



The Court of Appeal for Bermuda

CIVIL APPEALS Nos 3 & 3A of 2016

BETWEEN:

**THE MINISTER OF HOME AFFAIRS and
THE ATTORNEY GENERAL**

Appellant

-and-

MICHAEL & CHRISTINE BARBOSA

Respondent

**Before: Baker, President
Bell, JA
Bernard, JA**

Appearances: Mr. James Guthrie, QC, Mr. Phil Perinchief, and Ms. Wendy Greenidge, Attorney General's Chambers for the Appellant
Mr. Peter Sanderson, Wakefield Quin Limited, for the Respondents

Date of Hearing: 4 November 2016

Date of Judgment: 25 November 2016

JUDGMENT

Interpretation of section 11 (5) of the Constitution – meaning of the word “deemed” in the section

**Bernard, JA
Introduction**

1. The Respondents are husband and wife. The first Respondent (Mr Barbosa) was born in Bermuda on 12 February 1976 of non-Bermudian parents. He

therefore became a citizen of the United Kingdom and Colonies by birth, pursuant to the British Nationality Act, 1981. Then on 26 February 2002 he acquired British Overseas Territories (BOT) citizenship by virtue of the British Overseas Territories Act 2002. His parents not being Bermudian, he acquired no rights entitling him to reside in Bermuda. The second Respondent was not born in Bermuda, and on 18 May, 2007 married Mr Barbosa in Bermuda.

2. On 25 October, 2013 Mr Barbosa was granted indefinite leave to remain in Bermuda, but he is not eligible to apply for Bermudian status or the grant of a permanent resident's certificate. The second Respondent, however, was not only granted indefinite leave to remain in Bermuda, but on 29 October, 2014 pursuant to Section 18 of the 1981 Act, was granted a certificate of naturalisation as a British Overseas Territory Citizen. Consequently the second Respondent is deemed to belong to Bermuda because she falls within category 11(5) (b) of the Bermuda Constitution Order 1968 ("the Constitution").
3. On 10 August, 2015 both Respondents filed an Originating Summons seeking various declarations, of which only the ones listed below remain relevant for the purposes of this appeal :
 - (1) That Mr Barbosa as a BOT citizen by birth belongs to Bermuda for the purposes of the Constitution on the basis that, although Section 11(5) of the Constitution provides a list of persons deemed to belong to Bermuda, this complements rather than excludes other persons who belong to Bermuda pursuant to the common law;
 - (2) That further or alternatively he has been subject to inhuman or degrading treatment in that (i) he is unable to undertake paid work without the permission of the Minister, and (ii) there is no pathway for him to obtain Bermuda status.

Both Respondents sought damages for interference with their constitutional rights.

4. On 4 March, 2016 Hellman J granted the following declarations:
- (1) Mr Barbosa belongs to Bermuda within the meaning of Section 11 of the Constitution;
 - (2) For the avoidance of doubt that while in Bermuda he 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;
 - (3) Mr Barbosa has been discriminated against on the ground of place of origin contrary to Section 12 of the Constitution.

5. He dismissed the declaration that Mr Barbosa has been subjected to inhuman or degrading treatment. He granted him 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. He reserved judgment on the Respondents' application to adopt the second Respondent's niece, a matter which is no longer in issue.

6. On 16 March, 2016 the Appellants filed an appeal against the whole of the judgment, and on 12 April 2016 filed the following amended grounds of appeal which are hereunder summarised:

A The learned Judge was wrong to find in favour of the First Respondent and to grant him a declaration in respect of Ground 1 of the Respondents' application, as follows:

(i) The learned Judge was wrong to find that the First Respondent is a person who belongs to Bermuda within the meaning of Section 11(5) of the Constitution of Bermuda or at all. His conclusions at paragraph 33(1) to (6) of the Judgment were wrong and ought to be set aside.

