those with an unrestricted right to reside in Bermuda. Section 12, in part, provides as follows:

> *"Release on licence; fixed term*
> *12 (1) Without prejudice to sections 13 and 14, but subject to subsection (2) the Parole Board, having given due consideration to any recommendation made by the Commissioner of Prisons, may, in respect of any prisoner direct that instead of the prisoner being granted remission of his adjudged term of imprisonment under section 10, such prisoner shall, at any time on or after having completed one-third of his adjudged term of imprisonment, be released on licence under this section, but the provisions of this section are subject to section 70P of the Criminal Code.*
> *…*
> *(4) A person released on licence under this section shall until the expiration of his adjudged term of imprisonment be under the supervision of a probation officer or of such society or person as may be specified in the licence and shall comply with such other*

> *requirements as may be so specified; except that the Parole Board may at any time modify or cancel any such requirements.*
> *(5) If before the expiration of his adjudged term of imprisonment the Parole Board is satisfied that a person released has failed to comply with any requirement for the time being specified in the licence, the Parole Board may by order recall him to a prison; and thereupon he shall be liable to be detained in a prison until the expiration of his adjudged term of imprisonment and, if at large, shall be deemed to be unlawfully at large.*
> *(5A) Where the Parole Board has recalled a prisoner to a prison for failure to comply with any requirements specified in the licence, the prisoner shall be entitled to appear and be heard in person before the Parole Board, before a final decision is made on whether he will be recalled to prison.*"

10. The Chief Justice considered that the Bermuda legislative and administrative scheme for parole in relation to foreign nationals who have no right to reside in Bermuda and no means of being paroled to their country of origin was less than satisfactory for two main reasons:-

    (i) such prisoners have no prospect of being released until they have served two thirds of their sentence, while those for whom parole is available may be released after having served only one third of their sentences:

    (ii) the only possibility of such foreign nationals obtaining earlier release depends on whether or not the Bermudian Executive decides to propose to the Legislature some form of early release scheme designed

to give foreign nationals who are ineligible for parole (in Bermuda or in their country of origin) parity of treatment.

11. The Chief Justice rejected the Respondent's claim that his rights under section 5 of the Constitution: "*the right not to be deprived of personal liberty*", and under section 6: "*the right to a fair hearing*", had been breached.

12. The Chief Justice analysed that section 12 of the Constitution prohibited discrimination on various specified grounds including "place of origin" in two main forms: legislative discrimination and discrimination through actions of public authorities. As far as legislative discrimination was concerned, section 12(1) provides that "*…no law shall make any provision which is discriminatory either of itself or in its effect*". However, section 12(4)(b) exempts from prohibition in subsection (1) laws "*with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda or persons who do not belong to Bermuda for the purposes of section 11 of this Constitution*". Having regard to the terms of section 12(4)(b), the Chief Justice concluded that "*complaint cannot be made about the mere fact that parole is not available to persons who do not have a constitutional right to reside and work in Bermuda, as the [Respondent] pragmatically conceded*".

13. In relation to discrimination through the actions of public authorities, the Chief Justice stated that this form of discrimination is closely connected with indirect discrimination through legislation and, in particular, referred to section 12(2) of the Constitution. The Chief Justice held that it was conceded that the making an order of release on licence a privilege or advantage only available to persons who belong to Bermuda is constitutionally protected

discrimination by virtue of section 12(4)(b). However, the fact that persons who belong to Bermuda, or persons who come from countries which are willing to accept their nationals on licence, are given the advantage of gaining their conditional release after serving one third of their sentence and the Respondent is not (i) discriminates against a Respondent as a person of Jamaican origin; and (ii) is not a protected form of discrimination. The Chief Justice held that the effect of the present legislative scheme as it is applied by the Appellants is blatantly discriminatory in contravention of section 12(1) of the Constitution. The Respondent was discriminated against to a material extent simply because, as a Jamaican, he had no prospect of early conditional release. This occurred because of his place of origin and has contravened his rights under section 12 of the Constitution.

