In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 176

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

CENTRE FOR JUSTICE — Applicant

-v-

THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS

(acting on his own behalf and on behalf of the Government of Bermuda, including the Premier and the Parliamentary Registrar)

Respondent

-and-

PRESERVE MARRIAGE LIMITED

1st Intervener

-and-

OUTBermuda

2nd Intervener

REASONS FOR DECISION

(in Court)[1]

Judicial review-jurisdiction to join intervening parties- standing to seek declaratory relief in relation to fundamental constitutional rights and in relation to the Human Rights Act 1981 - legality of Referendum (Same Sex Relationships) Act 2016 and proposed referendum-Referendum Act 2012-undue influence-neutrality of polling stations-enforceability of fundamental common law rights

[1] The present Judgment was circulated without a hearing.

Date of Decision: June 10, 2016
Date of Reasons: July 11, 2016

Mr. Alex Potts, Sedgwick Chudleigh Limited, for the Applicant ("CfJ")
Mr Melvin Douglas, Solicitor-General, and Mr Gregory Howard, Attorney-General's Chambers, for the Respondent
Mr Delroy Duncan, Trott & Duncan Limited, for the 1st Intervener ("PML")
Mr Peter Sanderson, Wakefield Quin Limited, for the 2nd Intervener ("OB")

Background

1. By its Notice of Application pursuant to leave to seek judicial review granted on May 23, 2016, the Applicant sought the following relief:

   (1) A declaration that the Referendum (Same Sex Relationships) Act 2016, and any purported Referendum held thereunder, is unconstitutional and/or unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene certain fundamental rights and freedoms guaranteed under the Constitution, namely those rights provided for by sections 6(8), 8(1), 9(1), and/or 10(1) of the Constitution;

   (2) A declaration that the Referendum (Same Sex Relationships) Act 2016, and any purported Referendum held thereunder, is unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene certain fundamental rights and freedoms guaranteed under the Human Rights Act 1981, namely those rights provided for by sections 2(2) and/or 3(1) of the Human Rights Act 1981;

   (3) A declaration that the Referendum (Same Sex Relations) Act 2016, and any purported Referendum held thereunder, is unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene and/or are repugnant to certain fundamental rights at common law, including rights of natural justice, equality of treatment, and the rule of law;

   (4) A declaration that the Referendum (Same Sex Relations) Act 2016, and any purported Referendum held thereunder, is unlawful and /or legally void and/or legally inoperative, in that section 39 of the Referendum Act 2012, which prohibits the exercise of undue influence in the context of a Referendum, has already been breached and/or will inevitably be breached (unless the holding of such a purported Referendum is restrained);

(5) A declaration that the decision of the Parliamentary Registrar to designate Holy Trinity Church Hall, St Patrick's Church Hall, First Church of God Hall, Seventh-Day Adventist Church Hall, Calvary Gospel Church Hall, and/or Allen Temple Church Hall as polling rooms for the holding of the proposed Referendum was procedurally unfair, substantively unfair, Wednesbury unreasonable, and/or contrary to the express or implied provisions of the Referendum Act 2012, and/or the Human Rights Act 1981, and/or the Constitution, with a consequential quashing of such decision by the Court;

(6) A permanent injunction prohibiting or restraining the Government of Bermuda, its servants or agents, from holding any purported Referendum, or taking any further steps or actions associated with holding any purported Referendum, of the sort contemplated by the Referendum (Same Sex Relationships) Act 2016.

2. On June 10, 2016, the day after the two-day hearing, I refused the application for an injunction to prevent the referendum scheduled to take place on June 23, 2016 ("the Referendum") and declined to grant the related, foundational, declaratory relief. I granted the relief sought under paragraph (5) of the Notice of Application and quashed the decision of the Parliamentary Registrar nominating six churches (which were prominent campaigners for a "no" answer to the two Referendum questions) as polling rooms. Effectively by consent, I made no Order as to costs.

3. I gave brief reasons in case any party wished to appeal my judgment to the Court of Appeal before the Referendum took place and indicated that I would give fuller reasons later. These are the full reasons for that decision. CfJ's application raised complicated issues of considerable public importance which were argued and decided within a necessarily compressed timeframe. I am indebted to all counsel for the assistance which their careful and thoughtful submissions provided.

4. At the beginning of the hearing on June 8, 2016, I reserved judgment on the applications by the two interveners and agreed to hear their submissions *de bene esse*. I expressed the strong provisional view that the Court should adopt a flexible approach to their standing to intervene. On June 10, 2016 I granted leave to PML and OB to intervene, without hearing full argument and without any or any serious dissent. Included in the present Judgment are my reasons for granting the two Intervention Summonses.

The Intervention Summonses

5. By Summons dated June 6, 2016, PML applied for leave to intervene on the grounds that, *inter alia*, it had been instrumental in persuading Government to hold the Referendum and that the submissions it would make would not overlap with the parties' submissions. Its primary submission was that the Referendum should proceed

because it was important for community views to be canvassed before legislation validating same sex civil unions was considered by Government. OB applied to intervene by Summons dated June 6, 2016, on the grounds that it was Bermuda's first organisation dedicated to advocating for LGBTQ people on the Island. Its primary submission was that the Referendum was inappropriate and/or should not proceed on an expedited timetable, because this would minimize the possibility of the greatest possible voter participation. Intervention applications have in the past been dealt with flexibly and without serious controversy. For instance, in *Smith-v-Minister of Culture and Social Rehabilitation, Ombudsman Intervening* [2011] Bda LR 7, I merely noted: "*I granted leave to the Bermuda Ombudsman to intervene in the proceedings to deal with any submissions which might be made as to the jurisdiction of the Ombudsman. This intervention was extremely propitious and assisted the Court significantly in adjudicating the legality of the Minister's decision as a matter of public law*" (at paragraph 2).

6. In the present case it was obvious that the two interveners each had a special interest in the outcome of the present application which could not adequately be advanced by either of the two primary parties, even though the general position of one intervener was broadly aligned with the Applicant's position and the general position of the other intervener was broadly aligned with the Respondent's. I accordingly granted both intervention applications on the express understanding. In so doing, I exercised a case management discretion following the approach of Popplewell J in *R-v-Minister of Agriculture, Fisheries and Food ex parte Anastasiou (Pissouri)* [1994] EWHC J0223-1 (at page 10):

> "*It seems to me that there is an inherent jurisdiction in the Court to ensure in judicial review proceedings that all those who may be affected by the decision have the opportunity to present their case. The fact that their case may differ not at all from that presented by MAFF is no bar to them being present and presenting oral argument.*"

Standing to seek relief

7. The Respondent submitted that CfJ lacked standing to seek declaratory relief in relation to an alleged breach of constitutional rights and/or a breach of the Human Rights Act 1981. This was essentially because (a) it was not a victim as required by both the Constitution and the Human Rights Act 1981, and (b) because the issues raised were premature and the conditions for granting declaratory relief were not met. I rejected the lack of standing arguments. Each limb of the standing objections will be dealt with in turn.

Jurisdiction to grant declaratory relief in relation to the Constitution

8. The Respondent submitted that (a) the application was procedurally irregular because it was not possible to seek constitutional relief within a judicial review application and/or the Applicant lacked standing to seek relief under section 15 of the Constitution, (b) that the application was premature, and (c) that the questions raised were political in nature and not justiciable.

9. Reliance was placed on my own observations in *Cashman-v-Parole Board* [2010] SC (Bda) 36 Civ; [2010] Bda LR 45:

> "*42. An application under section 15 ought to be filed at the same time as the Order 53 application, so that the two applications can (if appropriate) be heard together. This will likely be appropriate in all cases where: (a) the judicial review application is opposed; and/or (b) the judicial review application is not demonstrably a very strong case; and (c) the urgency of the judicial review application being heard on its merits is not incompatible with a fair hearing of an application under section 15 of the Constitution. The merits of the judicial review application will usually be relevant to this case management exercise because dealing with constitutional matters at the same time as a judicial review application will involve additional costs which ought to be avoided if it seems improbable at the interlocutory stage that the need for relief under section 15 will actually arise.*
>
> *43. In other words, in cases where the judicial review applicant who also files under section 15 meets the comparatively low threshold for obtaining leave but the assigned judge's provisional view is that the judicial review application has only modest prospects of success, the applications ought to be directed to be heard together. When the provisional view ought to be formed by this Court will likely vary from case to case. Sometimes the appropriate direction may be clear at the leave stage; sometimes the position may only be clear after the filing of evidence on the judicial review application. However, unless an application under section 15 is filed from the outset, in cases where it is reasonable to do so, the Court is unlikely to be able to give informed directions as to whether or not the judicial review and constitutional applications ought to be heard together. It also ought not to be forgotten that the parties have a duty to assist the Court to achieve the overriding objective under Order 1A, and the question of whether or not a judicial review application will or will not succeed can always form the subject of an agreement.*"

10. Mr Potts for the Applicant conceded at the leave phase that there was eminent authority for the proposition that relief under section 15 of the Constitution was not available to a public interest litigant. However, he contended that the Applicant was, section 15 apart, entitled to seek declaratory relief as part of a judicial review application without having to resort to section 15, which was really a remedy of last resort. I initially found these submissions to be almost heretical, because they ran counter to my traditional understanding of both the nature of an application for

judicial review and the manner in which a declaration that constitutional rights have been infringed could be obtained.

