In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 336

BETWEEN:-

(1) MICHAEL BARBOSA
(2) CHRISTINE BARBOSA

Applicants

-and-

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

Respondents

JUDGMENT

(In Court)

Application to enforce fundamental rights under ss 1, 3, 11 and 12 of Constitution – whether common law right of belonging – if so, whether protected by s 11 of Constitution – whether Minister's failure to recognise common law right of belonging was inhuman or degrading treatment – whether discrimination on grounds of place of origin – whether persons who belong to Bermuda are residents of Bermuda for purposes of ss 25 and 2(3) of Adoption Act 2006 – whether damages for infringement of constitutional rights.

Date of hearing: 18th December 2015
Date of judgment: 4th March 2016

Mr Peter Sanderson, Wakefield Quin Limited, for the Plaintiffs
Ms Oonagh Vaucrosson, Attorney General's Chambers, for the Defendant

Introduction

1. The Applicants are husband and wife. The First Applicant, Mr Barbosa, was born in Bermuda on 12th February 1976. Under section 4 of the British Nationality Act, 1948 ("the 1948 Act") he was a citizen of the United Kingdom and Colonies by birth. On 1st January 1983 he became a British Dependent Territories citizen. This was by operation of section 23 of the British Nationality Act 1981 ("the 1981 Act"). Then, on 26th February 2002, pursuant to section 2 of the British Overseas Territories Act 2002, he became a British Overseas Territories citizen. These types of citizenship were not held concurrently: each succeeded the other. The Acts which conferred them were all UK statutes.

2. In 1992 Mr Barbosa, aged 16, moved to the Azores with his parents. He returned to live in Bermuda aged 27 in around 2003. He obtained a work permit and has lived here ever since. On 25th October 2013 he was granted indefinite leave to remain. However he is not eligible to apply for Bermudian status or the grant of a permanent resident's certificate under the Bermuda Immigration and Protection Act 1956 ("the 1956 Act"). Mr Barbosa feels keenly that he has second class status in Bermuda, although he looks upon the island as his only home. The practical consequences include restrictions on his employment opportunities and his (and his wife's) ability to purchase property. The less tangible consequences include the prejudice which he has encountered from some of those who do not regard him as "really" Bermudian.

3. The Second Applicant, Mrs Barbosa, was born in the Philippines. Mr and Mrs Barbosa married in Bermuda in May 2007. Sometime after November 2013 Mrs Barbosa was granted indefinite leave to remain, and on 29th October 2014, pursuant to section 18 of the 1981 Act, she was granted a certificate of naturalisation as a British Overseas Territories citizen.

4. Mrs Barbosa has a niece in the Philippines whose mother has died. Mr and Mrs Barbosa would like to bring her to Bermuda in order to adopt her. However they have been advised that they cannot adopt her here as they are not residents of Bermuda within the meaning of the Adoption of Children Act 2006 ("the 2006 Act").

5. Against that background, Mr and Mrs Barbosa have applied to this Court for redress under section 15(1) of the Bermuda Constitution ("the Constitution") on the grounds that their fundamental right under Chapter I of the Constitution have been contravened.

   (1) Mr Barbosa seeks a declaration that he belongs to Bermuda within the meaning of section 11 of the Constitution ("Ground 1").

   (2) Further or alternatively, Mr Barbosa seeks a declaration:

      (i) That he has been subjected to inhuman or degrading treatment in that: (i) he is unable to undertake paid work without permission of the Minister; and (ii) there is no pathway for him to obtain Bermuda status ("Ground 2A").

      (ii) That he has been discriminated against on the ground of place of origin contrary to section 12 of the Constitution in that there is no pathway for him to obtain Bermuda status ("Ground 2B").

   (3) Mr Barbosa (if he succeeds on Ground 1) and Mrs Barbosa seek a declaration that as persons who belong to Bermuda they should be classed as residents of Bermuda for purposes of the 2006 Act ("Ground 3").

