In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 14

BETWEEN:

(1) LEIGHTON GRIFFITHS
(2) RODERICKA GRIFFITHS

Applicants

-v-

(1) MINISTER OF HOME AFFAIRS

(2) THE ACTING GOVERNOR OF BERMUDA

(3) THE COMMISSIONER OF PRISONS

Respondents

JUDGMENT

(without a final hearing)

Judicial review-provisions of the Bermuda Immigration and Protection Act 1956 permitting the deportation of foreign male spouses- discrimination on the grounds of sex- whether provisions of Immigration law are inoperative for contravening the Human Rights Act 1981

Date of Judgment: June 7, 2016

Mr Eugene Johnston, J2 Chambers, for the Applicants
Ms. Shakira Dill-Francois, Deputy Solicitor-General, for the Respondents

1. The 1st Applicant is a Jamaican national married to the Bermudian 2nd Applicant. He was (when the present proceedings were commenced) completing service of a sentence of imprisonment for a serious drug-related offence and is the subject of a Deportation Order dated January 11, 2016. He was given an opportunity to make representations as to why he should not be deported in September 2015.

2. On January 12, 2016, the Applicants applied for leave to seek judicial review to challenge the legality of the Deportation Order, which is based on the premise that the 1st Respondent has lawfully revoked the 1st Applicant's special husband's rights under section 27 of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act"). The Applicants wished to argue that the provisions of section 27A of the 1956 Act purportedly authorising the deportation of special status husbands are inoperative (by virtue of the supremacy provisions in section 30B of the Human Rights Act 1981("the HRA")) because they discriminate on gender grounds against male foreign spouses of Bermudians. A logical extension of this complaint was that the relevant provisions discriminated against the 2nd Applicant as a Bermudian woman married to a foreign husband as well.

3. Foreign wives of Bermudians are not subject to the loss of their right to reside in Bermuda on comparable terms under section 27 of the 1956 Act. Most notably, wives do not loss their right to reside with their Bermudian husbands if they are convicted of a "*relevant offence*". Nor is their entitlement to do so conditional upon them being persons of "*good character*".

4. On January 13, 2016 I granted leave to seek judicial review without a hearing as on the face of the application the main grounds appeared to be strongly arguable. The application for leave was supported by a short skeleton argument and a bundle of authorities. The main case relied upon was my own decision in *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 82 Civ (27 November 2015); [2015] Bda LR 106. In that case I held that these same provisions of the 1956 Act engaged by the present application (a) afforded different immigration treatment to foreign heterosexual spouses of Bermudians and foreign same sex partners of Bermudians, and that (b) this differential treatment constituted discrimination in the provision of goods and services contrary to section 5 of the HRA.

5. I further held, following the landmark judgment of Hellman J in *Re A & B-v-Director of Child and Family Services* [2015] SC (Bda) 11 Civ (3 February 2015); [2015] Bda LR which decided for the first time that adoption services fell within the ambit of section 5 of the HRA, that, to the extent of the inconsistency, the relevant provisions of the 1956 Act were inoperative. Prior to the arguments advanced by counsel for the applicants in *Re A & B* in early 2015, this Court had never before been invited to exercise its jurisdiction under section 29 of the HRA (enacted in 1981) to declare statutory provisions which were inconsistent with the HRA to be inoperative by virtue of the primacy of the HRA under section 30B (enacted in 1992).

6. At the directions hearing in Chambers on January 15, 2016 (the "Directions Order"), I indicated my strong provisional view that the application was likely to be granted unless I could be persuaded to depart from the approach I adopted in the *Bermuda Bred Company* case. The provisions held to be inoperative for inconsistency with the HRA in that case were, broadly speaking, the same 1956 Act provisions which are under attack here. There the grounds of discrimination were primarily sexual orientation and secondarily marital status. The same Minister in *Bermuda Bred Company* had elected not to appeal my decision in that case. The present application appeared at first blush to be, to the colloquial term, a "slam-dunk" one for the Applicants subject, of course, to any higher level appellate review. Because of the findings I reach on the main challenge to the deportation order, I see no need to consider the subsidiary complaint that the process leading to the Deportation Order being made was flawed. This complaint in any event lacked any obvious merit.

7. Accordingly, I gave directions for the filing of evidence and written submissions with liberty to apply for an oral hearing. The Respondents filed their evidence in answer on January 29, 2016 in compliance with the Directions Order. The Applicants filed neither evidence in reply nor a skeleton in accordance with the directed timetable or at all. On February 26, 2016, the Respondents filed their skeleton argument in accordance with the directions order. Neither party, however, requested the Court to proceed to deliver judgment and the file fell dormant. These filings did not come to my attention until on or about May 4, 2016 when I directed (of the Court's own motion) that the Applicants should have a further 14 days to file any written submissions. I also requested the parties to indicate whether they wished an oral hearing. The Respondents indicated they would reserve their position on an oral hearing until they had seen the Applicants' submissions.