11. What is the scope of the discretionary remedy of 'judicial review'? It is important to distinguish this narrow discretionary statutory remedy based on the older common law jurisdiction of the Court to grant relief in response to prerogative writs, from the broader notion of judicial review of Governmental action which includes the ability to grant constitutional relief. The statutory remedy of judicial review was given a new form with effect from July 7, 2009 when the Administration of Justice (Prerogative Writs) Act 1978 ("the 1978 Act") was repealed by section 5 of the Supreme Court Amendment Act 2009. For present purposes, the following provisions of the Supreme Court Act 1905 are engaged:

> "***Application for judicial review***
> *64 (1)An application for judicial review may be made to the Court, in accordance with the Rules of Court, for one or more of the following forms of relief, namely, an order of mandamus, prohibition or certiorari, a declaration or an injunction.*
>
> *(2)No application for judicial review shall be made unless the Court has first granted leave in accordance with the Rules of Court to make the application, and leave may only be granted if the Court considers that the applicant has a sufficient interest in the matter to which the application relates.*
>
> ***Order of mandamus, prohibition or certiorari***
> *65(1) The Court may make an order of mandamus, prohibition or certiorari, on an application for judicial review seeking that relief, in the classes of cases in which it could do so immediately before commencement of this section.*
>
> *(2)If, on an application for judicial review seeking an order of certiorari, the Court quashes the decision to which the application relates, the Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the Court's findings.*
>
> ***Declaration or injunction***
> *66(1) The Court may make a declaration or grant an injunction, on an application for judicial review seeking that relief, if the Court considers that it would be just and convenient to do so, having regard to—*
>
> > *(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;*
> >
> > *(b) the nature of the persons and bodies against whom relief may be granted by such orders; and*
> >
> > *(c) all the circumstances of the case.*" [Emphasis added]

12. Judicial review is a proceeding commenced with a view to obtaining orders of certiorari, mandamus or prohibition, and declaratory or injunctive relief in the circumstances where these orders were previously available (section 65(1)). The scope of declaratory relief which may be granted is defined by reference to, first and foremost, "*the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari*" (section 66(1)).

13. Prior to July 7, 2009, the 1978 Act (which itself had abolished the prerogative writs of certiorari, mandamus and prohibition) provided as follows:

> "*10 (1) <u>In any case where the High Court in England would</u> issue an order for mandamus requiring an act to be done, or an order of prohibition prohibiting any proceedings or matter, or an order of certiorari removing any proceedings or matter into the High Court for any purpose, the Supreme Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.*" [Emphasis added]

14. It is trite law that judicial review is only available to challenge the decisions of courts and other tribunals (or public bodies) over which this Court exercises supervisory jurisdiction. It is settled law, as Lady Hale observed in *R (on the application of Cart)-v-The Upper Tribunal et al* [2011] UKSC 28, that:

> "*…the court* [has] *"an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law.*"

15. This Court's jurisdiction to grant relief by way of judicial review corresponds to that of the English High Court. Accordingly, it is clearly beyond the scope of the remedy of judicial review to seek a declaration that, for instance, a provision contained in primary legislation is void for inconsistency with the Bermuda Constitution. That would be plainly beyond the jurisdiction of the English High Court, even in the post-Human Rights Act 1998 (UK) era. On the other hand, Mr Potts invited me to have regard to the jurisdiction of the English High Court under the Human Rights Act 1998, which provides: "*It is unlawful for a public authority to act in a way which is incompatible with a Convention right*" (section 6(1)). This provision is diluted somewhat by section 6(2), which in effect provides that if primary legislation clearly <u>requires</u> a public authority to act in a manner which is inconsistent with a Convention right, the clear provisions of the inconsistent primary legislation will prevail. More

importantly still, for present purposes, the term 'public authority', the legality of whose acts can be challenged under the 1998 UK Act, "*does not include either House of Parliament*" (section 6(3)).

16. I also accept that a complaint may indeed potentially be made in the context of English judicial review proceedings to the effect that a public authority's actions are unlawful for contravening fundamental human rights. That is because of a specific statutory provision in the 1998 Act. Section 7 of the 1998 UK Act provides:

> "*(3) If the proceedings* [to complain that a public authority has acted unlawfully in breach of section 6(1)] *are brought on an application for judicial review the applicant is to be taken to have sufficient interest in relation to the unlawful act only if he is, or would, be a victim of that act.*"

17. It does not automatically follow that, as a matter of Bermuda law, by analogy, complaint can be made within a judicial review application that a public authority's actions would be unlawful because they would be inconsistent with fundamental rights and freedoms protected by Chapter 1 of the Constitution. But in my judgment the Bermudian law position ought, by analogy, to be no different despite the absence of any express statutory allusion in the Constitution to the possibility of raising such points by way of judicial review. As a matter of broad principle there is no distinction between challenging the legality of administrative action on the basis that the conduct complained of involves a breach of the law as contained in an ordinary statute, and grounding that complaint on a breach of the law which entails a contravention of constitutional rights.

18. If judicial review under Bermuda law can be viewed as encompassing the jurisdiction to grant such relief as Mr Potts submitted (and I initially, and incorrectly, strongly doubted), this would embrace the secondary complaint, made in paragraphs (1) to (4) of the relief sought under the Applicant's Notice of Application, that the effect of the Referendum would be to infringe constitutionally protected rights. It would exclude the complaint that the relevant statutory provisions are null and void. However, the Applicant would still have to meet the 'sufficient interest' test under section 65(2) of the Supreme Court Act 1905 and Order 53 rule 3(7) of the Rules. But that test has been liberally construed by the English courts in recent years to permit public interest litigants to seek judicial review and develop public law. For example, in *The Queen-v-Secretary of State for Industry ex parte Greenpeace Limited* [1999] EWHC J1105-13 at page 2, an application for leave to seek judicial review, Sir Maurice Kay J (as he then was) opened his judgment with the following words:

> "*This is an application by Greenpeace Limited, the corporate identity of Greenpeace UK, which is part of Greenpeace International. I shall refer to the Applicant as 'Greenpeace'. It is a well known campaigning body, the prime object of which relates to the protection of the natural environment. Its*

legal standing to bring proceedings such as the present application is well established."

19. There is no reason why the Bermudian courts should adopt a more restrictive approach. Mr Potts relied in this regard on my own observations in *Bulford and Jefferis-v- Commissioner of Police* [2015] Bda LR 79:

> "*20. …the recognised modern judicial review standing test is a flexible one, merely requiring the applicant to show "sufficient interest". It is flexible because, even though most judicial review applicants are in practice seeking to advance some personal interest unique to them, the overarching purpose of judicial review is to further the interests of good administration and the rule of law for the benefit of the public as a whole, rather than to advance the private interests of the individual applicant…*"

20. As far as the application for a declaration that "*the Referendum (Same Sex Relationships) Act 2016, and any purported Referendum held thereunder, is unconstitutional and/or unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene certain fundamental rights and freedoms guaranteed under the Constitution*", it seemed to me to be comparatively straightforward to conclude that the Applicant had standing to seek such relief under Order 15 rule 16 of the Rules of the Supreme Court 1985, rather than under the jurisdiction to grant declaratory relief in support of judicial review proceedings. The common law jurisdiction to grant declaratory relief clearly extends to declaring that:

    (a) a litigant has certain rights under the common law or a statute;

    (b) that certain conduct would be unlawful by reason of contravening a common law or statutory rule or right.

21. Order 15 rule 16 provides:

> "*No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.*"

22. Before judicial review was developed in comparatively modern times, it was well settled that declarations could be sought against the Crown: *Supreme Court Practice 1999*, paragraph 15/16/5. Where it is sought to obtain declarations about the legality of administrative action or subsidiary legislation, judicial review would now be the

appropriate remedy. But declarations as to the validity of primary legislation, to my mind, fall beyond the ambit of judicial review as it is recognised in both Britain and Bermuda. I have in the past been persuaded to assume that there is a 'bright line' dividing the jurisdiction to grant declaratory relief under the general law and the jurisdiction to grant declaratory relief in relation to alleged contraventions of the Constitution. This assumption was implicitly based on a narrow and restrictive view of the jurisdiction of this Court to grant relief in respect of alleged breaches of fundamental rights. It is a view perhaps subconsciously influenced by the fact that in Britain, prior to the incorporation of the European Convention on Human Rights ("ECHR") into domestic UK law in 1998, direct enforcement of fundamental rights was an elusive concept, only possible by means of non-domestic proceedings under international law. In *Minister of Home Affairs-v-Bermuda Industrial Union et al* [2016] SC (Bda) Civ (15 January 2016); [2016] Bda LR , I described the main ways in which constitutional points may be raised in the following admittedly restrictive manner:

> "*71. The Constitution can be raised in three main ways. Firstly, and more formally, to seek a declaration that a particular law is inconsistent on the face of the legislation in question with a constitutional provision such as section 12. This would ordinarily require a formal application for such relief under section 15 of the Constitution as read with Order 114 of the Rules of the Supreme Court 1985. Secondly, and perhaps marginally less formally, an application may be made for declaratory relief that certain administrative action taken under a law which is constitutionally valid on its face infringes the applicant's constitutional rights. Thirdly, and least formally still, the presumption that Parliament would not have intended to authorise a breach of the Constitution can be used as an aid to interpreting a legislative provision which is reasonably capable of two possible interpretations, one which conforms to the Constitution and the other which conflicts with it.*"

23. Mr Potts invited the Court to look at section 15 in a liberal rather than a restrictive manner and to view section 15 as the last port for call for seeking constitutional relief rather than the starting point. Two provisions in this section are crucial:

> *"15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) The Supreme Court shall have original jurisdiction—*
>
> > *(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and*
> >
> > *(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,*

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law." [Emphasis added]

24. The restrictive way in which the section 15 jurisdiction has traditionally been construed is as follows. The only way a complaint that fundamental rights have been infringed can be directly considered is by an application under section 15, provided that all non-constitutional overlapping remedies have first been exhausted. Without any real analysis, it has generally been accepted wisdom that a declaration that a statutory provision or administrative act is inconsistent with rights protected by Chapter 1 of the Constitution can only be obtained by an application under section 15 itself. In *Cashman* (and in subsequent cases), I have sought to loosen the strictures of this restrictive approach by permitting an application for constitutional relief to be heard at the same time as a judicial review application. The Applicant's counsel in the present case persuaded me that I did not go far enough in *Cashman* [2010] Bda LR 45. Because applications under section 15, properly construed, are not intended to be exclusive or even primary means of obtaining relief for contraventions of fundamental rights. The section explicitly states that:

    (a) applications under section 15 are "*without prejudice to any other action with respect to the same matter which is lawfully available*" (section 15(1); and

    (b) applications under section 15 shall not be entertained where "*adequate means of redress are or have been available to the person concerned under any other law*" (section 15(2), proviso).