(4) Both Mr and Mrs Barbosa seek damages for interference with their constitutional rights.

Ground 1

6. Chapter I of the Constitution protects *inter alia* the fundamental rights of freedom of movement and freedom from discrimination. But its protection is not absolute. In particular, it prohibits the State from restricting those rights in the case of someone who belongs to Bermuda in circumstances where it does not prohibit the State from restricting them in the case of someone who does not. Thus to belong to Bermuda is to enjoy an enhanced measure of protection under the Constitution.

7. Section 1 of the Constitution sets out certain fundamental rights and freedoms in broad terms. It provides that the subsequent provisions of Chapter I :

> "*shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*"

Those subsequent provisions include sections 11 and 12.

8. Section 11 of the Constitution provides in material part:

> *"**Protection of freedom of movement***
>
> *(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Bermuda, the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion therefrom.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*

. . . . .

(d) for the imposition of restrictions on the movement or residence within Bermuda of any person who does not ***belong*** *to Bermuda or the exclusion or expulsion therefrom of any such person;*

. . . . .

(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 under the British Nationality and Status of Aliens Act 1914 [1914 c.17] or the British Nationality Act 1948 [1948 c.56];

[NOTE by the British Nationality Act 1981 section 51 without prejudice to subsection (3)(c) thereof in any UK statutory instrument made before 1 January 1983 "British subject" and "Commonwealth citizen" have the same meaning and in relation to any time after 1 January 1983 means a person who has the status of a Commonwealth citizen under the British Nationality Act 1981]

(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.]

9. Section 12 of the Constitution provides in material part:

"***Protection from discrimination on the grounds of race, etc.***

(1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

. . . . .

(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.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

. . . . .

(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not ***belong*** *to Bermuda for the purposes of section II of, this Constitution;*

. . . . .

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it requires a person to possess Bermudian status or ***belong*** *to Bermuda for the purposes of section 11 of this Constitution or to possess any other qualification (not being a qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes.*" [Emphasis added.]

10. It is common ground that Mr Barbosa does not fall into any of the categories enumerated in section 11(5) of the Constitution. It was not in dispute that Mrs Barbosa falls into section 11(5)(c) as she was granted a certificate of naturalisation by the Governor under the 1981 Act, which succeeded the 1948 Act. As Kawaley CJ stated in Minister of Home Affairs v Carne and Correia [2014] Bda LR 47 SC at para 70:

"*There seems little room for doubt that a naturalised British overseas territories citizen (in respect of Bermuda) belongs to Bermuda under section 11(5) of the Constitution.*"

11. Mr Sanderson, who appears for Mr and Mrs Barbosa, submits that if the Constitution were to recognise that Mrs Barbosa belongs to Bermuda but not Mr Barbosa then that would be an indefensible anomaly. The question

before the Court is, then, whether the list of persons in section 11(5) is exhaustive of who counts as belonging to Bermuda under the Constitution.

12. The Privy Council considered this question, though only in passing, in Minister of Home Affairs v Fisher [1980] AC 319. The issue was whether "*child*" in section 11(5)(d) of the Constitution included an illegitimate child. Lord Wilberforce, giving the judgment of the Board, framed this issue at 326 D – F in terms of the structure of section 11:

> "*Thus fundamental rights and freedoms are stated as the right of every individual, and section 11 is a provision intended to afford protection to these rights and freedoms, subject to proper limitations. Section 11 states the general rule of freedom of movement, which is to include the right to enter and to reside in any part of Bermuda, but it allows, as a permissible derogation from this right, restrictions in the case of any person who does not 'belong to Bermuda.' Section 11 (5) then* ***defines*** *the classes of persons who 'belong to Bermuda.' Among these is 'the child... of a person to whom any of the foregoing paragraphs of this subsection applies.' One such person is the wife of a person who possesses Bermudian status. What is meant, in this context, by the word 'child'?"* [Emphasis added.]