(ii) Section 11(5) of the Constitution provides an exhaustive definition of those persons who are deemed to belong to Bermuda. The First Respondent is not such a person;

(iii) the learned Judge ought to have found that the First Respondent does not belong to Bermuda, and was wrong to find that the First Respondent belongs to Bermuda at common law on the basis that it is the territory to which his British Overseas Territories Citizenship relates;

(iv) the learned Judge was wrong to conclude that there is a common law right to “belong” to a territory;

(v) The learned Judge was also wrong to conclude that it was necessary for there to be clear and unambiguous language within Section 11(5) to exclude the First Respondent’s common law right to belong to Bermuda.

(vi) the learned Judge was also wrong to find that Section 11(5) of the Constitution of Bermuda does not employ clear and unambiguous language.

(vii) The learned Judge’s award of a declaration of any kind to the First Respondent was wrong.

B The learned Judge was wrong to find that Section 20B (2) of the Bermuda Immigration and

Protection Act 1956 discriminated against the First Respondent contrary to Section 12 of the Constitution of Bermuda on the grounds of his parents' or his own place of origin or at all.

(ix) The learned Judge's conclusion was based on his own prior finding that the First Respondent belongs to Bermuda and that finding was wrong for the reasons set out earlier, and therefore cannot stand.

7. Mr Guthrie, Counsel for the Appellant, in developing his grounds of appeal submitted that the learned Judge construed Section 11 of the Constitution too broadly and was wrong to find that Mr Barbosa "belongs" to Bermuda within the meaning of the Constitution on the basis of the common law.
8. Mr Guthrie contended that the claim should fail on the proper construction of the Constitution itself which clearly provides a comprehensive definition of persons who are deemed to belong to Bermuda within the meaning of Section 11, by Section 11(5). Mr Guthrie made reference to the opening words of Section 11(5) "For the purpose of this section" which are clear, and which can only be construed properly as referring to the categories of persons protected by Section 11; it was not permissible for the learned Judge to add to these categories. The Judge's declaration that a person in Mr Barbosa's position who did not fall within the categories set out within the meaning of Section 11, was contrary to the Section's expressed terms.
9. Mr Guthrie further contended that the use of the word "deemed" in Section 11(5) preceded by the words "for the purpose of this section, a person should be deemed to belong to Bermuda if that person ...etc." serves to emphasise the requirement for the person concerned to come within one of the categories, and

it also follows that if a person does not do so he or she will not be deemed to belong to Bermuda. It is not possible to read Section 11 in any other way, and attempts to bring Mr. Barbosa “within its meaning” ought to be rejected.

10. Mr Sanderson, Counsel for the Respondent on the other hand, supports the learned Judge’s conclusions, particularly with regard to who is a common law believer, and refers, as the learned Judge did, to the case of (*Bancoult*) *v. Foreign Secretary* (No. 2) [2009] 1 AC, 453 which related to the expulsion of the population of the British Indian Ocean Territory (BIOT). Unlike Bermuda BIOT did not have its own constitution, and relied only on the rights in the Magna Carta which protected the rights of freemen who could not be excluded from their land other than “according to law”. The exclusion of the population was by executive order which the House of Lords ultimately held was according to law and complied with Magna Carta.
11. Mr Sanderson further submitted that as a born BOT citizen, Mr Barbosa is a subject of the Crown and owes his allegiance to the Crown, referring again to the *Bancoult* case where Lord Hoffman stated that the right not to be expelled from one’s country or even one’s home is an important right; and such “general or ambiguous words in legislation will not readily be construed as intended to remove such a right”.
12. Mr Sanderson concluded that Mr Barbosa enjoys BOT citizenship because he was born in Bermuda prior to 1983, and as such he belongs to Bermuda according to the common law.
13. The statutory provisions relevant to this appeal are:
 - (a) Section 11(5) of the Constitution
 - (b) Section 20B of the Bermuda Immigration and Protection Act, 1956 (“the 1956 Act”).

14. Section 11(5) of the Constitution reads as follows:

“for the purpose 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;
- (c) is the wife of a person to whom either of the foregoing paragraphs of this sub-section applies not living apart from such persons 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.”