25. In my judgment Mr Potts was right to argue that section 15 is intended to be a last resort remedy rather than an exclusive one. It is impossible to ignore, when construing the remedial provisions of section 15, that in *Minister of Home Affairs-v-Fisher*[1980] AC 319, Lord Wilberforce (at page 338) crucially stated as follows:

> "*Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual' It is known that this chapter. as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of*

> *Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 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…*" [Emphasis added]

26. Section 15, construed in a generous manner, does not deprive this Court (or the Court of Appeal) of the jurisdiction to grant declaratory relief, and complementary injunctive relief, independently of an application under section 15. What section 15 (3) does unambiguously do is to prevent any court other than the Supreme Court or Court of Appeal from dealing with constitutional issues in terms which contemplate that fundamental rights' contraventions may arise and require determination independently of proceedings under section 15 itself:

> "*(3) If in any proceedings in any court established for Bermuda other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Chapter, the court in which the question has arisen shall refer the question to the Supreme Court unless, in its opinion, the raising of the question is merely frivolous or vexatious.*"

27. The sort of relief which can only be obtained under section 15 itself is relief which is not available as a matter of common law or statute. Clearly there is no purely common law power to declare that statutory provisions are void for inconsistency with the Constitution. That power is clearly within the range of remedies which this Court can grant under section 15. But is there any reason in principle why, in any proceedings where the constitutional validity of particular legislation is in issue, this Court cannot grant declaratory relief in a form signifying the invalidity of ordinary legislation because it conflicts with the provisions of Chapter 1 of the Constitution? The Court of Appeal has accepted that it is possible to grant precisely that form of relief in the context of a criminal appeal. In *Robinson-v-R* [2009] Bda LR 40, Nazareth JA opined as follows:

> "2. *The appellant's submission is that the combined effect of relevant statutory human rights and constitutional provisions entitles him to seek appropriate remedies in respect of his sentence.*
>
> *The Bermuda Constitution (the Constitution), unlike those of many of the Caribbean independent states of the Commonwealth, does not declare that the Constitution is the supreme law of Bermuda; but that position is*

achieved by the Bermuda Constitution 1967, which by Order-in-Council applied the Bermuda Constitution to Bermuda, in conjunction with the Colonial Laws Validity Act 1865, which provides by Section 2:

> *Colonial Laws, when void for repugnancy*
>
> *2 Any colonial law which is or shall be in any respect repugnant to the provisions of an Act of Parliament extending to the Colony which such law may relate or repugnant to any order or regulation made on the authority of such Act of Parliament or having in the Colony the force and effect of such Act shall be read subject to such Act order or regulation and shall, to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.*

Thus, as submitted, the effect of Section 2 of the Act of 1865 is that any law passed in Bermuda will be void to the extent of any inconsistency with the Bermuda Constitution…

6. Patently, Section 15 confers original jurisdiction under subsection 1 in respect of contravention of fundamental rights in Chapter 1. It may be mentioned that the above provisions of Section 15 and also its subsection (5) are materially identical to the corresponding provisions of The Bahamas Constitution. They were addressed by the Board in a similar context in Forrester Bowe ([2006] UKPC 10, paras 6-12) an appeal from The Bahamas, and support the appellant's contention that this Court has jurisdiction to entertain the appeal.

We accordingly had no hesitation in concluding that this Court has jurisdiction to entertain the appeal."

28. In *Forrester Bowe-v-R* [2006] UKPC 10, Lord Bingham (after reproducing the substantially identical Bahamian counterpart to section 15 of our own Constitution) stated:

> *"The majority of the Court of Appeal read this article as precluding it from entertaining a challenge to the constitutionality of a sentencing provision on an appeal against sentence in criminal proceedings. Redress must be sought in a separate application to the Supreme Court. The Board cannot accept these conclusions for two main reasons. First, they are inconsistent with the decision of the Board in Chokolingo v Attorney-General of Trinidad and Tobago [1981] 1 WLR 106 , 111-112. Secondly, they are inconsistent with article 28. Subsection (1) of the article makes plain that the right of application to the Supreme Court for redress is 'without prejudice to any other action with respect to the same*

matter which is lawfully available'. Thus the right of application to the Supreme Court is not provided as a unique or exclusive procedure, an interpretation made still clearer by the proviso to subsection (2). The provision in subsection (3) for reference to the Supreme Court applies only where the question arises in proceedings in any court 'other than the Supreme Court or the Court of Appeal': the inescapable inference is that if the question arises in proceedings in one or other of those courts, it shall be resolved in that court in those proceedings. In concluding otherwise the Court of Appeal majority fell into error." [Emphasis added]

29. On proper analysis, one does not need to commence proceedings under section 15 of the Constitution to seek declaratory and/or injunctive relief in relation to an alleged breach of fundamental rights by legislation said to be invalid on its face (or indeed administrative action said to be invalid in its effect). The general jurisdiction to grant declaratory and/or injunctive relief is sufficiently broad and flexible to make recourse to section 15 only optional in many cases. Where the contention is that local legislation is invalid for inconsistency with the Constitution, this is quintessentially a question of statutory interpretation, with the primacy of the Constitutional provisions deriving from either:

    (a) Section 5(1) of the Bermuda Constitution Order 1968 (UK), which provides that laws in force before June 2, 1968 "*shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*"; or

    (b) Section 2 of the Colonial Laws Validity Act 1865 (a UK statute which itself extends to Bermuda), which provides that laws passed by Bermuda's Parliament "*shall be absolutely void and inoperative*" to the extent of any repugnancy to a UK Order made under a UK Act (e.g. the Bermuda Constitution Order) extending to Bermuda.

30. Accordingly, while I accepted the Respondent's submission that the purely constitutional relief sought (i.e. the challenge to the validity of primary legislation) fell beyond the bounds of judicial review, I found instead that this Court's general jurisdiction to grant declaratory and injunctive relief was sufficiently broad to entertain complaints grounded in an allegation that constitutional rights have been or are likely to be contravened without the need for a separate application under section 15 of the Constitution. I further found that there was no clear or coherent basis upon which it might be argued that the Applicant, as a public interest litigant, lacked standing to seek declaratory relief under Order 15 rule 16 of the Rules and/or the inherent jurisdiction of the Court.

31. Mr Potts properly disclosed at the ex parte on notice leave to seek judicial review hearing that there was authority which might be read as denying the Applicant the right to seek relief under section 15 of the Constitution. This authority merely fortified the view that it must be possible to obtain alternative relief in 'non-

constitutional' proceedings. In *Mirbel-v-State of Mauritius* [2010] UKPC 16, Lord Phillips opined as follows:

> "26. *Section 17(1) of the Constitution is designed to afford an additional or alternative remedy for someone who contends that one or more of the fundamental rights that he enjoys under Chapter II of the Constitution have been, or are likely to be, infringed. The section provides a personal remedy for personal prejudice. It is not an appropriate vehicle for a general challenge to a legislative provision or an administrative act, brought in the public interest. This is made clear by the phrase "in relation to him" in section 17(1). It has also been repeatedly emphasised by the Supreme Court. In this case the Supreme Court rightly cited Tengur v Ministry of Education and Scientific Research and Another [2002] SCJ 48, [2002] MR 166 as exemplifying, in a tax context, the distinction between a claim under section 17(1) and a claim for judicial review.*"

32. This reasoning assumes that the parallel jurisdiction to make a challenge to the constitutionality of legislation in the public interest apart from an application for relief under the Constitution not only exists but also is a broad one. Section 15(1), like section 17(1) of the Mauritian Constitution, speaks of an application being made by a person who "*alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him*" and confers on such a person the right to "*apply to the Supreme Court for redress*" [emphasis added]. This would suggest that section 15 is in truth a remedial provision designed to grant relief (e.g. damages for breach of constitutional rights) which are not available under the general law. Lord Phillips' findings on the limited scope of constitutional relief were technically *obiter* as in *Mirbel* the Privy Council found that the appellant was entitled to relief. The issue in controversy in that case was not whether a public interest litigant could seek relief, but whether the constitutional complaint had practical implications justifying the grant of real (as opposed to hypothetical) relief.

33. The restrictive terms of our 1960's-vintage constitutional redress provision are to be contrasted with the unambiguously broad scheme of the 1990's vintage South African Constitution:

> "***38.*** *Enforcement of rights.-Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-*
>
> > *(a) anyone acting in their own interest;*
> >
> > *(b) anyone acting on behalf of another person who cannot act in their own name;*

> (c) *anyone acting as a member of, or in the interest of, a group or class of persons;*
>
> (d) *anyone acting in the public interest; and*
>
> (e) *an association acting in the interest of its members.*"

34. Should the modern interpretation of section 15 of the Bermudian Constitution be informed by the spirit of the expansive South African approach? Because of my findings on the merits of the application for constitutional relief, I did not find it necessary to consciously decide whether or not the Applicant had standing to seek relief under section 15 of the Bermuda Constitution. I instinctively concluded that it must be open to the Applicant to seek to challenge the constitutionality of the impugned legislation in the public interest. I was and remain inclined to the view that section 15 should be construed in a broad and purposive manner capable of embracing a claim by a public interest litigant. However, any such public interest litigant would have to demonstrate that practical relief was sought rather than simply to explore wholly academic points.

35. In the event that this conclusion was wrong, I was content to assume that the alternative position must unarguably be that the Applicant had standing to seek corresponding declarations as to the invalidity of Referendum (Same Sex Relationships) Act 2016 (the "2016 Act") under Order 15 rule 16 and/or the inherent jurisdiction of the Court.

<u>Standing to seek relief under the Human Rights Act 1981</u>

36. The Respondent's submission that the Applicant lacked standing as a public interest litigant to seek declaratory relief in relation to alleged contraventions of the Human Rights Act 1981 can be dealt with more shortly. The argument was not advanced with much conviction and was based on the following provisions of the Act:

> "20A(1) *A claim by any person ('the claimant') that another person ('the respondent') has committed an act of discrimination against the claimant which is made unlawful by virtue of Part II may be made the subject of civil proceedings in like manner as any other claim in tort.*
>
> *(2)For the avoidance of doubt it is hereby declared that damages in respect of an unlawful act of discrimination may include compensation for injury to feelings whether or not they include compensation under any other head.*"

37. It seems clear that as far as the special statutory remedy of filing a complaint with the Commission is concerned, only a "*person aggrieved*" has standing to make a complaint (section 14H(1)(a)). Section 20A makes it clear that the existence of a special procedure for making a complaint to the Commission does not deprive a complainant of the right to pursue a claim for unlawful discrimination in the same

manner as one would pursue a claim in tort. Such a claim could only be pursued, it seems obvious, by a litigant complaining that he or she has been the victim of an act of discrimination. A public interest litigant such the Applicant would lack the standing to pursue such a claim. The Applicant does not seek either of those two forms of relief.