13. In my judgment the reference to "*defines*" is *obiter*. It does not form part of the *ratio* of the case as it is not a necessary link in the chain of reasoning which led the Board to its decision. Put another way, whether or not section 11(5) contains an exhaustive list of classes of persons who belong to Bermuda is irrelevant to the question of whether in section 11(5)(d) "*child*" includes "*illegitimate child*".

14. Even an *obiter* statement by the Privy Council is naturally to be treated with great respect. But the weight to be accorded to this particular statement is qualified by several factors.

15. First, the point was not argued before the Board as it was not at issue.

16. Second, at 322 D – E counsel for the Minister submitted by way of background that the concept of belonging was a creature of statute:

"*There was a series of Constitutions in the 1960s. Some (e.g. Antigua) used the expression 'belonging to' and others (e.g., Jamaica) used 'citizens.' The term used picked up terms in existing legislation but in the case of Bermuda the draftsman had to invent a list of persons 'belonging to Bermuda' because they were not defined anywhere else.*"

This submission was not contradicted. But it was not correct. As more recent decisions of the House of Lords and UK Supreme Court, considered later in this judgment, have acknowledged, "*belonging*" was a common law concept which had been established for centuries. Had the Board had the benefit of submissions setting out the law on this point correctly, it might have been more cautious in using "*defines*".

17. Third, to treat section 11(5) as exhaustive would, to put it no higher, be in tension with the approach to interpreting Constitutions which Lord Wilberforce went on to expound later in the judgment. He noted that:

(1) Chapter I is drafted: "*in a broad and ample style which lays down principles of width and generality*" (328 E – F);

(2) Chapter I is headed "*Protection of Fundamental Rights and Freedoms of the Individual*". This Chapter, like other, similar, instruments drafted in the post-colonial period, was greatly influenced by the European Convention on Human Rights (1953) and the United Nations' Universal Declaration of Human Rights (1948):

"*These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.*"

(3) Section 11 formed part of Chapter I. It was thus to have effect for the purpose of affording protection to the fundamental rights and freedoms set out in section 1, subject only to the limitations contained in that section.

18. In light of these features, Lord Wilberforce concluded at 329 B – E that a Constitution is not to be interpreted as an Act of Parliament but *sui generis*. At 329 E – F he elaborated on what this entailed:

> "*A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.*"

19. Lord Wilberforce's judgment, then, does not provide a definitive answer to what is meant in section 11(5) of the Constitution by "*deemed to belong*". It does, however, provide authoritative guidance on how, in general terms, the Constitution should be interpreted.

20. Keeping firmly in mind that the Constitution is not to be interpreted as an Act of Parliament, it is nonetheless helpful to consider the case law on the meaning of "*deemed*". I was referred to a number of authorities, from which it is clear that, in an Act of Parliament at least, its meaning is dependent upon context. Thus Viscount Simonds stated in Barclays Bank Ltd v IRC [1961] AC 509 HL at 522 -523:

> "*I do not think that much assistance is to be got from the solution which has been given to similar questions in other cases … The answer must depend on the construction of the particular sections under review in the context of the whole Act in which they are found.*"

21. However other cases may be of assistance, if not in their solutions, then in elucidating the range of potential meanings which a deeming provision may carry. Eg in St Aubyn (LM) v AG (No 2) [1952] AC 15 HL Lord Radcliffe stated at 53:

> "*The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular*

construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

22. In Barclays Bank Ltd v IRC Viscount Simonds referred to this passage at 523 but observed:

"*I bear in mind what Lord Radcliffe said in St. Aubyn's case about the word 'deem' but nevertheless regard its primary function as to bring in something which would otherwise be excluded.*"

23. The use of "*deem*" in this sense to create what has been termed a "*statutory fiction*" has a long legislative history. This was reviewed by Windeyer J in the High Court of Australia in Hunter Douglas Pty Ltd v Perma Blinds [1970] HCA 63 at para 8:

"*This expression, apparently coined by James L.J. in Ex parte Walton; In re Levy, was adopted by Lord Cairns in Hill v. East and West India Dock Co.. It has had much currency since then as a heading in Beal's Cardinal Rules of Legal Interpretation. In Muller v. Dalgety & Co. Ltd., Griffith C.J. said that 'deemed' is commonly used 'for the purpose of creating a "statutory fiction" that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced'. This passage has been often quoted in Australian courts. It is a recognition that the verb 'deem', or derivatives of it, can be used in statutory definitions to extend the denotation of the defined term to things it would not in ordinary parlance denote. This is often a convenient device for reducing the verbiage of an enactment. But that the word can be used in that way and for that purpose does not mean that whenever it is used it has that effect. After all, to deem means simply to judge or reach a conclusion about something. A judge, or a juryman, is a deemster, although, except in the Isle of Man, that name has long been archaic. The words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some matter or thing has—the way in which it is to be adjudged. This need not import artificiality or fiction. It may be simply the statement of an indisputable conclusion, as if for example one were to say that on attaining the age of twenty-one years a man is deemed to be of full age and no longer an infant. Hundreds of examples of this usage of the word appear in the statute books.*"

24. Ms Vaucrosson, who appears for the Respondents, submits that section 11(5) is a definition section in which "*deemed to belong*" means "*adjudged to belong*". That, she submits, is the natural and ordinary meaning of these words when read in this particular statutory context. If, when promulgating the Constitution, Her Majesty in Council had intended "*belong*" to mean something more expansive, Ms Vaucrosson submits, then it is reasonable to expect that the Constitution would have said so in express terms. She would no doubt invite me to find that Lord Wilberforce's analysis of section 11(5) in Fisher is extremely persuasive.

25. Mr Sanderson disagrees. The starting point for his argument is that belonging to a country or territory is a concept originating in common law. I understand "*to belong*" to mean that one has a right to enter and remain within the country or territory to which one belongs.

26. The existence of this common law right was affirmed by the House of Lords in R (Bancoult) v Foreign Secretary (No 2) [2009] 1 AC 453. The case concerned the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitutional Order") which provided that no person had the right of abode in the British Indian Ocean Territory ("BIOT") and that no one was entitled to enter or be present in the BIOT except as authorised by the Constitutional Order or other law in force there. The former inhabitants of the BIOT, which comprised the Chagos Islands, had been compulsorily removed because the largest island in the archipelago was required for a US military base. One of the Chagos Islanders, who wanted to return, challenged the legality of the Order. He succeeded at first instance and in the Court of Appeal, but not in the House of Lords.

27. Jonathan Crow QC, counsel for the Secretary of State, submitted that the concept of "*belonger*" was a creature of legislation, had no independent existence in the common law, and could not found any legally enforceable right. The House unanimously rejected these submissions and held that the Chagos Islanders had a common law right of abode as a "*belongers*" to the islands. However a majority held that this right could be – and had been –

removed by statutory authority, and rejected the submission of Sir Sydney Kentridge QC, counsel for the claimant, that the right was fundamental and indefeasible. Lord Hoffmann, who was in the majority, explained the position thus:

"*42. Sir Sydney's proposition that the Crown does not have power to remove an islander's right of abode in the territory is in my opinion also too extreme. He advanced two reasons. The first was that a right of abode was a fundamental constitutional right. He cited the 29th chapter of Magna Carta: 'No freeman shall be taken, or imprisoned ... or exiled, or any otherwise destroyed ... but by the lawful judgment of his peers, or by the law of the land.'*

43. 'But ... by the law of the land' are in this context the significant words. Likewise Blackstone (Commentaries on the Laws of England , 15th ed (1809), vol 1, p 137): 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.'

44. That remains the law of England today. The Crown has no authority to transport anyone beyond the seas except by statutory authority. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases: see R v Bhagwan [1972] AC 60 . The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not empowered the Crown to change English common or statute law. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land.