8. The Applicants did not respond until May 26, 2016 when they indicated they proposed to file a fresh application which they wished to consolidate with the judicial review proceedings and would file those proceedings "*before end of day tomorrow*". They proposed that the issue of an oral hearing could be canvassed at the directions hearing of their new application which it was promised would be filed on May 27, 2016. No such application was filed. On May 27, 2016 the Respondents requested the Court to proceed without an oral hearing based on the material now before the Court in light of the Applicants' default. The Applicants have neither filed the threatened new proceedings nor responded to the Respondents' May 27, 2016 letter.

9. On June 1, 2016, I advised the parties that I intended to proceed to deliver judgment without an oral hearing. The short point is whether or not the statutory provisions upon which the deportation order are based are inoperative because they discriminate

against the 1st Applicant on the grounds of his sex contrary to the Human Rights Act 1981.

The relevant provisions of the 1956 Act

Primacy of 1956 Act

11. Section 8 of the 1956 Act provides as follows:

> "***Conflict with other laws***
> *8. (1)Except as otherwise expressly provided, wherever the provisions of this Act or of any statutory instrument in force thereunder are in conflict with any provision of any other Act or statutory instrument, the provisions of this Act or, as the case may be, of such statutory instrument in force thereunder, shall prevail.*
>
> *(2)Subject to subsection (1) nothing in this Act shall absolve any person from any liability that he may incur by virtue of any other Act or at common law.*"

Husbands of Bermudian wives

10. Section 27A ("*Special provisions relating to landing etc. of husbands of Bermudians*") of the 1956 Act provides as follows:

> "(1) *Notwithstanding anything in section 25*[1] *and without prejudice to anything in section 60*[2]*, 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;*

[1] Section 25 requires special permission to enter Bermuda with the exception of Bermudians, special category persons, lawful visitors and permanent residence certificate holders. Section 25 makes no reference to the position of husbands of Bermudians but as regards wives and children of Bermudians provides as follows:

"*(3) Section 27 and section 30 have effect respectively with respect to the special status, as respects entitlement to land in Bermuda, or to remain or reside therein, of wives and dependent children of persons who possess Bermudian status…*"

[2] Section 60 ("*General principle regarding regulating gainful occupation*") identifies those requiring specific permission of the Minister to work. Exceptions include "*a person who for the time being has spouse's employment rights*" (section 60(1) (c)). Subsections (3) and (4) define the rights of foreign husbands and wives in equal terms.

(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."

11. Controversial conditions for the enjoyment of "special status husband" rights include the following:

(1) (primarily) the requirement not to have a "*relevant conviction recorded against him*" (section 27A (2)(c)); and

(2) the requirement to be a "*person of good character and previous good conduct*" (section 27A (2)(d)).

<u>Wives of Bermudian husbands</u>

12. Section 27 ("*Special provisions relating to landing, etc., of alien wives, etc., of persons who possess Bermudian status*") provides as follows:

"*27. Notwithstanding anything in section 25, and without prejudice to anything in section 60 (which section imposes restrictions on the engagement of such persons in gainful occupation) the wife and dependent children under eighteen years of age of a person who possesses Bermudian status shall be allowed to land and to remain or reside in Bermuda in connection with the residence therein of the person who possesses Bermudian status as if such wife or child were deemed to possess Bermudian status if all the following conditions are fulfilled—*

(a) the wife or dependent children must not land, or remain or reside in Bermuda, while the husband or father, as the case may be, is not ordinarily resident, or is not domiciled, in Bermuda;

(b) the wife must not commence to live apart from her husband under a decree of a competent court or under a deed of separation; and

(c) *the wife and dependent children must not, while residing in Bermuda, contravene any provision of Part V (which Part relates to engagement in gainful occupation), but if any of such conditions are not fulfilled, then the landing of such wife and dependent children, or their residence in Bermuda, shall be deemed to become unlawful except with the specific permission of the Minister.*"

13. It is noteworthy, by way of comparison with the position of special status husbands, that wives are <u>not</u> required to comply with the following conditions:

(a) the requirement <u>not to have</u> a "*relevant conviction recorded against* [her]";

(b) the requirement to be a "*person of good character and previous good conduct*".