38. A declaration is sought that the 2016 Act is inoperative because it is inconsistent with the 1981 Act. The relevant jurisdiction is conferred by the following provision:

> "*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.*"

39. Section 29 provides a statutory basis for any applicant to seek a declaration that a provision of law is inoperative because "*it authorizes or requires the doing of anything prohibited by this Act*". The section expressly contemplates that such a declaration may be made in "*any proceedings before the Supreme Court*", whether specifically brought under section 29 of the Act the Act or otherwise. The jurisdiction is unqualified in terms of who may apply for such relief. Although a section 29(1) declaration may clearly be sought in judicial review proceedings, in my judgment it is not relief for which leave need be sought. But, for present purposes, all that is relevant is that a public interest applicant such as the Applicant is clearly eligible to seek relief.

40. In *Bermuda Bred Company-v-Minister of Home Affairs* [2015] Bda LR 106, these procedural nuances were dealt with in a rather muddled way, partly because constitutional relief was also sought. The public interest applicant correctly commenced proceedings by way of Originating Summons, but in the face of a standing challenge that was ultimately not pursued, obtained leave to convert the proceedings into judicial review proceedings. A section 29 declaration was ultimately granted. The step of converting the proceedings into judicial review proceedings in that case was redundant because section 29 provides a freestanding jurisdictional basis for obtaining declaratory relief. That case was a recent precedent for a public interest litigant obtaining relief under the 1981 Act.

41. For these reasons the Respondent's standing objections were refused.

Inappropriateness of using a referendum on human rights issues and the need for heightened scrutiny

42. The Applicant invited the Court to have regard to the need for careful scrutiny of the 2016 Act because it was wrong in principle to seek input from voters on a human rights issue.

43. Not only was it common ground that sexual orientation is a prohibited ground of discrimination under the Human Rights Act 1981. In *Bermuda Bred Company-v-Minister of Home Affairs* [2015] Bda LR 106, the Applicant's counsel reminded the Court, I observed that the Crown in right of Bermuda appears to be under a positive international law duty under article 8 of the ECHR to create some coherent legal framework for the recognition of same-sex relationships formed by Bermudians. The substantive finding in that case was that the Bermuda Immigration and Protection Act 1956 provisions creating spousal employment rights but no corresponding rights for same sex partners in stable relationships analogous to marriage were inoperative to the extent that they discriminated on sexual orientation grounds. The 2016 Act clearly dealt with a human rights issue.

44. The Applicant relied on, *inter alia*, the following statements of principle in support for the proposition that holding the Referendum was contrary to principle:

    (a) the statement of the former Premier Hon. Paula Cox on the Second Reading of the Bill which resulted in the Referendum Act 2012 ("the 2012 Act"):

    > "*I think that it is important that you provide an opportunity, as part of open Government, that you have an opportunity for referendum on an issue…which does not speak to fundamental rights, because fundamental rights have to be within the remit of the Government…*"[2];

    (b) the current Attorney-General's reported statement on February 11, 2016 that a referendum on same sex marriage was "*not appropriate*";

    (c) the finding recorded in '*Referendums in the United Kingdom*', House of Lords Select Committee on the Constitution, HL Paper 1999 (2010) (at paragraph 94) that "*if referendums are to be used they are most appropriately used in relation to fundamental constitutional issues*"[3];

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[2] Official Hansard Report, 8 June 2012, page 2232.

[3] The Report also noted at paragraph 44: "*Professor Gallagher stated that referendums are accused of allowing majorities to override the rights of minorities…Caroline Morris warned of 'the danger that minority rights may be overridden by popular sentiment'…*"

(d) the following observations of Kennedy J in *Obergefell-v-Hodges* 576 US (2015):

> "*The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 638 (1943).This is why 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.' Ibid. It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process.*"[4]

45. Mr Potts was careful to acknowledge that this was a principle that admitted of some exceptions. For instance, Ireland held a referendum on same sex marriage. But this was because a constitutional amendment was involved and its Constitution required constitutional amendments to be approved by way of a referendum. He was also forced to concede that, as far as Bermuda domestic law was concerned, the right not to be discriminated on the grounds of sexual orientation was not a constitutionally protected fundamental human right. However, I accepted the broad submission that the Government's decision to hold the Referendum on a human rights issue affecting what is generally regarded to likely be roughly 10 % of the electorate was contrary to principle. A principle which is not legally enforceable, as the Applicant's counsel fully appreciated, but a principle important enough to my mind to be characterised as a constitutional convention.

46. The decision (in contravention of this constitutional convention) to hold the Referendum created clear grounds for heightened scrutiny of the legality of the Act and its implementation.

Application for declarations that the Referendum (Same Sex Relationships) Act 2016 and any referendum under it are void and/or inoperative for contravening the Constitution

47. Section 3 of the 2016 Act most significantly provided as follows:

> "*3. A referendum shall be held on the following questions:*
>
> 1. *Are you in favour of same sex marriage in Bermuda?*
> 2. *Are you in favour of same sex civil unions in Bermuda?*"

48. Mr Potts made the introductory point that these questions lacked sufficient definition and/or legal certainty. I saw little in these complaints. Nor did I accept that the

[4] Transcript, pages 24-25.

holding of the Referendum was contrary to my findings in the *Bermuda Bred Company* case as to the Government's "*duties*". The observations I made as to what appeared to me to be Bermuda's international obligations formed no part of my decision, which was solely concerned with the Bermuda domestic law position.

49. It was not seriously arguable that the 2016 Act on its face was void for inconsistency with the Constitution, for the following reasons.

Section 6(8)

50. Firstly, it was complained that the subject-matter of the Referendum was a matter for determination by an independent court so that the Act infringed section 6(8) of the Constitution. The 2016 Act did not by its terms purport to take away rights which were being prosecuted in proceedings before the courts. The 2016 Act did not even by its terms change the law. Parliament can always change the law to override the effect of legal decisions (except for decisions in relation to constitutionally protected rights, where, as far as our local Legislature is concerned, the decisions of the courts reign supreme). Parliament cannot, as the Respondents implicitly conceded, change the law to alter the outcome of pending proceedings or otherwise take away vested rights. I accepted Mr Douglas' submission that this complaint was misconceived because section 6(8) was simply not in any direct way engaged at all.

Section 8(1)

51. Next it was complained that the 2016 Act was inconsistent with section 8(1) of the Constitution: "*Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.*" The argument was that the failure to explicitly distinguish in the posed questions between religious and civil marriage interfered with the section 8(1) rights of voters who were deprived of the opportunity to vote in favour of a civil or secular same sex marriage. This was a very subtle argument which lacked substance.

52. I accepted the proposition that the Act on its face did pose questions in a way which <u>potentially</u> interfered with the freedom of conscience rights of some voters in a real (if somewhat abstract way). Such an occurrence would be inevitable in any referendum because the choice of any political questions must necessarily involve the accommodation of certain views and the exclusion of others. However, in my judgment, bearing in mind the presumption of constitutionality which applies to all post-1968 laws, a legislative provision can only be found to be invalid on its face if it <u>clearly and necessarily</u> interferes with constitutional rights in a substantial way. If the position were otherwise, no referendum law would ever escape the judicial hatchet in

the face of a constitutional challenge under section 8. I found that this complaint failed to reach the level of cogency required to justify the exceptional finding that provisions of an act of Parliament were void for inconsistency with a constitutional right. The sort of provisions in a referendum act which might more obviously be liable to be struck down for inconsistency with section 8 (1) would, by way of hypothetical illustration, include the following:

(a) a provision requiring the poll to take place on a day of the week which members of particular faiths regarded as a day when they could not vote;

(b) a provision requiring voters to produce certificates of regular attendance at a religious institution as a condition of eligibility;

(c) a question in a referendum on whether or not ministers of religion should be required to perform same-sex marriages which was framed so as to include Christian ministers and exclude ministers of other faiths.

53. There is one actual Bermudian judicial example, being the only case to date in which a statutory provision has been held to be inoperative for contravening section 8(1) of the Constitution and freedom of conscience rights: *Attride-Stirling-v- Attorney-General* [1995] Bda LR 6[5]. Section 27(1) of the Defence Act 1965 provided as follows:

> "*Notwithstanding anything in the foregoing provisions of this Part, a person may, at any time after reporting under section 13A(2), apply to the Exemption Tribunal to be registered as a conscientious objector* <u>*on the ground that he objects to performing combatant duties.*</u>" [Emphasis added]

54. The Court of Appeal for Bermuda held that the underlined words infringed section 8(1) of the Constitution because the exemption failed to recognise the rights of those persons who, like the applicant, conscientiously objected to all forms of military service. Section 27 of the Defence Act purported to compel persons who were found by the Exemption Tribunal to genuinely adhere to a recognised body of beliefs (pacifism) to undergo compulsory military service, albeit of a non-combatant nature. This was a very clear, concrete and extremely intrusive interference with freedom of conscience rights on the face of the statutory provisions themselves. Sir Alan Huggins noted (at page 4):

> "*We do not think it is disputed by the Attorney General that recognition is now widely given to the fact that there are those who genuinely object to being*

[5] Also reported at [1995] 1 LRC 234; [1996] 1 CHRLD 24.

compelled to serve in a military organisation in any capacity whatsoever. It is not for us to consider whether we think such an attitude is reasonable: it is one which falls within section 8(1) of the Constitution…"

55. The present complaints are far more abstract and hypothetical in character. Mr Douglas rightly submitted that for views allegedly infringed to be accorded protection, the "*right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance*": *Eweida and others-v- United Kingdom* [2013] ECHR 48420/10 (at paragraph 81). This case only directly supports the narrow proposition that the right to manifest one's belief is not absolute. However, it also illustrates the wider proposition that some interference with freedom of conscience rights is inevitable and not all infringements qualify for constitutional protection.

56. The *Eweida* case most clearly supported Mr Douglas' fall-back submission that if the Act did interfere with section 8(1) rights in any way, it must be held to be saved by the provisions of subsection (5) of section 8:

> "*(5) 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 which is reasonably required—*
>
> *(a) in the interests of defence, public safety, public order, public morality or public health; or*
>
> *(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited interference of persons professing any other religion or belief,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*"

57. The 2016 Act was, in freedom of conscience terms, reasonably required to protect the political and/or religious rights and freedoms of other persons, most obviously those represented by PML. I found it difficult to accept the proposition that any slight interference with the freedom of conscience rights of potential voters who might find the Referendum questions did not give them scope to express their views was a disproportionate exercise of legislative power. If I had found that the 2016 Act

infringed section 8(1) on its face, I would have found in the alternative that it was saved by section 8(5).