45. What these citations show is that the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right: see R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115 , 131–132. But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer. The importance of the right to the individual is also something which must be taken into account by the Crown in exercising its legislative powers—a point to which I shall in due course return. But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it."

28. It was necessarily implicit in this analysis that the common law principles governing the right of abode in the United Kingdom also applied to the inhabitants (or former inhabitants) of British Overseas Territories. The clearest exposition of how this came to pass was given by Lord Mance. Its validity is not affected by the fact that he was in the minority on the separate question of the indefeasibility of the right of abode:

"*153. Mr Crow submits that the common law principles governing persons with a right of abode in England have no relevance to ceded territories like BIOT. In this submission, inhabitants of BIOT never had any right of abode, and certainly none which could survive or be the basis of any objection to section 9 of the BIOT Order 2004. ...*

154. As to Mr Crow's ... submission, the common law position must in my opinion be that every British citizen has a right to enter and remain in the constitutional unit to which his or her citizenship relates. That is the case with the United Kingdom. In relation to overseas territories acquired by the Crown, there exists in relation to private law a distinction between those acquired by settlement on the one hand and those acquired by conquest or cession on the other. ...

155. However, no such distinction exists as regards public law, or in particular as regards constitutional questions including the nature and extent of the Crown's prerogative. Even where the Crown acquires overseas dominions by conquest or cession, the relationship between the Crown and its subjects becomes subject to the like public law principles to those applicable in the United Kingdom ... The inhabitants of BIOT came in Lord Mansfield's words under the protection of the Crown, became subjects and were to be universally considered in that regard, not as enemies or aliens. They acquired as against the Crown the like constitutional right of abode and the like immunity from exile as the common law confers on citizens of the United Kingdom..."

29. The UK Supreme Court reaffirmed the existence of a common law right of abode in Pomiechowski v District Court of Legnica, Poland [2012] 1 WLR 1604. Lord Mance, writing for the plurality, stated at para 31:

"*Both in international law and at common law British citizens enjoy a common law right to come and remain within the jurisdiction, and Mr Halligen is such a citizen. Blackstone (Commentaries on the Laws of England , 15th ed (1809), vol 1, p 137) stated: 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal' This passage was cited and approved by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and*

Commonwealth Affairs (No 2) [2009] AC 453 , para 43. In R v Bhagwan [1972] AC 60 , 77g Lord Diplock spoke of 'the common law rights of British subjects … to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm'. In Van Duyn v Home Office [1975] Ch 358 , para 22, the European Court of Justice recognised that: 'it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between member states, that a state is precluded from refusing its own nationals the right of entry or residence.' The principle is the necessary corollary of a state's right (subject to obligations undertaken by eg the Geneva Refugee Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms) to refuse aliens permission to enter or stay in its territory. Were it otherwise, the Flying Dutchman would be no fleeting phantom."

30. Baroness Hale, at para 49, put the matter more succinctly:

"*The right of a person to enter and remain in the country of which he is a national is the most fundamental right of citizenship. … as Lord Mance JSC has demonstrated, it has been part of United Kingdom law for centuries.*"

31. Mr Sanderson submits that at common law Mr Barbosa belongs to Bermuda. Ie that he is a British Overseas Territories citizen by birth and that the constitutional unit to which his citizenship relates is Bermuda as that is where he was born. Moreover, that is where his parents were ordinarily resident at the time of his birth and where he spent the first sixteen years of his life.

32. Mr Sanderson submits that Mr Barbosa, as someone who belongs to Bermuda, enjoys a common law right to enter and remain within the jurisdiction. That is a right which has been variously described as "*important*" and "*fundamental*" by members of the House of Lords and the UK Supreme Court. As Lord Hoffmann stated in Bancoult (when construing a Constitution): "*General or ambiguous words in legislation will not readily be construed as intended to remove such a right.*" On the Respondents' construction, section 11(5) does not remove Mr Barbosa's common law right to belong but rather fails to afford it constitutional protection. Nonetheless Mr Sanderson submits that the principle articulated by Lord Hoffmann is applicable by analogy. He submits that the deeming

provision in section 11(5) of the Constitution is ambiguous. It is the more so as, *per* Lord Reid in Barclays Bank Ltd v IRC at 528, "*deemed*" is not a word generally used to introduce a definition.[1] Thus, Mr Sanderson submits, section 11(5) should be construed generously as affording constitutional protection to everyone who belongs to Bermuda at common law.