The relevant provisions of the HRA

<u>Definition of discrimination</u>

14. Section 2 of the HRA defines discrimination in the following way:

> "*(2) For the purposes of this Act a person shall be deemed to discriminate against another person—*
>
> > *(a) <u>if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because</u>—*
> >
> > *(i) of his race, place of origin, colour, or ancestry;*
> >
> > *<u>(ii) of his sex</u>;*
> >
> > *(iii) of his marital status;*
> >
> > *(iiiA) of his disability;*
> >
> > *(iv) he was not born in lawful wedlock;*

(v) she has or is likely to have a child whether born in lawful wedlock or not; or

(vi) of his religious beliefs or political opinions;

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—

(i)which is such that the proportion of persons of the same race, place of origin, colour, ancestry, sex, marital status, disability, religious beliefs, or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii)which he cannot show to be justifiable irrespective of the race, place of origin, colour, ancestry, sex, marital status, disability, religious belief or political opinions of the person to whom it is applied; and

(iii)which operates to the detriment of that other person because he cannot comply with it." [Emphasis added]

15. Section 2(2)(a) defines what is generally referred to as 'direct discrimination' while section 2(2)(b) defines what is generally referred to as 'indirect discrimination'[3]. Only direct discrimination appears to be engaged by the present application. The complaint is that foreign husbands of Bermudians are deliberately treated differently under section 27A contrasted with foreign wives under section 27 because of their sex.

Protected sphere of discrimination: services and facilities

16. The HRA prohibits discrimination in various spheres. Section 5 ("*Provision of goods, services and facilities*") provides so far as is material as follows:

"*(1)No person shall discriminate against any other person due to age or in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.*

(2)The facilities and services referred to in subsection (1) include, but are not limited to the following namely—

[3] This view was confirmed by Lord Neuberger in *Thompson v. Bermuda Dental Board* [2008] UKPC 33 at [12].

access to and use of any place which members of the public are permitted to enter;

accommodation in a hotel, a temporary boarding house or other similar establishment;

facilities by way of banking or insurance or for grants, loans, credit or finance;

facilities for education, instruction or training;

facilities for entertainment, recreation or refreshment;

facilities for transport or travel;

the services of any business, profession or trade or local or other public authority."

17. Section 31 provides that the HRA applies to the Crown as well as to private persons. Section 3 of the Interpretation Act 1951 provides:

> "'*public authority' means any designated person or body of persons (whether corporate or unincorporate) required or authorized to discharge any public function—*
>
> *(i) under any Act; or*
>
> (ii) *under any Act of the Parliament of the United Kingdom which is expressed to have effect, or whose provisions are otherwise applied, in respect of Bermuda; or*
>
> (iii) *under any statutory instrument…*"

Jurisdiction of Supreme Court to declare statutory provisions inconsistent with HRA inoperative

18. Section 29 of the Act provides:

> "*29. (1) In any proceedings before the Supreme Court under this Act or otherwise it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act.*

(2)The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions."

19. Section 30B provides:

"***Primacy of this Act***

30B (1)Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.

(2)Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."

Relevant findings in Bermuda Bred Company case

HRA primacy provisions trump section 8 of the 1956 Act

20. After quoting section 8 of the 1956 Act, I reached the following conclusions:

"*66. This provision, possibly the earliest such primacy provision enacted by way of local legislation, unambiguously provides that BIPA provisions will prevail over any other statutory provisions in the event of any conflict. The caveat, which contemplates that it may be "otherwise expressly provided", may be viewed as the draftsman doffing his hat at the doctrine of Parliamentary supremacy. It is explicitly acknowledged that subsequent legislation may later expressly override provisions of BIPA. In effect, it signals to future draftsman that clear language will be required to override the primacy for BIPA secured by section 8. Does section 30B of the HRA expressly override section 8 of BIPA? It provides:*

> *'**Primacy of this Act***
> *30B (1)Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.*
>
> *(2)Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."*

66. It is difficult to fairly construe section 30B as expressly providing that the HRA is to have primacy over the BIPA because it does not say so in terms. The legislative intent to expressly modify earlier legislation generally is made plain; a two year transitional period was provided between January 1, 1993

and January 1, 1995. This was presumably to enable Parliament, if it wished, to amend other legislation to either:

> *(a) bring it into conformity with the HRA; or*
>
> *(b) to expressly provide that the provisions of section 30B would not apply to such extent as might be specified.*

67. So the Respondents had a two-year window between 1993 and 1995 to amend section 8 of the BIPA to expressly provide that it took precedence not just generally, but specifically notwithstanding section 30B of the HRA. That opportunity was scorned. It is impossible to read section 8 of the BIPA as intending to expressly override the HRA. Yet to my mind that is still not sufficient to justify viewing section 30B of the HRA as expressly overriding section 8 of the BIPA. The conflict between the two provisions as a matter of primary construction is irreconcilable. This conflict engages the following supplementary rule of construction, which is formulated by Bennion as follows:

'Section 80. Implied amendment
Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."

68. Applying this canon of construction to the conflict between BIPA section 8 and HRA section 30B, section 30B must properly be read as amending section 8 of the BIPA by implication to exclude the HRA from the class of other legislation which the BIPA takes primacy over. In other words, I accept the Applicant's central submission that the HRA takes primacy over the BIPA. This has the crucial result that this Court's jurisdiction under section 29 of the HRA to declare conflicting provisions of other legislation to be inoperative may potentially be deployed in relation to the impugned provisions of the BIPA."