Section 9(1)

58. The next complaint was that the 2016 Act was void for inconsistency with section 9 of the Constitution. Section 9(1) provides as follows:

> "*(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*"

59. Reliance was placed on essentially the same arguments as were deployed in respect of the section 8(1) complaint. It was submitted that the "yes/no" choices did not allow voters to freely express their political views. However, it was also noted that Deane and Toohey JJ in *Nationwide News Pty Ltd-v- Wills* [1992] HCA 46 stated (at paragraph 8):

> "*An ability to vote intelligently can only exist if the…content of the proposed law submitted for the decision of the people at a referendum can be communicated to the voter.*"

60. This case merely illustrates the typical ground which freedom of expression ordinarily occupies. The right is about freedom of communication, not (as the Applicant's complaint implies) the right to vote. It is possible for the sophist to construct analytical frameworks within which poorly crafted referendum questions impair the ability of the citizen to express his political opinions in the purest possible way. Such abstractions are not the stuff that legally viable complaints of a breach of freedom of expression rights are made of. This ground for attacking the validity of the 2016 Act was bound to fail. There is nothing in the 2016 Act which, on the face of the provisions, impedes freedom of expression as that right is traditionally legally understood.

61. The present case is far removed from the legal context of the only Bermudian case in which a statutory provision has held to be invalid for infringing freedom of expression rights, *Richardson-v-Raynor (Police Sergeant)* [2011] 1 Bda LR 52. The relevant provision (section 214(1) of the Criminal Code) made defamation a criminal offence with no need to prove aggravating elements. In that case I held:

"*69.Section 214(1) on its face and read in its statutory context presently permits a charge of criminal defamation to be laid in respect of non-intentional (and even non-negligent) defamation in circumstances where the statement is not made on a protected occasion. The only mental element of this offence which I am satisfied has to be proved is that the accused intended to publish the material in question; this is the way I would construe the Tongan Court of Appeal (Burchett, Salmon and Moore JJ) decision in R-v-Pohiva [2010] 1 LRC 763 at paragraphs [12]-[13].*

70. In such cases the Crown need not prove aggravating elements such as ill-will or an absence of good faith (including an intention to defame). Moreover, the narrow scope of the criminal defence of justification under section 212 of the Code would mean that a person could potentially be charged in circumstances where the defamatory statement was true but not made for the public benefit. Rendering such statements criminal clearly interferes with freedom of expression contrary to section 9(1) of the Constitution. Neither the Respondent nor the Attorney-General has shown that criminalizing defamation to such an extent is "reasonably required" in accordance with section 9(2):

'(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments…'".

Section 10(1)

62. Finally it was complained that the 2016 Act was void for inconsistency with section 10(1) of the Constitution, which provides:

"***Protection of freedom of assembly and association***

10 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or

belong to trade unions or other associations for the protection of his interests."

63. This complaint is wholly untenable for more fundamental reasons than those raised in the Respondent's Submissions. There is no authority for the proposition that section 10 (based on article 11 of ECHR) is broad enough to encompass personal or family relationships at all. Those relationships have always been recognised as protected by the right to family life under article 8 of ECHR, which has no counterpart in the Bermuda Constitution.

64. However, even if family relationships were protected by section 10(1), the Respondent's counsel correctly submitted that the 2016 Act on its face did not interfere with those rights in any meaningful way.

Application for declarations that the effect of the Referendum (Same Sex Relationships) Act 2016 would involve contravening the Constitution

65. It is usually easier to make out a complaint that the implementation of provisions of a statute which is on its face constitutionally valid interferes with constitutional rights, than it is to establish that the statute (or some of its provisions) are constitutionally invalid on their face. In the present case, however, for the same reasons that I rejected the attack on the validity of the 2016 Act on its face, I was bound to find that the holding of the Referendum itself did not to any meaningful extent if at all conflict with the rights protected by:

    (a) section 6(8) (fair hearing);

    (b) section 8(1) (freedom of conscience).

66. The Applicant and OB raised substantial concerns which I considered more clearly engaged freedom of expression and freedom of association rights in a tangible manner. The Applicant made two complaints which could not be convincingly contradicted:

    (a) the Referendum timeline was lawful but extremely compressed. The 2016 Act took effect on March 28, 2016. On May 9, 2016, the Premier published a notice appointing June 23, 2016 for the holding the Referendum. Although under section 7 of the Referendum Act 2012 ("the 2012 Act") the Premier had 90 days to publish a referendum notice, he did so within roughly 42 days. The Referendum then had to be convened for a date within no more than 60 days; it was convened for a date within roughly 45 days. The polling date was fixed for late June when it could have been as late as July or August;

(b) the Premier had failed to exercise his discretion under section 53 of and Schedule 6 to the 2012 Act to appoint an ad hoc Committee to advise him in relation to the Referendum. As a result, the quality of information received by voters (combined the absence of any apparent public campaigning roughly two weeks before polling was due to take place) to enable them to freely hold opinions and receive and impart ideas and information was impaired to an extent which fell below the best practice standards established by the Venice '*Guidelines on the Holding of Referendums*' (adopted by the European Council for Democratic Elections, October 12, 2006). These standards required, *inter alia*:

(i) an explanatory report to be published by the authorities far in advance of the referendum explaining the respective campaign position in a balanced way;

(ii) respect for freedom of association and assembly for political purposes in connection with a referendum with equality of opportunity for each side.

67. Mr Sanderson for OB complained that the timing of the Referendum made it likely that overseas students might not be able to participate. Initially, I thought this had considerable substance as far as UK-based students were concerned, but Mr Duncan convincingly suggested that most UK educational institutions would by then be on holiday. More importantly, however, OB's counsel submitted that the compressed timetable made it particularly difficult for LGBT campaigners, who were (in large part due to the discrimination they still faced in Bermuda) loosely organised and poorly funded, to effectively campaign. He also complained that the failure to consult in relation to the holding of the Referendum made the implementation of the Act procedurally unfair: *R (Plantagenet Alliance Ltd)-v- Secretary of State for Justice et al* [2014] EWHC 1662 (QB) at paragraph 98.

68. I was bound to accept that there was a serious risk that the Referendum would, to some extent, interfere with the freedom of expression and freedom of association rights of many voters and/or potential voters to an extent which was more than trivial. The question was whether the interference identified was so serious as to justify the Court concluding that it ought to restrain the Government from holding the Referendum altogether. After all, the Referendum is not concerned with the existence or scope of rights which are protected by the Constitution and which Parliament is not competent to alter. No authority was cited to illustrate the circumstances under which good electoral practices might be shown to have been breached to so serious an extent

as to justify a court restraining the conduct of the poll on the appointed date altogether.

69. Mr Howard urged the Court to accept the constitutional principle based on the separation of powers that it was entirely a matter for the Executive under the 2016 Act to decide on matters such as when a referendum was held and how it was administered. He also argued, by reference to '*De Smith's Judicial Review*', Sixth edition (paragraphs 7-026-7-027), that matters such as the decision to have the Referendum were 'legislative' and therefore immune form judicial review:

> "*In the 4th edition of this work in 1979 it was contended that the decision of a minister to close a coal pit would, because government economic policy was involved, not attract the duty to act fairly. In a later case, however, it has been held that just such a decision was void for failure to consult the unions and others who had a legitimate expectation of being consulted prior to the pit closures. Nevertheless, aside from situations where a legitimate expectation exists, decisions such as these, and others categorised as 'legislative', have remained relatively immune from the assault that has been made upon the distinction between duties that are analytically "judicial" and those that are 'purely administrative'. English courts have been reluctant to impose the duty to consult on ministers exercising powers delegated under legislation to issue orders or direction. Nor is such a duty imposed upon the procedures for making policy of a less formal kind, although where consultation is required by statute the courts will police its implementation and insist that it is adequate and genuine. By contrast, in the United States full opportunity for notice and comment for most administrative rule-making is provided by statute.*
>
> *There are two reasons why 'legislative' decisions have been held exempt from the duty to provide a fair hearing: first, where the decision is taken by a minister or other elected official who is accountable to Parliament or a local authority, the courts will be chary of adding an additional forum of participation where one is already in place as part of the process of political accountability. The second reason is a practical one: bodies may be exempt from the duty to provide a hearing where the potential of adversely affected interests is too diverse or too numerous to permit each individual to participate.*"

70. The Respondent's Counsel also pointed out that the legislative scheme did not confer on the Court an express supervisory role. Furthermore, the results in any event would not be legally binding. These were important arguments which supported the conclusion that, even if (as appeared to me to be the case) the Referendum had been

organised in a somewhat shabby and shambolic fashion with little or no apparent regard for good referendum practice, it was impossible for the Court to be satisfied that the minimum legal standards established by the 2012 Act would be breached to such an extent that a lawful referendum could not take place on the appointed date. Save in one respect (which was capable of being remedied) the formal requirements of both the 2012 and 2016 Acts had been scrupulously met. I found it difficult to assess the extent to which, if any, the legislative scheme made consultation essential and was simply not persuaded that the lack of consultation complained of constituted sufficient legal grounds for restraining or postponing the holding of the Referendum.

71. I also took into account in particular two crucial points and, to this limited extent, accepted the Respondent's submission that the application for constitutional relief was premature:

    (1) it was impossible to gauge what quality of information and campaigning might take place between the date of the hearing and the Referendum; and

    (2) depending on what happened during the last two weeks by way campaigning and the Referendum results, it was still open to the Applicant (and any interested party) to challenge the results. This is the context in which the courts in western democracies are routinely engaged in supervising the electoral process.