33. There is force in the submissions of both parties. I resolve the matter thus:

(1) Mr Barbosa belongs to Bermuda at common law as this is the jurisdiction to which his British Overseas Territories citizenship relates.

(2) Belonging is an important or fundamental common law right. The Constitution would have to employ clear and unambiguous language to justify the conclusion that the protection which it confers on persons belonging to Bermuda applies to some but not all such persons.

(3) Section 11(5) of the Constitution does not employ clear and unambiguous language to that effect. The use of the deeming provision is ambiguous.

(4) The Constitution is to be interpreted so as to give full recognition and effect to the fundamental rights and freedoms stated in section 1. This approach would be inconsistent with limiting protection of freedom of movement and protection from discrimination to some but not all persons belonging to Bermuda.

(5) Limiting those protections in this way cannot reasonably be justified as necessary to ensure that their enjoyment by Mr Barbosa does not prejudice the rights or freedoms of others or the public interest. The proviso in section 1(c) of the Constitution is therefore not engaged.

[1] Although in that case both Lord Reid at 528 and Lord Denning at 541 held that "*deemed* " was used to introduce a definition in the statutory provision at issue.

(6) For these reasons I grant the declaration sought that Mr Barbosa belongs to Bermuda within the meaning of section 11 of the Constitution.

Ground 2A

34. Section 3 of the Constitution provides:

"*No person shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

It is in all material respects the same as Article 3 of the European Convention on Human Rights. This article was authoritatively explained by the European Court of Human Rights in Pretty v UK (2002) 12 BHRC 149 at para 52:

"*As regards the types of 'treatment' which fall within the scope of Article 3 of the Convention, the Court's case-law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see Ireland v. the United Kingdom, cited above, p. 66, § 167; V. v. the United Kingdom [GC], no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see amongst recent authorities, Price v. the United Kingdom, no. 33394/96, §§ 24-30, ECHR 2001-VII, and Valašinas v. Lithuania, no. 44558/98, § 117, ECHR 2001-VIII).*"

35. Mr Barbosa has not satisfied this high hurdle and his application for a declaration that he has been subjected to inhuman or degrading treatment is dismissed.

36. Ground 2A has in any case been largely overtaken by events. In Williams v Minister for Home Affairs [2015] SC (Bda) 46 Civ the Chief Justice held at para 30 that section 11(5) of the Constitution conferred on persons who were deemed to belong to Bermuda not just the right to reside in Bermuda but

also, by necessary implication, the right *inter alia* to seek employment in Bermuda without any restrictions and without being discriminated against. Section 60(1) of the 1959 Act, which prohibited persons other than those categories specified in the section from engaging in gainful occupation in Bermuda without the permission of the Minister, was to be construed accordingly. By reason of the Court's finding on Ground 1, that right applies to all persons belonging to Bermuda, including Mr Barbosa, and not only those deemed to belong by reason of section 11(5).

37. For the avoidance of doubt, I therefore declare that while in Bermuda Mr Barbosa can engage in any gainful occupation without the specific permission of the Minister, and that section 60(1) of the 1956 Act is to be construed accordingly.

38. The decision in Williams has been appealed. If it is overturned, then Mr Barbosa will not plausibly be able to complain that his constitutional rights have been infringed by a provision of the 1956 Act which, by reason of the successful appeal, will have been held to pass constitutional muster.

39. As to Bermuda status, in February 2016 the Government published an information sheet headed "*Pathways to Status*" which stated that in the current legislative session it would seek to amend the 1956 Act to provide pathways to Bermuda status for long term residents. The proposals in this document address Mr Barbosa's concerns. I need not comment upon the proposals further.