The 1956 Act in differentiating the immigration rights of foreign persons in stable relationships with Bermudians on prohibited grounds breaches the HRA

21. I further found in the *Bermuda Bred Company* case that the limitation of spousal rights under sections 27 and 27 A of the 1956 Act to foreign married partners quite obviously discriminated against unmarried partners directly and same sex foreign partners indirectly:

> "*71. The complaint was that this section, and sections 27 and 27A which confer preferred residential rights on wives and husbands of Bermudians, discriminate directly against unmarried Bermudians directly (on marital status grounds) and indirectly against gay and lesbian Bermudians (on sexual*

orientation grounds). These provisions purported to authorise the Minister to regulate the entry into Bermuda of long-term foreign partners of Bermudians which discriminated against those Bermudians who were unmarried or in same sex relationships. The direct discrimination was self-evident and quite obvious. No or no coherent counter-argument was advanced on behalf of the Respondents. The fact that the statutory provisions said to be inoperative because they conflicted with the HRA could not be attacked as unconstitutional was entirely beside the point."

Direct discrimination cannot be justified: only indirect discrimination can be justified

22. The distinction between the ability of a respondent to justify indirect discrimination but not direct discrimination was explained in the *Bermuda Bred Company* case as follows:

> "*81. Against this background, the broad approach of Hellman J in A & B-v-Director of Child and Family Services [2014] SC (Bda) 11 Civ (3 February 2015) is highly persuasive and I fully endorse it. He explained an important conceptual distinction between the ECHR regime and our own HRA regime in the following way:*
>
> > *'13. Where direct discrimination is alleged, ie discrimination contrary to section 2(2)(a) of the 1981 Act, the court is required to engage in a factual inquiry as to whether discrimination on a prohibited ground has taken place. If it has, then that is an end of the matter: the discrimination was unlawful.*
> >
> > *14. However, where indirect discrimination is alleged, ie discrimination contrary to section 2(2)(b) of the 1981 Act, the court is required to undertake a more complex inquiry. This includes consideration of whether the allegedly discriminatory condition was justifiable. If it was justifiable it will not be discriminatory."*"

Declaratory relief granted

23. The judgment in the *Bermuda Bred Company* case concluded as follows:

> "*92. The present application was based on the combined effect of direct marital status discrimination and indirect sexual orientation discrimination. Subject to hearing counsel, the appropriate declaration to which the Applicant is entitled is one in the following terms:*
>
> > *'Sections 25 [, 27, 27A] and 60 of the Bermuda Immigration and Protection Act 1956 shall be inoperative to the extent that they authorise*

the Minister to deny the same-sex partners of persons who possess and enjoy Bermuda status, and who have formed stable relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses by the said sections 25 and 60 respectively."

Findings: does the 1956 Act discriminate against the 1st Applicant as a foreign male spouse of a Bermudian on the grounds of his sex?

Starting assumption: foreign male spouses of Bermudians are clearly discriminated against in their residential rights under section 27A as contrasted with the more generous residential rights conferred on foreign wives of Bermudians under section 27 of the 1956 Act

24. It seems self-evident that foreign male spouses of Bermudian wives are treated differently and less favourably than foreign female spouses of Bermudian husbands:

    (a) a foreign female spouse of a Bermudian acquires her section 27 rights without regard to her past or present character. She does not lose her section 27 rights if she commits offences of moral turpitude;

    (b) a foreign male spouse of a Bermudian can only acquire his section 27A rights if he is of good character, past and present. He will lose those rights if he commits an offence of moral turpitude.

25. The philosophical underpinnings of these differences appear to belong to what for most of the Western world at least is a bygone era. The European Convention of Human Rights 1950 ("ECHR"), which extends, to Bermuda prohibits discrimination on gender grounds. So does the International Covenant on Civil and Political Rights 1966. Foreign wives of Bermudian men are both equated to the children of Bermudian men and additionally have the right to reside in Bermuda as long as they are not estranged from their Bermudian husbands under sections 27 and 27A of the 1956 Act. Foreign husbands of Bermudian women can only acquire the right to reside in Bermuda if the State is satisfied that they are of good character, past and present. They can only retain those rights if they do not 'misbehave' and commit offences of "moral turpitude", even if they are not estranged from their Bermudian wives. On its face, this appears to be an emblematic case of indefensible unequal treatment, unless one accepts the "separate but equal" doctrine used to justify US school segregation which was rejected by the US Supreme Court over 60 years ago in *Brown-v-Board of Education of Topeka*(1954) 347 U.S. 483.