Appellants' Submissions

14. Mr. Guthrie, QC opened his appeal on behalf of the Appellants by pointing out that it was regrettable that the Chief Justice was not referred to some of the English authorities which had considered the issue of discrimination in similar circumstances. Mr. Guthrie referred to a number of cases dealing with the English arrangements for Home Detention Curfew ("HDC"). The purpose of HDC is to manage more effectively the transition of offenders from custody back into the community. For most eligible prisoners, HDC will be a normal part of their progression through their sentence. A risk assessment is conducted before HDC is granted. Suitable accommodation must be available and a person released on HDC is electronically tagged and subject to various restrictions, notably curfew conditions. HDC in England has certain similarities to release on licence and parole in Bermuda.

15. *R (on the application of Francis) v Secretary of State for Justice* [2012] EWCA Civ 1200 concerned a challenge by the appellant claiming a declaration that the

Secretary of State's failure to release her on HDC at a time when she was eligible for such release, breached her rights under Article 8 of the European Convention on Human Rights (the "Convention"). The appellant was a Jamaican national who was granted temporary admission to the UK in 1999. On 17 November 2008, the appellant was convicted of offences of possessing heroin and crack cocaine with intent to supply and on 9 December 2008, she was sentenced to concurrent terms of two years imprisonment. The appellant was a fixed term prisoner within the meaning of section 244 of the Criminal Justice Act 2003 and, as soon as she had served the "requisite custodial period", it was the duty of the Secretary of State to release her on licence. In her case, the requisite custodial period was one half of the sentence and she became entitled to release on 8 December 2009 and was notified of that.

16. Section 246 of the 2003 Act empowers the Secretary of State to release prisoners on licence "*at any time during the period of 135 days ending with the day on which the prisoner will have served the requisite custodial period*". By virtue of section 246(4)(f) the power does not apply where the prisoner is "*liable to removal from the United Kingdom*". On 11 November 2009, the UK Border Authority notified the applicant that the Secretary of State for the Home Department had decided that she must make a deportation order against her as a foreign criminal under the UK Borders Act 2007; and on 23 July 2009 a detention order was made authorising her detention until a deportation order had been made. The applicant sought to amend her claim before the Divisional Court by alleging that the failure to grant HDC was in breach of Article 14 (Prohibition of Discrimination) in combination with Article 5 (Right to Liberty and Security). The Divisional Court refused leave to amend and on appeal to the Court of Appeal, Pill LJ said at [40] – [42]:-

"*[40] The Divisional Court's reasoning as to delay is persuasive but, in any event, there is a clear justification in substance for the distinction between foreign and national prisoners. A scheme designed to promote resettlement into the UK community cannot be expected to apply on the same terms to those subject to notice of intention to make a deportation order. The case is very different from the denial of medical therapy in Rangelov.*

[41] The Appellant was treated differently not because she was Jamaican but because of her immigration status. Neither race nor nationality are causally relevant. A scheme designed for reintegration into the community cannot be expected to operate in the same way for those liable to deportation.

[42] The issue of different treatment as between national and foreign prisoners was considered in Brooke v Secretary of State for Justice [2009] EWCH 1396 (Admin) (Divisional Court) and I agree with the approach. Sir Anthony May P, stated, at para 30:

> *"The essential point, in my view, is that the position of, and statutory release arrangements for, prisoners who are liable to be removed from the United Kingdom are not analogous with those for prisoners who are not so liable to be removed. The different regimes are in place not because of differences in nationality, but because the first class of prisoners is liable to be removed and the second is not. The two situations are not comparable. Release on home detention is to be seen as a relaxation of a custodial sanction. Release for the purposes of removal is to enable a different sanction from imprisonment in this country to be brought into effect.*

> *Such prisoners are not released into the community.*"

17. *R (on the application of Serrano) v Secretary of State for Justice* [2010] EWHC 3216 (Admin) concerned a challenge to the policy, contained in paragraph 2.47 of the Prison Service Instruction providing, that in a case where a prisoner has been notified of liability to deportation but no decision to deport has been made, the prisoner "*should be presumed unsuitable to be considered for release on HDC unless there are exceptional circumstances justifying release*". Males J. first considered whether differential treatment in the grant of HDC on the ground of nationality comes within the ambit of a Convention right. Relying upon *R (Clift) v SSHD* [2006] UK HL 54, he held it clearly did. In relation to the issue whether the policy discriminated unlawfully on the ground of nationality contrary to Article 14 ECHR, Males J. held that he was bound by the decision in *Francis* and at [67] said:-