Ground 2B

40. The relevant parts of section 12 of the Constitution are set out above. As I have found that Mr Barbosa belongs to Bermuda, the exclusion in section 12(4)(b) does not apply to him. Even if it did, I think it unlikely (without deciding the point) that the provisions of the 1956 Act which I am about to consider would be caught by that exclusion.

41. Part III of the 1956 Act is headed "*Acquisition and Enjoyment of Bermudian Status*". The statutory scheme was neatly summarised by Lord Neuberger, giving the judgment of the Privy Council in Thompson v Bermuda Dental Board (Human Rights Commissioners intervening) [2009] 2 LRC 310; [2008] UKPC 33 at para 4, drawing on para 8 of the judgment of Evans JA in the Court of Appeal:

> "*In this connection, as Bermuda is a British overseas territory, there is no Bermudian nationality as such. The concept of a Bermudian has therefore to be understood by reference to the provisions of the Bermuda Immigration and Protection Act 1956 , in particular sections 16 to 22 . As Evans JA helpfully explained in para 8 of the judgment in the Court of Appeal in this case, there are five main categories of 'Bermudian status', namely:*
>
> *'(i) Birth — whether in or outside Bermuda, if the parents were domiciled in Bermuda and at least one parent possessed Bermudian status at the time of the birth …, or as the child of a person who has Bermudian status, wherever born, but only until the age of 22 years …;*
>
> *(ii) Long term residence in Bermuda — by grant from the Minister, if qualified by residence in Bermuda for at least ten years, and with a 'qualifying Bermudian connection' …;*
>
> *(iii) Domicile — a transitional provision …;*
>
> *(iv) Spouses of persons having Bermudian status, coupled with a residence requirement, and by grant from the Minister;*
>
> *(v) By grant from the Minister in certain other cases, with residence, birth and parentage requirements ….'* "

These pathways to status are all closed to Mr Barbosa.

42. For the purposes of Ground 2B, section 20B of the 1956 Act is of particular relevance:

> "*(1) A person may apply to the Minister under this section for the grant to him of Bermudian status.*

(2) This section applies to a person who is a Commonwealth citizen not possessing Bermudian status, was ordinarily resident in Bermuda on 31st July 1989 and either—

(a) (i) is a person at least one of whose parents possessed Bermudian status at the time of his birth; and

(ii) was born in Bermuda or first arrived in Bermuda before his sixth birthday; or

(b) is a British Dependent Territories citizen by virtue of the grant to him by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 (U.K.) or the British Nationality Act 1948 (U.K.) or the British Nationality Act 1981 (U.K.), having been approved for the grant of Bermudian status; ...

. . . . .

and in relation to whom in addition the requirements of subsection (3) are fulfilled.

(3) The requirements referred to in subsection (2), in relation to an applicant for the grant of Bermudian status under this section, are as follows—

(a) the applicant must have reached the age of eighteen years before the application was made;

(b) the applicant must have been ordinarily resident in Bermuda for the period of ten years immediately preceding the application.

. . . . . ”

43. Mr Barbosa was ordinarily resident in Bermuda on 31st July 1989. However neither of his parents possessed Bermudian status at the time of his birth. He is therefore unable to apply for Bermudian status under section 20B(2)(a) of the 1956 Act.

44. Mr Sanderson submits that section 20B(2)(a) unlawfully discriminates against Mr Barbosa on the ground of place of origin because it treats him less favourably than someone at least one of whose parents possessed Bermudian status at the time of his birth. I agree. In my judgment, which is guided by the principle of giving full recognition and effect to those

fundamental rights and freedoms with a statement of which the Constitution commences, the prohibition in section 12 of the Constitution against affording different treatment to someone attributable wholly or mainly to his description by place of origin, such that he is subjected to disabilities or restrictions to which persons of another place of origin are not subject, extends to affording different treatment of that nature to someone by reason of his parents' place of origin.