26. Assuming (a) one is required to interpret the HRA in a broad and purposive manner, designed to amplify rather than to constrict the enjoyment of rights protected by the HRA, and (b) *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 82 Civ (27 November 2015); [2015] Bda LR 106 was correctly decided, it is not easy to identify grounds on which the Applicant's claim could be rejected. Section 27A on its face deprives persons in the position of the 1st Applicant who have been convicted of serious criminal offences of the right to reside in Bermuda with their Bermudian wives while a foreign wife convicted of the same offence (or even more grave criminal offences) is permitted by section 27 to continue to reside in Bermuda with her Bermudian husband. This Court has previously determined that:

    (a) the HRA by virtue of section 30B takes primacy over the 1956 Act notwithstanding the provisions of section 8 of the 1956 Act;

    (b) section 5 of the HRA prohibits discrimination in the provision of services relating to applications for residential rights under the 1956 Act;

    (c) provisions of statutes including sections 27 and 27A of the 1956 Act which are inconsistent with section 5 of the HRA can be declared to be inoperative under section 29 of the HRA;

27. The discrimination on the grounds of gender between foreign husbands of Bermudians and foreign wives on the face of sections 27 and 27A is far more blatant and obvious than the discrimination on the grounds of sexual orientation which was established in *Bermuda Bred Company-v-Minister of Home Affairs*. Because foreign husbands and foreign wives are both parties to the same form of stable relationship which is sanctioned both locally and globally by law. It is interesting to note that the right of men and women to have equal rights in relation to marriage is explicitly proclaimed by the Universal Declaration of Human Rights 1948. The underlying 'applicants' in *Bermuda Bred Company* were complaining of a more nuanced form of discrimination based on the complaint that persons in relationships comparable to marriage but not yet legally recognised were being discriminated against on grounds of their sexual orientation and/or marital status. What was alleged there was a case of discrimination by omission rather than discrimination on the face of two different statutory provisions dealing with the same subject matter, as in the present case.

The Respondents' case for displacing the starting assumption

28. The Deputy Solicitor-General was undaunted by the obvious difficulties in opposing the present application. She advanced one broad attack on the Court's starting assumption. The core of the argument was that because foreign husbands of Bermudians had no constitutional "belonger" status, the HRA should be construed in such a way that permitted differential treatment which was not inconsistent with the

Constitution itself. No attempt was made to contend that the findings reached in the *Bermuda Bred Company* case were wrong and should be revisited.

29. It is uncontroversial that the Constitution not only implicitly permits discrimination on the grounds of sex through laws or the actions of public authorities because sex is not a ground of discrimination which is prohibited by section 12 (3). The Constitution itself explicitly discriminates on gender grounds because section 11(5) (c) only confers belonger status on foreign wives:

> "*(5) For the purposes of this section, a person shall be deemed to belong to Bermuda if that person—*
>
> *(a) possesses Bermudian status;*
>
> *(b) is a citizen of the United Kingdom and Colonies by virtue of the grant by the Governor of a certificate of naturalisation …;*
>
> *(c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person under a decree of a court or a deed of separation; or*
>
> *(d) is under the age of eighteen years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies.*" [Emphasis added]

30. My own independent research suggests that the Bermuda Constitution Order 1968 was substantially based upon the Bahama Island Constitution Order 1963, and that sections 11(5)(c) and 12(3) of our own Constitution correspond to the 1963 Bahamian sections 11(4)(e) and 12(3), respectively. It seems somewhat odd that the declaratory provisions of section 1 proclaim that everyone in Bermuda is entitled to enjoy the rights of Chapter 1 without discrimination on the grounds, *inter alia*, "*sex*", but this Court has, three decades, ago formally decided that those words only have symbolic rather than actual legal effect: *Davey and Davey-v-Minister of Home Affairs* [1986] Bda LR 52. Be that as it may, the Respondents are quite right to point out that the Constitution itself confers 'belonger' status on foreign wives of Bermudians and not on foreign husbands.

31. The next three limbs of the argument are less easy to readily accept. The Deputy Solicitor-General correctly submits that section 27 of the 1956 Act is a provision designed to give effect to the constitutional rights conferred on foreign wives of Bermudians by section 11(5)(c). However she then cites in apparent support for the

validity of section 27A Lord Hoffman's observation that "*the right of abode is a creature of the law. The law gives it and the law may take it away*…": *R (Bancoult-v-Secretary of State for Commonwealth Affairs* [2009] AC 453; [2008] UKHL 61(at paragraph 45). Those observations were made in the context of a controversial decision the soundness of which has been since doubted by some legal commentators and which I would be reluctant to endorse in relation to Bermuda. The House of Lords in *Bancoult* was dealing with a far removed legal issue. The question was whether the Crown's prerogative powers to legislate for an overseas territory could be used to deprive the Chagos Islanders of the right of abode in their native land. We are here simply concerned with the question of whether of whether or not Bermuda's own Parliament is competent to legislate in terms which are inconsistent with the HRA, and so it is difficult to see how the quoted *dictum* of Lord Hoffman bears on the question in controversy in the present case.