> "*[67] In my judgment the reasoning of Pill LJ at 40 to 42 set out above constitutes a determination both (1) that difference in treatment regarding release on HDC based on liability to removal from the United Kingdom is not discriminatory on the ground of nationality (see particular 41 and the citation from Brooke at 42) and (2) that in any event such difference in treatment, even if on the ground of nationality, is clearly justified and so is not a breach of art 14 (see 40). I consider that I am bound to follow this reasoning. However, even if that is not so, this is a considered decision with which both Lloyd and Lewison LJJ agreed, which is at least strongly persuasive and which I ought to follow.*"

18. Relying upon *Francis*, Males J. held that there was no discrimination based on nationality for the purposes of Article 14 and the challenge to the policy failed. In relation to the issue of discrimination, Males J. added at [70]:-

> "*[70] … I would in any event have accepted Mr Deakin's submission that the relevant distinction so far as HDC is concerned is not between British and foreign prisoners but between those who are liable to deportation and those who are not. The latter category includes foreign nationals who are not subject to the automatic deportation provisions (because they are serving sentences less than one year) and whose deportation has not been determined to be conducive to the public good, and also foreign nationals who are subject to the automatic deportation provisions but in respect of whom the SSHD has decided that one of the s 33 exceptions applies.*"

19. *R (Mormorc) v Ministry of Justice* [2014] EWHC 4024 (Admin) again concerned a challenge to the policy relating to foreign prisoners and the availability of HDC. The policy stated that where the prisoner has been notified of liability to deportation but there has not been a decision to deport, the prisoner is not precluded from consideration for release on HDC and may be released where there are exceptional circumstances. It was argued that the application of the policy to the applicant in that case, a Romanian national, amounted to unlawful discrimination on the grounds of nationality, contrary to his rights under the European Union law under the Equality Act 2010, and to unlawful discrimination under Article 14 of the Convention. In considering the core issue whether any different treatment accorded to the claimant was based upon nationality or based on his immigration status, his Honour Judge Cooke said at [20] – [22]:-

> "*20. I shall attempt to summarise and say something about those arguments in a moment. But, it seems to me, that I ought to start by saying that I accept Mr. Deakin's submissions that ultimately all of these arguments turn on the issue*

> *whether any different treatment that was accorded to the claimant as compared with any other comparator by virtue of this policy was a distinction based on his nationality or one based on his immigration status.*
>
> *21. It is true to say that foreign nationality is an indispensable precondition of liability for deportation. Any decision that a person should be deported therefore necessarily involves a prior finding that he is a foreign national. But it does not mean, in my view that the decision on deportation that is eventually made is necessarily one which is made on the basis of nationality, unless perhaps a challenge were made to the whole regime of deportation of foreign nationals.*
>
> *22. Mr. Deakin points out for instance that the policy under which the claimant was considered does not apply to all foreign nationals. It does not for instance apply to those who are not liable for deportation, either because they have not served a sentence sufficient to render them liable for deportation or because the authorities have accepted that one of the available exceptions applies so they are not in fact deportable. The distinction he says therefore is between those who are potentially subject to deportation and those who are not. That is not a distinction based on nationality per se.*"

20. The English authorities cited above are persuasive in demonstrating that there is, in principle, a distinction between the prohibited grounds of discrimination set out in Article 12(3), which include the prohibited ground of place of origin, and immigration status. Immigration status determines whether a particular prisoner is allowed to remain in Bermuda and whether he is allowed to work in Bermuda. Unless a particular prisoner has the immigration status to remain in Bermuda, it would clearly not be possible for the Parole Board to release that person early to assist his rehabilitation as a member of the community in

Bermuda. As the annual reports of the Parole Board record "*Parole is the conditional release from imprisonment that entitles the person receiving it to serve the remainder of their term of incarceration under supervision in the community, if all terms and conditions connected with the persons release are satisfactorily complied with*". In our judgment, unless a particular prisoner is able to reside and work in Bermuda under the relevant provisions of BIPA 1956, he clearly is unable to benefit from the statutory scheme which allows the Parole Board to release prisoners on licence under section 12(3) of the Prisons Act 1979. This disability to take advantage of the early release arises as a result of the Respondent's immigration status and not because of his place of origin. Consistent with the analysis in the English authorities cited above, this would not amount to discrimination based upon the prohibited grounds set out in section 12(3) of the Constitution.