45. I draw support for this conclusion from the analogous case of Benner v Canada (Secretary of State) [1997] 1 SCR 358, in which the Supreme Court of Canada held that the fact that a child born abroad of a Canadian mother was required to undergo a security check and to swear a citizenship oath when a child born abroad of a Canadian father would not have been required to do so was a denial to the child of the equal benefit of the law guaranteed by section 15(1) of the Canadian Charter of Rights and Freedoms.

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

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

48. In the circumstances I grant a declaration that Mr Barbosa has been discriminated against on grounds of place of origin contrary to section 12 of the Constitution. The proposed "*Pathways to Status*" will provide him with an effective remedy. If, by the end of the current legislative session, no such remedy has been provided, Mr Barbosa has liberty to restore this matter to Court. In such event the Court would consider whether, under section 15 of the Constitution, further steps were necessary to secure enforcement of Mr Barbosa's section 12 rights.

Ground 3

49. Section 25 of the 2006 Act provides:

"*The court has jurisdiction to make an adoption order if—*

(a) the child to be adopted is a resident of Bermuda or was born in Bermuda;
(b) the person having parental responsibility for the child is a resident of Bermuda, or is the Director; or

(c) the applicant is a resident of Bermuda."

50. Section 2(3) of the 2006 Act provides:

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

(a) possesses Bermudian status;

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

(c) holds a permanent resident's certificate."

51. Mr Barbosa relies upon the Court's expansive approach in Williams to the rights necessarily implicit in belonging to Bermuda. He submits that, applying this approach, section 2(3)(a) of the 2006 Act should be amended to read: "*possesses Bermudian status or belongs to Bermuda*".

52. Before deciding this point I think it prudent to await the outcome of the appeal in Williams, which is due to be heard in the March 2016 session of the Court of Appeal. I shall therefore reserve judgment on Ground 3 for now. Once judgment in the appeal has been delivered the parties to the instant case will have 14 days in which to make, if they so wish, written submissions on the appellate decision and how it impacts upon Ground 3. I will then deliver judgment.

Damages

53. Although in the Originating Summons both Mr and Mrs Barbosa have claimed damages, I understand from Mr Sanderson's submissions that they are claimed principally by Mr Barbosa and in relation to Ground 1. He seeks an appropriate level of damages to vindicate his constitutional rights and to provide some measure of satisfaction and resolution. In assessing damages a relevant consideration will be whether, as the Court found in Williams, persons who belong to Bermuda have an implied right *inter alia* to seek employment in Bermuda without any restrictions and without being discriminated against. The definitive resolution of that question must await the outcome of the appeal in Williams. For that reason I shall reserve judgment on damages until the outcome of the appeal is known.

Summary

54. The Court:

(1) Grants Mr Barbosa a declaration that he belongs to Bermuda within the meaning of section 11 of the Constitution.

(2) For the avoidance of doubt, grants Mr Barbosa a declaration that while in Bermuda he can therefore engage in any gainful occupation without the specific permission of the Minister, and that section 60(1) of the 1956 Act is to be construed accordingly.

(3) Dismisses Mr Barbosa's application for a declaration that he has been subjected to inhuman or degrading treatment.

(4) Grants Mr Barbosa a declaration that he has been discriminated against on the ground of place of origin contrary to section 12 of the Constitution.

(5) Grants Mr Barbosa liberty to apply if, by the end of the current legislative session, the Government of Bermuda has failed to provide an effective remedy for the breach of his rights under section 12 of the Constitution.

(6) Reserves judgment on Mr and Mrs Barbosas' applications for:

(i) a declaration that as persons who belong to Bermuda they should be classed as residents of Bermuda for purposes of the 2006 Act; and

(ii) damages for infringement of their constitutional rights

until after the Court of Appeal has delivered judgment in Williams.

55. I shall hear the parties as to costs once I have delivered judgment on all the above applications.

DATED this 4th day of March, 2016

_____

Hellman J