15. Section 20B of the 1956 Act is to this effect:

“(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; ...

(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.”

16. Section 11(5) of the Constitution defines a person who is deemed to belong to Bermuda, which gives rise to the meaning of “belong” in the context in which it is used. This context suggests having (or intending to have) a permanent geographical attachment to Bermuda as opposed to a temporary or transient one. Section 11(2)(d), where the word “belong” first appears, seems to imply permanent residence in Bermuda providing as it does for protection of freedom of movement to an immunity from expulsion for any person who belongs to Bermuda.
17. Section 11(5) for the purposes of the section includes a person who is deemed to belong to Bermuda being (a) one possessing Bermudian status, (b) one who is a citizen of the United Kingdom and Colonies and who is granted a Certificate of Naturalisation, (c) the wife of the aforementioned persons and not living apart, or (d) one who is under the age of eighteen years.
18. The Learned Judge identified one of the questions to be determined as being whether the list of persons mentioned in Section 11(5) who are deemed to belong to Bermuda is exhaustive, having regard to the fact that the second Respondent, Mr Barbosa’s wife, is covered under the Section, but not Mr Barbosa, who was born in Bermuda. In this regard he made reference to *Minister of Home Affairs v Fisher* [1980] AC, 319, a Bermudian case, in which the issue was whether “child” in Section 11(5)(d) of the Constitution included an illegitimate child. He quoted dicta by Lord Wilberforce to the effect that a constitution is a legal instrument giving rise to individual rights capable of

enforcement in a court of law, and respect must be paid to the language which has been used; further at page 326 D-F, Lord Wilberforce made reference to section 11(5) of the Constitution where the section **defines** the classes of persons who “belong to Bermuda”. Hellman J regarded the reference to “defines” as obiter as it does not form part of the ratio of the case since it was not a necessary link in the chain of reasoning which led to the decision.

19. Lord Wilberforce in reference to Chapter 1 of the Constitution, headed “Protection of the Fundamental Rights and Freedoms of the Individual”, stated that the 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), and “these antecedents, and the form of Chapter 1 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.’”
20. Although Hellman J conceded that Lord Wilberforce’s judgment does not provide a definitive answer to what is meant in Section 11(5) by “deemed to belong”, it does provide authoritative guidance on how, in general terms, the Constitution should be interpreted.
21. The learned Judge in his judgment considered case law on the meaning of “deemed” in section 11(5) of the Constitution, and concluded that it is clear that in an Act of Parliament its meaning is dependent upon context, and made reference to dicta of Viscount Simonds in *Barclays Bank Ltd v IRC* [1961] AC, 509, HL at p.522-523, to the effect that it depends “on the construction of the particular sections under review in the context of the whole Act in which they are found.”

22. The learned Judge also made reference to *St. Aubyn (LM) v AG (No. 2)* [1952] AC, 15, HL, where Lord Radcliffe indicated that the word “deemed” is sometimes used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. In *Barclays Bank Ltd v IRC* Viscount Simonds referred to the said passage in *St. Aubyn*, but regarded the primary function of the word “deem” to bring in something which would otherwise be excluded.
23. The opening words of Section 11(5) indicate that it is restrictive. Its provisions with regard to persons who shall be deemed to belong to Bermuda are “for the purposes of this section”. Only persons who fall within the categories of Section (a) to (d) shall be “deemed” to belong to Bermuda. I had recourse to “Bennion on Statutory Interpretation” (5th Edition, p 949) for guidance on deeming provisions in statutes, and the first comment is that they often deem things to be what they are not, and on the other hand an enactment may deem something to be the case when it may or may not be the case. However, in construing a deeming provision Bennion advises that it is necessary to bear in mind the legislative purpose, and refers to *Murphy v Ingram* [1974] CH. 363 at 370.
24. I posit the view, in the absence of any tendered reasons, that the legislative purpose of section 11(5) was to provide a list of persons who qualify as belonging to Bermuda. It sought to make clear and remove doubt about those whom the Constitution regarded as belonging to Bermuda. I do not agree with Hellman J that the list is not exhaustive on the basis of his reference to Lord Wilberforce in *Fisher*. Unfortunately persons such as the first Respondent who was born in Bermuda of parents who did not have Bermudian status were not part of that list. The anomalies created are unsatisfactory.
25. Bennion at Section 305, page 951 defined a purposive and literal construction of a statute as being one which follows the literal meaning of the enactment