Respondent's Response

21. In response, Mr. Johnston, on behalf of the Respondent, makes a number of points. First, it is argued that the words "place of origin" and "immigration status" are synonymous in the Constitution. We are unable to accept this submission. Immigration status is concerned with the ability of an applicant to enter, reside and work in a particular jurisdiction and, in the context of Bermuda, is concerned with the position of the Respondent under the relevant provisions of BIPA 1956. Place of origin may be a factor in determining the immigration status of a particular person but it is not synonymous with immigration status. Place of origin ordinarily denotes characteristics acquired at birth and may include an applicant's nationality. In *Thompson* [2008] UK PC 33, Lord Neuberger considered at [27] that the reference to "national origins" in a paragraph which also refers to "place of origin" in the Human Rights Act 1981 is apt to cover nationality. However, the Privy Council decision in *Thompson* lends no support to the argument that the reference to

"place of origin" in section 12(3) of the Constitution is wide enough to include an applicant's immigration status. In our judgment, whilst an applicant's place of origin may be a relevant factor in determining his immigration status, the two concepts are different and reference to a person's place of origin in the Constitution is not synonymous with that person's immigration status.

22. Secondly, the Respondent contends that even if a discriminatory treatment was as a result of the Respondent's immigration status, the Constitution still provides protection against discrimination. It is argued that Article 14 of the Convention considers "immigration status" one of the prohibited grounds of discrimination and the Respondent places reliance on *Bah v United Kingdom* [2011] ECHR 1448. In our judgment *Bah* does not assist in the present appeal. Article 14 prohibits discrimination on grounds of "*sex, race, colour, language, political or other opinion, national or social origin, association with national minority, property, birth or other status*". The European Court of Human Rights in *Bah* held that immigration status could conceivably come within the ground of "other status" expressly set out in Article 14. However, section 12(3) of the Constitution, setting out the prohibited grounds, makes no reference to the ground of "other status". Indeed, the judgment in *Bah* makes a clear distinction between nationality (which has affinity to place of origin) and immigration status, and in this regard the Court stated at [43] – [44]:-

> "*[43] The Court now turns to the issue of the ground of distinction, or the basis for the differential treatment. In this case, the applicant contends that she was treated differently based on the nationality of her son, which equates to "national origin" for the purposes of art. 14. The Government, on the other hand, contends that the basis for the differential treatment of the applicant was her son's immigration status which, being a*

> *purely legal rather that a personal status, did not amount to an "other status" in terms of Article 14.*
>
> *[44] The Court must therefore decide whether the ground of distinction was indeed the applicant's son's immigration status, or rather his nationality, as the applicant claims... The Court finds that, on the facts of this applicant's case, the basis upon which she was treated differently to another in a relevantly similar position, who for the reasons given at [42] above is considered to be the unintentionally homeless parent of a child not subject to immigration control, was her son's immigration status. The Court specifically notes in this regard that the applicant's son was granted entry to the United Kingdom on the express condition that he would not have recourse to public funds. The Court finds that it was this conditional legal status, and not the fact that he was of Sierra Leonean national origin, which resulted in his mother's differential treatment under the housing legislation.*

23. In support of his general argument that early release provisions are constitutionally protected, Mr. Johnston referred us to the House of Lords decision in *R (Clift) v Home Secretary* [2007] 1 AC 484. In that case, the issue was whether the early release provisions applicable to long term prisoners under the Criminal Justice Act 1991 fell within the ambit of Article 5 of the Convention. The issue arose because under the relevant provisions, the Parole Board had no power to recommend the early release on licence of long term prisoners subject to deportation orders and that decision could only be made by the Secretary of State. The issue before the Court was whether the early release on licence of long term prisoners subject to deportation orders should, like all other prisoners, be considered by the Parole Board. The House of

Lords held that there was no longer any justification why the Parole Board should not consider the issue of early release on licence for long term prisoners subject to deportation orders. The decision is of limited assistance in relation to the issue in the present case, namely, whether a denial of release on licence to prisoners liable to deportation constitutes discrimination on ground of place of origin. *Clift* was considered in the English cases and in this regard, we note that the relevant passages from the Judgment of Lord Bingham are set out in the Judgment of Males J. in *Serrano* at [50] and *Clift* was also cited before the Divisional Court in *Francis* (*Serrano* [59]).