72. The 2012 Act itself, moreover, only contemplates the postponement of a referendum in extreme circumstances:

> "10(1) *Where at any time between the publication of a referendum notice and the polling day appointed by that notice, the Premier is satisfied that it is expedient so to do by reason of—*
>
> *(a) Bermuda having become, or being likely to become, engaged in any war;*
>
> *(b) a state of emergency having been proclaimed under section 14(3) of the Constitution;*
>
> *(c) the occurrence of an earthquake, hurricane, flood or fire, or the outbreak of a pestilence or an infectious disease or other calamity whether similar to the foregoing or not;*
>
> *(d) the likelihood that the parliamentary register will not be available before the polling day; or*

> (e) *the occurrence of rioting, open violence or other civil disturbance which has caused, or is likely to cause, such interruption or abandonment of the electoral process as to prejudice the holding of a fair referendum,*
>
> *he may by notice published in the Gazette cancel the polling day and appoint another day, not being more than thirty days after that notice is published, to be the polling day instead.*"

73. In summary, I found that the holding of the Referendum would likely interfere with some freedom of expression and freedom of association rights to a certain extent (the perfect referendum could, of course, never be organised). However, the Applicant failed to make out a case for the draconian form of declaratory relief sought, namely either restraining the Referendum altogether or postponing it to a later date.

Application for a declaration that breaches of the Human Rights Act 1981 will occur unless the Referendum is restrained

74. The boldest attack on the holding of the Referendum was the complaint that, in effect, because section 2(2) the Human Rights Act 1981presently prohibits discrimination on the grounds of sexual orientation (and by implication entitles same sex couples to legal recognition of their relationships) it was not legally permissible to propose any change in the existing law. The full breadth of this argument was somewhat disguised, because the only explicit complaint made was that any notices published in relation to the Referendum would contravene section 3(1) of the 1981 Act, which provides:

> "*(1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons in any of the ways set out in section 2(2).*"

75. The impugned notices were primarily the official notices, published and to be published, although reference was also made in the course of argument on the undue influence point to 'campaign' material. The Respondent's written submissions made the following cogent response to this argument:

> "*86. With regard to the Applicant's contention that the notices are discriminatory, we respectfully disagree. The referendum is inherently neutral and is part of the consultative process which appears to be envisaged by the*

European Court of Human Rights in Oliari v Italy. The published notices do not treat or purport to treat any person or class of persons less favourably than the treatment of other-persons generally. The questions in the notices refer to concepts pertaining to marriage or unions and do not refer to anyone that can be categorized as being treated less favourably than other persons generally due to any of the prohibited grounds specified in section 2(2) of the HRA.

87. Further the notices under section 7, 8 and 33 are statutory instruments as defined under the ***Statutory Instruments Act 1977*** *and have legislative effect. If the mere reference to the term same-sex marriage or civil unions in an instrument having legislative effect is discriminatory as the Applicant contends than it would lead to the absurd result of any legislation which utilizes those terms as being in contravention of section 3(1) of the HRA. As there is a presumption of construing enactments to avoid a construction that produces an absurd result we invite the court to reject the construction that the Applicant contends for in construing the notices made pursuant to the Referendum Act 2012 as read with the Referendum (Same Sex Relationships) Act 2016.*"

76. While I do not read *Oliari-v-Italy* [2015] ECHR 716 as contemplating consulting the public on the same sex marriage issue by way of referendum as such, I accepted the fundamental point that notices in relation to the Referendum (and even campaign material merely calling upon voters to vote against same sex marriage and/or same sex civil unions) did not into fall into the category of notice which would fall afoul of section 3(1). Moreover, the underlying premise of this complaint was fatally flawed. The Referendum was seeking to canvass the electorate on possible legislative changes which our own Parliament was constitutionally competent to make. The Referendum questions implied the possibility that the right not to be discriminated against on the grounds of sexual orientation might be given more or less protection than was possible under the current state of the law. They did not manifest an intention by the Government to seek a positive mandate to discriminate, let alone to reduce existing protections under the law.

77. Mr Duncan pointed out that at the ECHR level governments were not obliged to act immediately to ensure equality of treatment between same sex and opposite sex couples in the sphere of civil partnerships and marriage. The right to family life and the right not to be discriminated in relation thereto were to be enjoyed subject to a margin of appreciation afforded to Governments to decide what form legal protections should take: *Steinfeld-v-Secretary of State for Education* [2016] 4 WLR 41 (at paragraphs 82-83). This provided further support for the general proposition that holding the Referendum in and of itself could not be fairly characterised as promoting unlawful discrimination in breach of the Human Rights Act.

78. However, as I observed in the course of the hearing, the margin of appreciation which forms part of ECHR case law is an aspect of public international law. It is a concept which is reflected to some extent in the exceptions contained in the fundamental rights and freedoms provisions of the Constitution. It is not in any evident way embodied in the Human Rights Act 1981, which broadly applies to private persons and the Crown on the same terms.

79. However, Mr Duncan also defended the legality of any notices on free speech grounds, arguing that even offensive speech was permissible absent threats to public order. He relied on this Court's decision in *Richardson-v-Raynor* [2011] Bda LR 52 where I concluded:

> "*83. The Applicant is entitled to a declaration that his prosecution for unlawful defamation (in relation to a Facebook posting suggesting that a Police Inspector involved in his prosecution for a previous minor criminal offence, and for which the Applicant was conditionally discharged by the Magistrates' Court, might be a racist) contravened his rights of freedom of expression in contravention of section 9 of the Bermuda Constitution. Section 9 is substantially similar to article 10 of the European Convention on Human Rights and highly persuasive decisions of the European Court of Human Rights strongly support both this conclusion and the Respondent's decision to concede this point.*"

80. The need to take into account free speech when assessing whether or not criminal sanctions were infringed by offensive speech was also supported by reference to *Hammond-v-DPP* [2004] EWHC 69 (Admin) (at paragraphs 32-33), and *Abdul-v-DPP* [2011] EWHC 247 (Admin). All of these authorities made it clear that there could be no justification for this Court finding that Referendum notices were in contravention of section 3 of the Human Rights Act 1981. Moreover, they also supported a wider proposition which was important for determining the undue influence complaints considered below. The fundamental right of freedom of expression (and the related right of freedom of conscience) requires courts to adopt a restrained rather an activist approach to finding potentially offensive expressions of opinions to be unlawful.

81. For these reasons this head of complaint failed.

Application for a declaration that breaches of the prohibition on undue influence in referendums will inevitably occur unless the Referendum is restrained

82. Section 39 of the 2012 Act prohibits the exercise of undue influence in relation to a referendum, and this includes spiritual or religious influence, the Applicant rightly submitted. The relevant statutory prohibition is framed as follows:

> "***Undue influence***
> *39. (1) A person shall be guilty of undue influence if he directly or indirectly, by himself or through any other person on his behalf—*
>
> *(a) makes use of or threatens to make use of any force, violence or restraint;*
>
> *(b) inflicts or threatens to inflict any temporal or spiritual injury, damage, harm or loss,*
>
> *upon or against any person in order to induce or compel that person to vote or refrain from voting, or vote "Yes" or 'No", or on account of that person having voted or refrained from voting, or having voted "Yes" or "No", at a referendum.*
>
> *(2)A person shall also be guilty of undue influence if he directly or indirectly, by himself or through any other person, by abduction, duress, or any fraudulent device or contrivance—*
>
> *(a) impedes or prevents any person from freely exercising his right to vote at a referendum; or*
>
> (b) *compels, induces or prevails upon any person to vote or refrain from voting, or to vote "Yes" or 'No", at a referendum.*" [Emphasis added]

83. The contention that there was some risk of undue influence could not be dismissed out of hand. It was not disputed that certain religious leaders had, prior to the Referendum, campaigned against same sex marriage on religious grounds being grounds which either expressed or implied spiritual injury, damage or loss if same sex marriage was to be introduced. It was not disputed that, in the run in to the Referendum, religious leaders would renew that campaign on broadly similar grounds. PML, to protect the right to do so, was an interested party before the Court. Two crucial questions arose:

    (a) where was the demarcation line between freedom of conscience and freedom of expression (freedom of religion and freedom of speech)?

(b) was the risk of the offence of undue influence being committed sufficiently great to justify the draconian remedy of restraining the holding of the Referendum altogether?

84. Mr Potts relied on the recent decision of *Erlam-v-Rahman* [2015] EWHC 1215 to illustrate both what the prohibition on undue influence meant in practice and how a statutory provision similar to our own section 39 had been legally interpreted in modern times. This was a case where the petitioners sought to set aside the re-election of the Mayor for Tower Hamlets in London "*on several grounds, principally the alleged commission by the First Respondent (Mr Rahman) or his agents of corrupt and illegal practices*" (paragraph 9). The Election judge was Commissioner Richard Mawrey QC, who dealt with the topic of spiritual undue influence at paragraphs 148-162. Passages cited in argument included the following:

> "148. *The court was aware, and, even if it had not been, it would have been frequently reminded by counsel, that election cases involving allegations of spiritual influence have been very rare since 1900. Even before that time, cases of spiritual influence in mainland Britain were few and far between. It is very tempting (and Mr Penny did not shrink from the role of tempter) to regard undue spiritual influence as a historical anomaly, designed to counter the baleful influence of the Roman Catholic clergy of (largely the southern counties of) Ireland over elections in the late 19th century. Can it be supposed, ran the rhetorical question, that undue spiritual influence can have any meaning in the secular society of 21st century Britain?*
>
> *149. The court must, however, resist the siren voices. What is now s 115 has a long legislative history. On each occasion that election law has been consolidated and updated its provisions have been re-enacted. Section 115 is itself a re-enactment of the Representation of the People Act 1949 s 101 so that it can be said that these provisions have been considered by Parliament at least twice since the Second World War and it was not thought appropriate to delete reference to spiritual injury. There have also, of course, been several Acts of Parliament, including within the last decade, which have amended or added to the 1983 Act. This part of s 115 cannot properly, therefore, be considered a dead letter or obsolete…*
>
> *158. What principles emerge from the Irish cases? The first is that, while clergy of all religions are fully entitled, as are all citizens, to hold and to express political views and to argue for or against candidates at elections, there is a line which should not be crossed between the free expression of political views and the use of the power and influence of religious office to convince the faithful that it is their religious duty to vote for or against a particular candidate. It does not matter whether the religious duty is expressed as a positive duty – 'your allegiance to the faith demands that you vote for X' – or a negative duty –'if you*

vote for Y you will be damned in this world and the next'. The mischief at which s 115 is directed is the misuse of religion for political purposes. A strong case can be made out for saying that the rule against misuse of religion is even more necessary in a country which prides itself on being a secular democracy than it might be in a state where there is a universal and dominant religion which is part of the fabric of society. It is noticeable that other democratic countries, such as France, operate rules against the misuse of religious influence on electors.