32. Putting aside the question in issue in the present case, it will of course generally be the case that rights are creatures of the law and that Parliament may create rights and take them away by two obvious mechanisms:

    (a) by providing, as section 27A does, that rights are conferred on a conditional basis and then when one or more conditions no longer apply the right will lapse; or

    (b) by suspending the operation of and/or amending legislative provisions so that rights which did exist no longer apply.

33. Ms Dill-Francois next advances the startling submission that there is no discriminatory treatment at all because special status husbands, "*whilst enjoying those rights…are treated in the same way as the wives of Bermudians*". This seeks to conveniently ignore the main issue: that the specific discrimination complained of is that the residential rights of foreign husbands are subject to conditions which do not apply to foreign wives. Conditions which, if a foreign husband is unable to meet, will result in his residential rights lapsing altogether. It could not be responsive to a complaint that a theatre which has a policy prohibiting patrons from bringing in food, but only expels patrons of a particular race who breach the policy, is discriminating on grounds of race for the proprietor to argue as follows. Members of the expelled race are treated equally when they do not breach the policy complained of; accordingly, they cannot complain that the policy is being applied in a discriminatory manner. An attempt was nevertheless made to support this woeful submission by reference to eminent authority. Reliance was placed on the reasoning of the Privy Council in *Marshall and others-v-Deputy Governor of Bermuda and others* [2010] All ER (D) 239; [2010] UKPC 9. That case in my judgment has no application here, primarily because it is dealing with employment discrimination rather than goods, services and facilities discrimination.

34. In *Marshall*, an ambitious attempt was made to obtain a declaration that provisions of the Defence Act 1965 providing for male only conscription were unlawful. It was agreed that male only conscription was discriminatory (within the statutory definition of discrimination) on gender grounds because it imposed obligations on men which women were not subject to. Because discrimination on the grounds of sex is not prohibited by section 12 of the Bermuda Constitution, the *Marshall* applicants were forced to rely upon the HRA. The further challenge the applicants had was to find an appropriate discrimination gateway because the scheme of the HRA is, as has been noted above, to prohibit discrimination in specific contexts, rather than to prohibit discrimination generally. The applicants in *Marshall* were compelled to rely upon employment discrimination contrary to section 6 of the HRA. This gateway led to a dead end; because women were permitted to be employed in the Bermuda Regiment and the applicants were unable to point to any discrimination in employment terms. As Lord Phillips opined:

> "*17. If the Regiment was comprised exclusively of male conscripts it might have been arguable that there was discrimination against them because of a refusal to conscript women, within the ambit of section 6(1)(a). Mr Crow's problem is that there is no refusal to recruit women for employment in the Regiment. They are invited to join the Regiment on precisely the same terms as the male conscripts, as are any men who are not conscripted. Mr Crow seeks to meet this difficulty by submitting that one must imply the addition of two words into (a) so that it reads "refusing to refer or to recruit by conscription any person or class of persons (as defined in section 2) for employment."*
>
> *18. This is, in the opinion of the Board, a step too far. The meaning of section 6(1)(a) is crystal clear. It treats employment as something that is desirable and renders unlawful treating a person less favourably by denying him or her employment, or the chance of obtaining employment. The relevant wording echoes that of the similar provision in section 2(2)(a), where the ambiguity of the phrase "any person" is not present. By advancing a construction that treats employment as a detriment Mr Crow seeks to turn the meaning of section 6(1)(a) on its head. However generous and purposive one's approach to the subsection it cannot achieve this result.*
>
> *19. Mr Crow is confronted with a similar problem in relation to section 6(1)(e). It is arguable that conscripts constitute an "employment classification or category". The maintenance of that classification or category does not, however, "exclude any person or class of persons from employment". Those who are not conscripted, be they women or men, are free to obtain employment that is identical to that of those who are conscripted. Mr Crow argues that one must add, by implication, an additional phrase, so that the relevant provision*

reads "exclude any person or class of persons from employment as a conscript". Once again this turns the natural meaning of section 6(1)(e) on its head, and is not a viable interpretation.

20. Mr Crow has a different argument in relation to section 6(1)(g). He submits that the obligations that relate to conscription constitute a "special term or condition of employment" that treats men who are liable to conscription less fairly than women who are not. The problem with this argument is that conscription is not a "term or condition of employment", it is a manner of procuring employment. The terms and conditions of employment of those who are conscripted and those who volunteer are, in accordance with the provisions of section 19 of the Defence Act, identical."

35. The only observations in *Marshall* which are sufficiently broad to be of relevance to the question under consideration here appear in the separate judgment of Lady Hale, to which I will return below. However, I decisively reject the suggestion that the analysis of section 6 of the HRA in Marshall supports the view that no discrimination has occurred in the present case. On the contrary, *Marshall* merely confirms that complaints of discriminatory treatment must be based on conduct properly fall within the four corners of the relevant sphere of prohibited discriminatory action. The differential treatment here clearly falls within the scope of section 5 of the Act, assuming that this Court was correct in the *Bermuda Bred Company* case that immigration services were a protected form of service provided by a public authority for the purposes of section 5.