24. Thirdly, it is argued that section 27A of BIPA 1956 Act used to revoke the Respondent's special husband status is discriminatory and in the circumstances, it would be wrong to allow the Government to rely on immigration status distinction as support for the denial of the Respondent's parole. Reliance is placed on the Supreme Court decision in *Bermuda Bred Company v The Minister of Home Affairs* [2015] SC (Bda) 82 Civ. Again, we are unable to accept this submission. Any challenge to the validity of the recommendation for a deportation order by the Minister of Home Affairs and the making of such a deportation order by the Governor must be challenged in separate proceedings. Indeed, we understand that the Respondent may indeed challenge the making of such an order.

25. Mr. Johnston also argues that by the time the Respondent was eligible for early release on licence, no decision had been made by the Minister in relation to the making of a deportation order. However, it is clear from the Affidavit of Mr. Edward Lamb, the Commissioner of Corrections, that the only reason why the Respondent was not granted early release was his immigration status and in particular that he did not have the necessary endorsement of the Department of Immigration to be employed. We also note that in the Affidavit

of Dr. Danette Ming, the Chief Immigration Officer, she states that the intent of the letter to the Chairman of the Parole Board dated 5 August 2011 was to convey "*the intent of the Minister responsible for Immigration to recommend to the Governor that Mr. Griffiths be deported, per Section 106 of the Act*". The Affidavit of Dr. Ming appears to indicate that a decision to deport the Respondent had in fact been made. In any event, it seems to us that the issue is whether the Respondent was liable to deportation and not whether a deportation order had been made on a particular date. In both *Francis* and *Serrano*, the challenge by the prisoners to the refusal to release them on HDC was at a time when no decision on deportation had yet been taken by the Secretary of State (*Serrano* [57]).

26. Fourthly, the Respondent contends that even if treatment afforded to the Respondent was not directly discriminatory, it was an instance of indirect discrimination. The Respondent argues that persons in his position would find it markedly more difficult to satisfy the conditions made necessary for the grant of parole in Bermuda. In our judgment, the Respondent's case on indirect discrimination stands in no better position than his claim on direct discrimination.

27. Indirect discrimination can be said to occur when an apparently neutral provision or criterion places persons protected by the general prohibition of discrimination (by race, place of origin, political opinions, colour or creed) at a particular disadvantage compared with other persons, unless that provision or criteria is objectively justified.

28. We were referred by Mr. Johnston to the case of *DH & Others v The Czech Republic* where the Grand Chamber stated at [175] that case law establishes that discrimination means treating differently, without an objective and

reasonable justification, persons in relevantly similar situations. In relation to indirect discrimination, the court accepted that a general policy or measure that has a disproportionately prejudicial effect on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group. However, even in the context of indirect discrimination, it remains relevant to determine that a condition or criterion which is complained of is applied to persons in relevantly similar situations.

29. The Chief Justice held that the Respondent was discriminated against to a material extent simply because, as a Jamaican, he had no prospect of early conditional release [77]. With respect, we are unable to agree with this conclusion. In our judgment, the Respondent was unable to take advantage of early conditional release because he had been advised by the Chief Immigration Officer that as a result of his conviction for a serious offence, he was likely to be deported from Bermuda and the Parole Board had taken the position that foreign inmates without permission to reside were not suitable candidates for parole. The relevant distinction so far as parole is concerned is not between inmates whose place of origin is Bermuda and inmates whose place of origin is outside Bermuda, but between those who are liable to deportation and those who are not. The latter category includes inmates whose place of origin is outside Bermuda who are not subject to deportation orders, either because they belong to Bermuda or the offence is not sufficiently serious to warrant a deportation order.

30. Secondly, even in the context of indirect discrimination claims, it is necessary for the Court to understand the reason why the protected group is disadvantaged and in particular whether the disadvantage is causally connected with the prohibited ground. In the case of *DH*, the Grand Chamber

referred at [80] to its earlier decision in *Hoogendijk v The Netherlands* where the court had stated:-

> "*Where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the Respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex*".