159. The second thing we get from the Irish cases is that the question of spiritual influence cannot be divorced from a consideration of the target audience. Time and again in the Irish cases it was stressed that the Catholic voters were men of simple faith, usually much less well educated than the clergy who were influencing them, and men whose natural instinct would be to obey the orders of their priests (even more their bishops). This principle still holds good. In carrying out the assessment a distinction must be made between a sophisticated, highly educated and politically literate community and a community which is traditional, respectful of authority and, possibly, not fully integrated with the other communities living in the same area. As with undue influence in the civil law sphere, it is the character of the person sought to be influenced that is key to whether influence has been applied…

161. In the case of undue spiritual influence, the balance is very well articulated by the judgment of Fitzgerald J in Longford (above) albeit written some three-quarters of a century before the ECHR was even contemplated. The priest or other religious authority has the right of the ordinary citizen to hold and express political views and the law will protect that right. There is, as has been said, a line beyond which the priest may not go and that line is reached when the priest uses his religious and moral influence to attempt to 'appeal to the fears, or terrors, or superstition of those he addresses', to 'hold hopes of reward here or hereafter', or to 'denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter'." [Emphasis added]

85. Applying this legal test to the Referendum in the present case where it appeared likely that ministers of religion would be actively involved in persuading their congregations that same sex marriage in particular was a 'sin', the Applicant succeeded in satisfying me that, applying English standards at least, undue influence would likely occur to some extent. Indeed, quite unusually, the Referendum itself was all about what for many was primarily a religious issue. As a matter of principle, therefore, it was jurisdictionally open to me to grant injunctive relief. The Respondent submitted that because section 39 created criminal penalties, the civil law should not be invoked to determine that breaches might occur and to restrain such breaches. PML made the more comprehensive submission in its '*Intervener's Skeleton Argument*' (at paragraph 85). The final sentence delivered a knock-out punch:

"*(6) In any event, the risk of undue influence arises whenever there is a referendum. Campaigners are required to keep their contribution to the public debate within the boundaries of the law. Any campaigner who does 'inflict or threatens to inflict any temporal or spiritual injury, damage, harm or loss' in matters concerning the referendum is liable for punishment under s.40. The Referendum Act therefore provides a clear mechanism for regulating the activities of campaigners. The risk that the law may be breached is no cause for avoiding the referendum altogether.*" [Emphasis added]

86. I found that *Erlam-v-Rahman* [2015] EWHC 1215, taken at its highest, merely confirmed that election results can be set aside where spiritual undue influence has bene shown to have occurred. However I considered it necessary to distinguish the context of the present case in two important and related ways. Firstly, and perhaps most obviously, the principles of spiritual undue influence discussed in *Rahman* were grounded in the implicit assumption that it was a misuse of freedom of religion and free speech rights to deploy them excessively in the context of a secular election where religious concerns had no obvious bearing on the ability of the candidate to serve the electorate. The Referendum was strikingly different. PML had negotiated for a referendum to decide what was, for it and its supporters, a religious rather than a secular issue.

87. Secondly, and more subtly, Mr Duncan challenged the notion that Bermuda could fairly be equated with a Western European state, dominated by secularism and an innate regard for personal freedom and individual libertarian rights. He noted that even within different regions of Europe, there were different levels of acceptance of same sex or LGBT rights. The variances were even greater if one took into account other parts of the world. He pointed out that Britain was willing to take such cultural differences into account in its Overseas Territories, citing Hendry and Dickson, '*British Overseas Territories Law*' (at page 156) to illustrate that the British Virgin Islands[6], Cayman Islands[7] and Turks and Caicos Islands[8] 21st century constitutions have all protected the institution of marriage between a man and a woman. In this regard it bears remembering that Commissioner Richard Mawrey QC observed in Rahman that "*the rule against misuse of religion is even more necessary in a country which prides itself on being a secular democracy than it might be in a state where there is a universal and dominant religion which is part of the fabric of society.*" For this observation made it clear that that the legal concept of religious undue influence could not be mechanistically applied without regard to the relevant socio-cultural context. Where did Bermuda fit into this geopolitical cultural scheme?

88. It seemed to me that Bermuda was not yet a country which, at a popular level at least, clearly either fully or predominantly prided itself on being a secular democracy, despite the fact that our Constitution is explicitly a secular one and our legal system is generally both heavily influenced by and often indistinguishable from English law. The judicial function is unambiguously a secular one with the courts legally bound to afford equal treatment to litigants of every faith, denomination or non-faith. On the

[6] Virgin Islands Constitution Order 2007 (UK SI 2007: 1678), section 20(1).
[7] The Cayman Islands Constitution Order 2009 (UK SI 2009: 1379), section 14(1).
[8] The Turks and Caicos Islands Constitution Order 2006 (UK SI 2006: 1913) section 9(1),

other hand, despite the predominance of Christianity, it seemed self-evident to me that Bermuda had in recent years moved gradually, if sometimes haltingly, towards a more secular 'modern' approach to governance. This movement was doubtless due in part to increasing internationalisation and cultural diversification, but was partly attributable increasing maturity and sophistication in a democracy which is not yet 50 years old. Against this background, the clash between advocates for equal rights for the LGBT community and the advocates for preserving traditional Christian values appeared to me to represent, in part at least, a collision between modern, cosmopolitan and predominantly Anglo-American and Western European values and traditional, local and predominantly African-Bermudian values. As I have observed extra-judicially:

> "*In the mushrooming public law arena in particular, defining the parameters between the boundaries of parallel rights is perhaps the greatest challenge judges and Governments will face not just in Bermuda, but in democratic societies everywhere in the 21st century.*"[9]

89. Bermuda's distinctive cultural context provided further supplemental support for the conclusion that the constitutionally protected freedom of conscience and freedom of expression rights of the churches and their members, which were represented before the Court by PML, must override all other countervailing concerns about the way in which the Referendum campaign might be conducted. I emphasise the word 'supplemental', because even if *Erlam-v-Rahman* [2015] EWHC 1215 were to be followed on the basis that no material or relevant socio-cultural distinctions exist between England and Bermuda, that case came nowhere near to supporting restraining the Referendum altogether based on a risk that spiritual undue influence might occur at a future date. For these reasons, the attempt to restrain the holding of the Referendum on undue influence grounds could only properly be refused.

Application for an order quashing the decision of the Parliamentary Registrar to designate six church halls as polling rooms on the grounds that, *inter alia*, it was unreasonable and/or contrary to the express and/or implied provisions of the Referendum Act 2012

90. I granted an Order quashing this decision. I found that the statutory scheme by necessary implication must be read as requiring polling to take place at neutral locations to ensure an appearance of a fair electoral or referendum process. As I stated in my Judgment of June 10, 2016, in construing the statutory scheme and applying what some may well view as overly high standards of fairness, I had in mind not just the civil and political rights of Bermudian voters of all persuasions to be able to participate in a credible referendum process. I also approached this issue conceiving of Bermuda as leading international financial centre with an economy primarily

[9] '*Remarks at Special Sitting of Supreme Court of Bermuda Commemorating 400th Anniversary of First Sitting of the Court of General Assize on 15 June 1616*'.

dependent on international business. Bermuda is a domicile serving a clientele which relies upon the courts to uphold the highest standards of good governance and respect for the rule of law.

91. I was bound to find that the decision to designate the churches in question as polling rooms was unreasonable and/or irrational in the recognised public law sense. When the main hearing began, I was somewhat bemused that the Respondent was not willing to concede what seemed to me to an obvious objection raised by the Applicant. However, in hindsight, the point emerged in a somewhat confusing way which makes it entirely understandable that the point was seemingly misunderstood. In these circumstances, the criticisms made of the Respondent's counsel for contesting this issue (paragraph 21 of my June 10, 2016) were not entirely warranted.

92. The Notice of Application for Leave was dated May 3, 2016 and supported by the First Affidavit of Venous Memari. The notice convening the Referendum was published on May 11, 2016. On a date uncertain but likely no sooner than May 11, 2016, the polling rooms were identified on the Parliamentary Registrar's website. Six of the twelve designated polling rooms were churches who were admittedly linked with the "no" side of the Referendum campaign (based in part on publically available records of earlier campaigning on the same broad issue). The Second Memari Affidavit sworn on May 18, 2016 raised concerns about this polling station designation decision. At the hearing of the application for leave to seek judicial review on May 23, 2016, I expressed the provisional view that the concerns about the legality of the polling rooms decision seemed meritorious. The complaint was then advanced as a freestanding limb of the Notice of Originating Motion dated May 25, 2016, independently of the undue influence ground, with the Applicant seeking relief in the following terms:

> "5. *A declaration that the decision of the Parliamentary Registrar to designate Holy Trinity Church Hall, St Patrick's Church Hall, First Church of God Hall, Seventh-Day Adventist Church Hall, Calvary Gospel Church Hall, and/or Allen Temple Church Hall as polling rooms for the holding of the proposed Referendum was procedurally unfair, substantively unfair, Wednesbury unreasonable, and/or contrary to the express or implied provisions of the Referendum Act 2012, and/or the Human Rights Act 1981, and/or the Constitution, with a consequential quashing of such decision by the Court.*"

93. However, the only reference made to the polling rooms issue in the Applicant's earlier Skeleton Argument dated May 20, 2016, which was relied upon at the substantive hearing in June, was in the following terms:

> "*The risk of undue influence is compounded by the fact that 6 of the 12 polling stations for the proposed Referendum (and the only polling station for advanced polling) are church halls…*"

94. Between the date of the leave application and the main hearing, the Parliamentary Registrar very properly took steps to ensure that no undue influence would occur on Referendum day. These steps satisfied me that there was no serious basis for any concern about undue influence on Referendum day, in the sense of overt acts of intimidation (whether spiritual or physical) being perpetrated in breach of section 39 of the 2012 Act. There is no tradition of such conduct in Bermuda and the likelihood of it occurring on church property seemed even more improbable. However, this left unresolved what I considered to be the more fundamental objection to the very principle of non-independent polling rooms being used at all.