36. The final limb of the Respondents' argument is perhaps the central argument. It is, properly analysed, simply unsustainable. Reference is firstly made to a fuller quotation of the following dictum of Lord Hoffman in an English case, *R-v-Secretary of State for the Home Department ex parte Simms*[2000] 2 AC 115:

> "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights…Fundamental rights cannot be overridden by general or ambiguous words…*"

37. The Deputy Solicitor-General then submits:

> "*19. Consequently, we submit that what the Applicants are requesting this Honourable Court to do is to derogate from the provisions of the Constitution by effectively conferring belonger status rights on the husband of a Bermudian.*
>
> *20. This we say is not in accordance with section 28(a) of the Human Rights Act which states:*

"***Avoidance of doubt provisions***

28. For the avoidance of doubt it is hereby declared that-

(a) *The provisions of this Act are in addition to and not in derogation of Part I of the Constitution;…*"

38. Lord Hoffman's *dictum* is inapposite in terms of illuminating the issues under present consideration for two reasons. Firstly, it begins by reciting the British constitutional position. Bermuda's Parliament is <u>not</u> competent to legislate in a way which is inconsistent with the fundamental rights and freedoms provisions in Chapter 1of the Bermuda Constitution. Secondly, the *dictum* is being used to justify engaging the rules applicable to construing legislation for conformity with Chapter I of the Constitution in circumstances where no potential conflict arises. This seems to be based on a reading of section 28(a) of the HRA which turns the long-accepted meaning of that provision on its head. Moreover, the Preamble to the HRA states as follows:

> *"WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the World and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations:*
>
> *AND WHEREAS the European Convention on Human Rights applies to Bermuda:*
>
> *AND WHEREAS the Constitution of Bermuda enshrines the fundamental rights and freedoms of every person whatever his race, place of origin, political opinions, colour, creed or <u>sex</u>, but subject to respect for the rights and freedom of others and for the public interest:*
>
> *AND WHEREAS these rights and freedoms have been confirmed by a number of enactments of the Legislature:*
>
> *<u>AND WHEREAS it is expedient to make **better provision** to affirm these rights and freedoms and to protect the rights of all members of the Community</u>…*" [Emphasis added]

39. Bermuda's Parliament was indeed not competent to, when enacting the HRA, derogate from the provisions of the Chapter I of the Bermuda Constitution by purporting to restrict (as opposed to enlarge) the scope of the fundamentally protected rights. Nevertheless, section 28, for the avoidance of doubt, confirms that the provisions of the Act are "*in addition to*" or by way of amplification of the rights contained in Chapter I of the Constitution (which section 28(a) erroneously refers to

as "Part I"). The HRA provides additional human rights protections which, unlike Chapter I:

(a) regulate not simply the Crown and relations between the citizen and the State, but regulate relations between citizens *inter se* as well; and

(b) prohibit discrimination on grounds not protected by section 12(3) of the Constitution, most notably (for present purposes) sex as well.

40. It is difficult to see how it can be seriously argued that the drafters of the HRA intended the Act to operate in the way the Respondents now suggest. In effect, the logical extension of their argument goes, any complaint of a breach of the HRA can be defeated by demonstrating that the right asserted is broader than a corresponding constitutionally protected right. If a foreign husband cannot complain of discriminatory 'belonger' rights because section 11(5)(c) of the Constitution only confers more generous rights on foreign wives, it must follow that no valid sex discrimination complaint can ever be made at all. Because section 12(3) of the Constitution does not recognise sex discrimination at all and Parliament in protecting a right not protected by the Constitution is legislating inconsistently with the Constitution. The same absurd results apply if one approaches this question from the standpoint of construing the fundamental rights and freedoms provisions themselves.

41. The Respondents accept that the rights and freedoms protected by Chapter 1 of the Constitution must be given a broad and purposive construction consistent with the canons of construction first articulated by the Bermuda Court of Appeal and affirmed by the Privy Council in *Minister of Home Affairs-v-Fisher* [1980] A.C. 319. The purpose of fundamental rights and freedoms provisions in a constitution is to prevent a democratic majority using its legislative and executive power in a way which overrides fundamental individual or collective rights. Ordinary legislation can give and take away more generous human rights protections in accordance with the modified version of the traditional British doctrine of Parliamentary sovereignty which has existed in Bermuda since the 1968 Constitution took effect. It is impossible to construe such provisions broadly and at the same time to hold that their intent is to prohibit Parliament from passing laws which provide more generous protections. Such a construction would lead to absurd results, most obviously rendering most of the HRA (including the entire Act as applied to private individuals or bodies) completely inoperative.