where that meaning is in accordance with the legislative purpose. This leads me now to discuss whether recourse can be had to the common law to fill any gaps which arise in giving full effect to the interpretation of a statute.

26. On the issue of constitutional interpretation the opinion of Lord Hoffmann reflected in the judgment of the Board in *Matadeen v Pointu and others* [1999] 1 AC 98 at 108 is of great significance, and reads as follows:

“It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which judges are required to give effect in accordance with their own conscientiously held views of what such principles entail.

It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma* [1995] (4) B.C.L.R. 401, 412: “If the language used by the lawyer is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination”.

27. I now turn to Section B of the 1956 Act. The trial judge concluded that the first Respondent had been afforded different treatment and was discriminated against under Section 20B (2)(a) of the 1956 Act, 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. This was in breach of Section 12 (1) of the Constitution which provides that no law shall make any provision which is discriminatory either of itself or in its effect subject to the provisions of sub-section (4), (5) and (8).

28. It is unfortunate that the first Respondent is deprived of the right to traverse the pathway to Bermudian status due to Section (2) (a)(i) in that even though he was born in Bermuda, neither of his parents was. Whether this is a form of discrimination depends on Section 12 (1) of the Constitution which reads as follows:

- “(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 11 of this Constitution”.

The learned Judge granted Mr Barbosa a declaration that he had been discriminated against on the ground of place of origin contrary to Section 12 of the Constitution, and granted Mr Barbosa liberty to apply if the proposed “Pathways to Status” failed to provide him with an effective remedy by the end of the then current legislative session. As suggested by the trial Judge Mr Barbosa can approach the Court if he so desires.

30. For all of the aforesaid reasons I would allow the appeal and set aside the declarations of the Judge.

PRESIDENT

1. I agree with the judgment of Bernard JA and her reasons why this appeal must be allowed. I add a few words of my own because we are differing from the Learned Judge and the conclusion seems to me to result in an injustice to Mr. Barbosa

2. The key question is the true construction of Section 11 (5) of the Bermuda Constitution Order 1968. The point at which I part company with the Judge is his conclusion that the section can be read as incorporating an additional category of persons who are deemed to belong to Bermuda, namely 'belongers' at common law. In my judgment the section is clear and unambiguous. There are several factors that have led me to this conclusion. First, the opening words of the section are:

“For the purposes of this section, a person shall be deemed to belong to Bermuda if that person

This indicates that the definition that follows is section specific; the definition is provided for the purposes of the section. The word “if” sets out the qualifications that have to be met.

3. Second, the section goes on to specify four categories of 'belonger', the first of which is the most obvious and the broadest, namely possessors of Bermudian status. The next three categories are those who don't possess Bermudian status but are brought under the same umbrella for the purposes of the section.

4. Third, whilst 'deemed' is a word that can be used in many different contexts, it is unsurprising to find it used in this section. The list of belongers mentioned in the section is intended to be comprehensive. The learned Judge said at paragraph 20 of his judgment that the meaning of 'deemed' was dependant on its context, a conclusion with which I entirely agree but he did not go on to say what it actually means in section 11 (5).

Fourth in *Fisher* Lord Wilberforce said at 332 D:

"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 person who "belong to Bermuda".

5. In my judgment his view of section 11 (5) as a definition section lends strong support to the view that one cannot imply the inclusion of any other category of 'belonger' into the section. *Fisher* is certainly not authority for altering the meaning of the section by adding words that are not there.



Baker, P



Bernard, JA

Bell, JA

I agree to both judgments.



Bell, JA