31. The need to pinpoint the cause of the different treatment was emphasised by the Privy Council in *Nadine Rodriguez v The Minister of Housing of the Government* [2009] UK PC 52. Lady Hale at [18] and [25] said:-

> "*18. … It would be unfortunate if discrimination in constitutional and human rights law were to get bogged down in the problems of identifying the proper comparator which have so bedevilled domestic anti-discrimination law in the United Kingdom. There is no need for it to do so, because in constitutional and human rights law, both direct and indirect discrimination can be justified, whereas in our domestic anti-discrimination law, direct discrimination can never be justified.*
> *…*
> *25. The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim.*"

32. Applying that analysis to the facts of this case, it is clear that the reason why the Respondent was not granted parole was not that he was born in Jamaica, but that he had committed a serious offence which resulted in the Minister of

Home Affairs making a recommendation for his deportation from Bermuda. The reasoning of Pill LJ in *Francis* is equally applicable here when he said at [41]:-

> "*The appellant was treated differently not because she was Jamaican but because of her immigration status. Neither race nor nationality are causally relevant. A scheme designed for reintegration into the community cannot be expected to operate in the same way for those liable to deportation*".

33. We note that the issue of indirect discrimination was in fact raised in the English cases. In *R (Mormorc) v Ministry of Justice* [2014] EWHC 4024 (Admin), it was argued by counsel for the applicant at [24] that in *Francis* there was simply a finding that discrimination on the grounds of nationality is justified by the desirability of being able to deal with those who are liable to deportation. Counsel argued that he should be allowed to reopen the question of justification because "*If it is indirect discrimination, then he says that too low a standard has been applied in determining whether it was justified or not*". His Honour Judge Cooke rejected that submission and held at [25] that whilst the Court of Appeal did indeed consider that there was justification, that was in addition to the clear finding that the distinction in that case was not a distinction on nationality, but a distinction based on status. In relation to the issue of justification, Judge Cooke held:-

> "*All arguments in my view based on justification for discrimination on the grounds of nationality therefore fall away simply because there was no relevant distinction which could be regarded as discriminatory by virtue of nationality*".

34. Finally, English cases and in particular *Francis* (Pill LJ at [40] – [42]) hold that the difference in treatment would be justified even if based upon nationality.

The justification lies in the fact that persons liable to be deported "*are not released into the community*". In principle, the same reasoning applies in Bermuda. We have held that the Respondent was ineligible to be granted parole not because his place of origin was Jamaica, but because it was likely that he would be subject to a deportation order. In the circumstances, the issue of justification does not, strictly speaking, arise. However, we agree that if the reason why the Respondent is unable to take advantage of the provision of parole in Bermuda is due to the likelihood of a deportation order made against him by the Governor under BIPA 1956, then any difference in treatment would clearly be justified.

35. Mr. Johnston submits that the English authorities relied upon by the Appellants in support of their submission on immigration status distinction are distinguishable on the facts. He argues that *Francis* and the cases that follow it all relate to the English arrangements for HDC which is a unique regime which is separate and apart from parole in the Bermuda context. We are unable to accept this submission. The Mission Statement of the Bermuda Parole Board, as set out in its annual reports, is to facilitate offenders to become law abiding citizens through community supervision and support designed for successful reintegration. HDC permits release into the community before the end of a fixed sentence, with a view again of assisting rehabilitation. Both the early release on licence and the HDC scheme come within the ambit of Article 5 of the Convention so as to give rise to a potential claim under Article 14 of the Convention (*Serrano* [50] – [51]). Participation in the HRD scheme and the release on licence is only possible if the prisoner can lawfully reside in the community. The relevant issue in the English cases relating to HRD and the relevant issue in this case are essentially identical, namely, whether a prisoner can participate in HRD and the early release schemes in circumstances where he is likely to be the subject of a deportation

order. In all the circumstances, we consider that the reasoning in the English cases is indeed of assistance to this Court in dealing with the present appeal and it is unfortunate that they were not cited to the Chief Justice

Conclusion

36. We recognise that the difficulty faced by foreign prisoners is bound to lead to a sense of unfairness. They may be good candidates for parole but are unlikely to be considered for parole unless they can demonstrate that they can lawfully reside and work in Bermuda It is also inherently unsatisfactory that the Bermudian taxpayer should have to pay the additional cost of a longer period of custody for someone in the Respondent's position. The remedy surely lies in effective arrangements with Jamaica for the repatriation of prisoners The issue on this appeal, however, is a narrow one: have the Respondent's constitutional rights under section 12(1) been infringed. On that narrow issue, we have come to the conclusion that they have not. For these reasons, the Court allows the appeal against the decision of the Supreme Court dated 13 August 2013.

Signed

Hargun, JA (Acting)

I agree *Signed*

Baker, P

I agree *Signed*

Bell, JA