42. Sections 29 and 30B of the HRA are clearly intended to make the more generous human rights protections binding on Parliament unless Parliament makes a conscious decision to expressly pass laws which are not subject to the primacy provisions of the

HRA. The contents and scope of the HRA and these powerful enforcement provisions make no sense if the HRA is to be construed as a statute merely designed to give effect to rights already protected by the Constitution. The HRA enjoys by virtue of sections 29 and 30B a higher quasi-constitutional status than ordinary legislation save that our own Parliament can expressly dis-apply its provisions.

43. Accordingly, I am bound to reject the submission that the Applicants cannot complain about discriminatory treatment flowing from section 27A of the 1956 Act because the treatment complained of relates to a right which is not protected by the Constitution. Parliament elected to prohibit discrimination on the grounds of sex through the HRA although the Constitution did not grant corresponding protections. Parliament elected to fortify this and other HRA protections by including a primacy clause in that Act and empowering this Court to declare conflicting statutory provisions to be inoperative. It is for Parliament, not the courts, to remove these protections.

44. It is important to remember that the present proceedings are brought both by the 1st Applicant, the primary complainant seeking to assert that the loss of his special status husband rights and his proposed deportation discriminate against him as a foreign male spouse of a Bermudian. His Bermudian wife also joins these proceedings, making the subsidiary complaint she is being discriminated against on the grounds of her sex by being deprived of her foreign husband in circumstances which would not occur if she were a Bermudian husband. But he is the primary Applicant. On the facts of the present case, they each have standing to advance the same broad claim. In this regard, it is worth remembering the observations of Lady Hale in *Marshall-v-Deputy Governor* [2010] UKPC 9:

> "*55. It may seem paradoxical that a man could complain about a difference in treatment which is grounded in outdated assumptions about the proper roles and predicted abilities of women. But a paradox is merely a "seemingly absurd" statement which may actually be well-founded. Outdated assumptions about women's roles and abilities usually result in less favourable treatment of women. But they can also result in less favourable treatment of men…*"

Conclusion

45. In summary, I find that the provisions of section 27A of the 1956 Act are inconsistent with the provisions of section 2 as read with section 5 of the HRA to the extent that they purport to treat foreign husbands of Bermudian wives less favourably than foreign wives of Bermudian husbands. The unfavourable treatment is quite blatant and consists of the fact that a foreign husband of a Bermudian wife purportedly loses his right to reside in Bermuda in circumstances where his female counterpart would not. The immigration rights afforded to the foreign spouses of Bermudian men are preferential to those afforded to foreign spouses of Bermudian women. The HRA prohibits discrimination by public authorities in the provision of services and facilities on the grounds of, *inter alia*, sex and further provides that legislation which is inconsistent with the HRA is liable to be declared inoperative to the extent. The fact that corresponding rights do not exist for foreign husbands of Bermudians under the Constitution is entirely beside the point as the manifest purpose of the HRA is to amplify the rights protected by the Chapter I of the Bermuda Constitution. The preamble to the HRA makes reference to the ECHR. The inclusion of "sex" as a prohibited ground of discrimination in section 2(2)(a) of the HRA made that statute ECHR compliant with article 14 of the ECHR while, embarrassingly, section 12 of the Constitution is not.

46. The Applicants are entitled to an Order of Certiorari quashing the Deportation Order on the grounds that it was made without lawful authority. They are also entitled in principle to an Order declaring that section 27A of the 1956 Act is inoperative to the extent that it imposes conditions upon foreign male spouses which are not imposed on their female counterparts as this less favourable treatment is inconsistent with the HRA. This case was dealt with on the papers without oral argument because it was in most respects on all fours with the legal ground covered by this Court in *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 82 Civ (27 November 2015); [2015] Bda LR 106, a judgment which was not appealed and the 1st Respondent promised to implement. It was accordingly difficult (if not legally impermissible) for the Respondents to reargue the key issues decided against the 1st Respondent in that case, namely that (a) sections 27 and 27A can be tested for conformity with section 5 of the HRA, and (b) that the sections are inoperative to the extent of any conflict.

47. In that case the conflict was the <u>omission</u> of any provision for foreign same-sex partners of Bermudians in stable relationships comparable to marriage in terms of residential rights. Such persons were denied access to the rights altogether. Here, the conflict was the less extreme but far more obvious differential treatment of foreign female spouses and foreign male spouses which found expression in additional conditions being imposed on foreign male spouses for accessing the residential rights conferred on spouses of Bermudians by section 27A of the 1956 Act. Apart from conceding the present application, the Deputy Solicitor-General's only option was to

identify new and inevitably rather improbable arguments, namely points which had not been previously advanced and rejected in the *Bermuda Bred Company* case. The robust manner with which those arguments have been rejected above (and the Respondents' waiving of their right to oral argument) must be viewed against this unusual background.

48. I will hear counsel on the terms of the final Order if required. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the costs of the present application shall be paid by the Respondents to be taxed if not agreed.

Dated this 7th day of June, 2016 _____

IAN RC KAWALEY CJ