95. Mr Potts aptly characterised the flaw as involving an appearance of unfairness. Not only might some "yes" voters be unhappy about voting on church property. Some church members who might be inclined to vote "yes" might be discouraged from voting against church policy on church property. As this argument did not in any way depend on establishing any actual impediment to a free voting process, I viewed these examples as helpful illustrations as to why there was an appearance of unfairness. It mattered not that the 2012 Act did not expressly require polling rooms to be independent. In fact, I preferred to view the problem as being a breach of an implied requirement to designate polling rooms which were and appeared to be neutral. In *R (Plantagenet Alliance Ltd)-v- Secretary of State for Justice et al* [2014] EWHC 1662 (QB), it was noted that:

> "85 In *Lloyd v McMahon* [1987] 1 AC 625, 702-3, Lord Bridge of Harwich said:
>
> > *'[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'*"

96. The designation of polling rooms was an administrative decision clearly amenable to judicial review which was made under the following statutory provision:

> "***Notice of referendum by Registrar***
> *8 (1) The Registrar shall, as soon as practicable after a referendum notice is published under section 7, also give notice of the holding of the referendum by publication of a notice in two successive publications of the Gazette and in at least one other newspaper circulating in Bermuda.*
>
> *(2)Every such notice shall specify—*
>
> > *(a) the polling day;*
> >
> > *(b) the polling room, or polling rooms, for the holding of the referendum; and*

(c) the question or questions to be answered at the referendum.

(3)A polling room appointed for a referendum shall be a building or part of a building which is not licensed for the sale of intoxicating liquor." [Emphasis added]

97. The only express statutory requirement imposed on the Parliamentary Registrar was to specify the polling rooms for holding the Referendum and to choose a building or part thereof which was not licensed for the sale of alcohol. This power was obviously subject to an implied obligation to have regard to the needs of both actual and apparent fairness. The scheme of the Act embodies various express provisions which manifest a clear legislative intention to ensure that referendums are conducted in a way which is not only substantively but apparently fair:

    (a) section 14(2) mandates a secret ballot with voters free from interference;

    (b) the Registrar, an independent public officer appointed by the Governor, is put in overall charge of conducting the referendum (section 5), supported by Returning Officers and presiding officers (sections 11);

    (c) various criminal sanctions are imposed in relation to e.g. undue influence and misconduct during a referendum (sections 39-43);

    (d) section 23(1) provides:

    > "*No premises which are situated above, below, adjacent to or within the same curtilage as the polling room shall be used by any person at any time on the polling day of a referendum for any of the purposes of a committee room*";

    (e) the polling room /polling day rules are designed to prevent not only actual interference with the voting process but also the appearance of interference by, *inter alia*, strictly regulating who may be in a polling room at all material times (Schedule 1).

98. An essential ingredient, it seemed to me, of a credible referendum was a voting process which was not only managed by independent persons (the Registrar and Returning Officers) but which took place on independent premises. It was self-evident that in an election or referendum being contested by two political parties that one could not lawfully designate the branch offices of one party as polling stations across 50% of the total number of constituencies . In the present instance, the relevant churches were, in appearance terms, the equivalent of party branch offices in a

General Election, all linked with one and not the other party. The Respondent had no coherent response to this argument. The importance of the appearance of fairness in the electoral or referendum context was similar, as I observed in the course of arguments, to the requirements of fairness in relation to court proceedings. It would be unthinkable for a court adjudicating a commercial dispute involving two banks to sit in the boardroom of one of the two protagonists. Even Mr Duncan, on behalf of PML, was unable to muster any defence of the fairness of polling rooms decision as regards churches who were likely to be actively involved in the Referendum campaign. I required no assistance from judicial or other authority to conclude that the impugned decision of the Parliamentary Registrar should be quashed.

99. The requirement of neutral voting locations appears to be too well recognised to be the subject of extensive comment or debate. However I have since found at least one good practice electoral guides, apparently aimed at emerging democracies, which supports this analysis. The '*Electoral Knowledge Network*' states:

> "*<u>The location of polling stations must be in an ideologically neutral site in order not to discourage the free expression of the vote</u>. In this sense, polling stations should not be located in police stations, army barracks, headquarters of political parties, offices of religious groups and government buildings in times of political transition…*"[10]

100. As I observed in my June 10, 2016 Judgment, had the Premier appointed an Ad Hoc Committee of the sort contemplated by section 53 and described in Schedule 6 of the Schedule to the Referendum Act 2012, this error would perhaps not have been made. The Parliamentary Registrar should have had more time and the assistance of other objective and detached minds to carefully consider such matters as the neutrality of polling stations issue. This complaint could not be dismissed as trivial in light of the other departures from referendum good practice which I found were not judicially reviewable, most significantly:

(a) the very decision to subject a human rights issue affecting a minority to a referendum;

(b) the short timelines within which the Referendum was being held; and

(c) the absence, just over two weeks before the date of the Referendum, of any clear evidence that the public would be given adequate information upon which to make an informed decision.

[10] http://aceproject.org.

101. For these reasons, I granted the application for an Order of certiorari quashing the decision of the Parliamentary Registrar to designate six church halls as polling rooms for the purposes of the Referendum.

Application for a declaration that the conduct of the Referendum is contrary to certain fundamental rights at common law, including rights of natural justice, equality of treatment, and/or the rule of law and ought to be restrained

102. The most ambitious limb of the Applicant's claim was the complaint that the Referendum and/or its conduct was/would be unlawful because it contravened (or would contravene), fundamental common law rights and/or the rule of law. Mr Potts expressly conceded that a claim of this nature was perhaps too novel to achieve relief at the first instance level. In CfJ's Skeleton Argument, it was submitted:

> "*46. The Applicant further submits that the Referendum (Same Sex Relationships) Act 2016, and any proposed Referendum held thereunder, is repugnant to certain fundamental rights of individuals at common law, including rights of natural justice, equality of treatment, and the rule of law (over and above, and in the alternative to, rights protected by the Constitution and the Human Rights Act 1981).*"

103. This argument had to be rejected as a matter of principle, not merely because none of the authorities cited supported it. Bermuda's Parliament is competent to override common law rights by clearly drafted legislation subject to three important *caveats*. Firstly its law making powers are subject to the provisions of the Constitution (section 34). Secondly, its law making powers cannot be exercised in a way which conflicts with any UK legislation which extends to Bermuda (Colonial laws Validity Act, 1865). And, thirdly, Parliament's law making powers cannot effectively be exercised in a way which conflicts with the Human Rights Act 1981 unless Parliament expressly provides that the relevant law is not subject to the primacy provisions of the 1981 Act (1981 Act, section 30B(1)). The cases relied upon in support of the common law repugnancy argument did not support this argument which I rejected for the following reasons:

(a) reliance was placed on the following passage in the judgment of Baroness Hale in *Ghaidan-v-Godin-Mendoza* [2004] 2 AC 557, which did no more than to explain the importance of the concept of equality of treatment in the context of applying a statutory prohibition on discrimination, without supporting the common law repugnancy argument contended for:

> > "*132. Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having*

less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being…";

(b) reliance was placed on the observations made in passing in a case concerning the legality of an Act passed by the Scottish Assembly, *AXA General Insurance Limited-v- The Lord Advocate* [2011] UKSC 46, which again did not support the common law repugnancy argument contended for as a basis for invalidating primary legislation enacted by a central (as opposed to a devolved) legislature:

(i) "*97. Common law review: All that I would add to what is said by Lord Hope and Lord Reed is that I question whether irrationality as a ground of review at common law is confined as closely to purpose as Lord Reed appears to regard it at the conclusion of his para 143. In Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, Lord Diplock said of irrationality in the Wednesbury sense, that it "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". There can be decisions – to take a familiar extreme example, a blatantly discriminatory decision directed at red-headed people - where, irrespective of any limitation on the purposes for which the decision-maker might act, a court would regard what has been done as irrational, because of the way in which the decision operated. If a devolved Parliament or Assembly were ever to enact such a measure, I would have thought it capable of challenge, if not under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very core of which are principles of equality of treatment.*" (Lord Mance);

(ii) "*153. The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in R v HM Advocate [2002] UKPC D 3, 2003 SC (PC) 21, para 16, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In Robinson v Secretary of State for Northern Ireland [2002] UKHL 32, [2002] NI 390, para 11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted "bearing in mind the values which the constitutional provisions are intended to embody". That is equally true of the Scotland Act. Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional*

principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law." (Lord Reed);

(c) reliance was placed on the observations made in passing in a case concerning whether or not convicted prisoners could vote in the Scottish independence referendum, Moohan *-v- The Lord Advocate* [2011] UKSC 46. These statements merely hinted at the possibility that the common law repugnancy principle contended for might exist:

(i) "*35. While the common law cannot extend the franchise beyond that provided by parliamentary legislation, I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful. The existence and extent of such a power is a matter of debate, at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament: see AXA General Insurance Co Ltd v Lord Advocate 2012 SC (UKSC) 122, Lord Hope (paras 49-51) and in relation to the Scottish Parliament Lord Reed (paras 153-154). But such a circumstance is very far removed from the present case, and there is no need to express any view on that question*" (Lord Hodge);

(ii) "*86. The common law can certainly evolve alongside statutory developments without necessarily being entirely eclipsed by the latter. And democracy is a concept which the common law has sought to protect by the incremental development of a system of safeguarding fundamental rights. In this regard, it marches in step with other European states - see, for instance, Lautenbach (2013) 'in European states the protection of human rights, democracy and the rule of law are interwoven and all part of the domestic [and legal] system: 'The Concept of the Rule of Law and the European Court of Human Rights', p 209*" (Lord Kerr);

(d) in the context of deciding whether the Referendum which I had found could be held without offending the Constitution and/or the Human Rights

Act 1981 should or should not be restrained, the rule of law in fact required the Court to respect the fact that political judgments are for politicians, not judges, to make. There is room for judicial activism when entertaining applications to enforce statutory human rights. There is a need for judicial restraint when courts are invited to thwart the lawfully articulated will of Parliament. For the Judiciary to trespass on the proper domain of the Executive and Judicial branches of Government, it seemed to me, would, as Lord Collins has opined in another context, "*have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional*."[11]

Conclusion

104.For the above reasons, on June 10, 2016, I quashed the Registrar-General's decision to designate the premises of six partisan churches as polling rooms and rejected the Applicant's contentions that the Referendum could not take place lawfully and ought to be restrained.

Dated this 11th day of July 2016 ______________________

IAN RC KAWALEY CJ

[11] *Singularis Holdings Ltd-v-PricewaterhouseCoopers* [2014] UKPC 36; [2014] 87 WIR 215; [2015] AC 1675 (at paragraph 108).