In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018: No. 34/2018: No.99

IN THE MATTER OF AN APPLICATION UNDER SECTION 15 OF THE BERMUDA CONSTITUTION 1968

AND IN THE MATTER OF THE DOMESTIC PARTNERSHIP ACT 2018

BETWEEN:

RODERICK FERGUSON

Applicant

-v-

THE ATTORNEY GENERAL

-and-

OUTBERMUDA

1st Applicant

-and-

MARYELLEN CLAUDIA LOUISE JACKSON

2nd Applicant

-v-

THE ATTORNEY-GENERAL

Respondent

JUDGMENT SUMMARY ISSUED BY THE SUPREME COURT OF BERMUDA

This summary is provided to assist in understanding the Judgment of the Court. It does not form part of the Judgment. The Judgment itself is the only authoritative document. The full Judgment is available at www.gov.bm/court-judgments-2018.

Overview of the issues

1. Since 2013, the Human Rights Act 1981, which binds the Crown, has prohibited discrimination on the grounds of sexual orientation by public authorities in providing services or facilities to the public. The 1981 Act provided that unless expressly stated otherwise in any other statute, the Human Rights Act took precedence over any other inconsistent provisions of law. The 1981 Act expressly empowered the Supreme Court to declare any laws which were inconsistent with the Human Rights Act to be of no legal effect. In *Godwin and Deroche-v-Registrar-General and others* [2017] SC (Bda) Civ (5 May 2017), Mrs Justice Charles-Etta Simmons decided that the definition of marriage as a union between a man and a woman was invalid because its discriminated against the applicants as same-sex partners. The Domestic Partnership Act ("DPA") reversed this judicial decision and restored the former (traditional) legal definition of marriage. The Applicants sought declarations under section 15 of the Bermuda Constitution that Parliament could not validly reverse this Court's decision that same sex marriage was a right guaranteed by Bermudian law. Only the validity these provisions of the DPA (the "revocation provisions") were challenged.

2. The legislative branch of Government has not for 50 years had more than qualified Parliamentary sovereignty in Bermuda. The Judiciary has been tasked by Chapter 1 of the Bermuda Constitution 1968 with ensuring that both executive action and legislative provisions do not contravene the fundamental rights of freedoms of the citizens and residents of Bermuda. Relief was sought, most importantly, on the following grounds:

    (1) Bermuda has a secular Constitution and section 8 of the Constitution prohibits Parliament from passing laws of general application for a religious purpose. The restoration of traditional marriage was primarily a response to religious lobbying by Preserve Marriage Bermuda ("PMB") and so the relevant provisions of the DPA were invalid because they were enacted for an impermissible religious purpose;

    (2) denying and/or depriving each person who believed in same-sex marriage (whether on religious or non-religious grounds) of the right to manifest their

beliefs through legally recognised marriage ceremonies interfered with the constitutionally protected freedom "*either alone or in community with others, and both in public or in private, to manifest and propagate* [their] *religion or belief in worship, teaching, practice and observance*" (section 8(1));

(3) maintaining or restoring a definition of marriage which favoured those who believed in opposite-sex marriage and disadvantaged those who believed in same-sex marriage discriminated against the latter group on the grounds of their "creed" contrary to section 12 of the Constitution.

3. The Applicants fell into three categories:

(1) members of the LGBT community who had either religious or secular beliefs in the importance of marriage as a legally recognised institution. They complained that the revocation provisions prevented them from entering into a legally recognised marriages;

(2) OUTBermuda ("Out"), a public interest litigant, who complained about the impact of the revocation provisions on both on (a) LGBT persons who believed in marriage as a legally recognised institution, and (b) churches and/or ministers of religion who wished to manifest their belief in same-sex marriage through conducting legally recognised marriage ceremonies;

(3) a minister of religion, church and church trustee, who complained that their ability to conduct legally recognised same-sex marriages had been taken away by the revocation provisions.

Summary of Findings

4. Bermuda's Constitution is a secular one designed to require the State to give maximum protection for freedom of conscience. It only permits interference with such freedoms in the public interest for rational and secular grounds which are permitted by the Constitution. The present decision vindicates the principle that Parliament cannot impose the religious preferences of any one group on the society as a whole through legislation of general application.

5. One side of the freedom of conscience coin is that as a general rule no one can be compelled to participate in activities which contravene their beliefs. The other side of the same coin is that the State cannot use the legislative process to pass laws of general application which favour some beliefs at the expense of others. The

complaints in the present case were aggravated by the fact that the DPA took away legal rights which had only recently been recognised by the Court applying the supremacy provisions expressly conferred by an Act of Parliament (the Human Rights Act 1981).

6. The Chief Justice acknowledged that the Government only legislated as it did having been placed between the proverbial 'rock and a hard place'. The Government also apparently acted fully confident that, based in large part on European Convention on Human Rights case law (which the Court itself previously assumed had relevance) it had free reign to delineate the scope and content of the legal protections accorded to same-sex relationships. Presumably it was informed by this same 'conventional wisdom' that the Governor signified his assent to the DPA Bill. In general terms, however, the DPA might come to be viewed in time as one of the most progressive pieces of legislation enacted in the 1968 Constitution's first 50 years; most of the DPA was not challenged.

7. The Applicants were accordingly entitled to a declaration that the provisions of the DPA purporting to reverse the effect of this Court's decision in *Godwin and Deroche -v-Registrar-General and others* [2017] SC (Bda) Civ (5 May 2017) are invalid because they contravene the provisions of section 8(1) of the Bermuda Constitution and (in respect of Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr Gordon Campbell) section 12(1) as well.

Is Bermuda's Constitution secular and were the revocation provisions of the DPA invalid because they were enacted for a religious purpose?

8. The Court agreed with the Applicants that Bermuda's Constitution is secular and that legislation may not validly be enacted when it is proposed solely or substantially for a religious purpose. However, the Court agreed with the Respondent that the relevant time for assessing the purpose for which the DPA was being enacted was when it was being proposed, <u>not</u> (a) when the ancient content of the common law definition of marriage was first enunciated, or (b) when the private members bill which first proposed the statutory repeal of same-sex marriage was first proposed. The Crown's evidence revealed that the DPA was enacted for multiple purposes and that Minister Walton Brown, who introduced the Bill, during the debate, made an eloquent defence of the secular role of Parliament. The Court refused the Applicants' request that the revocation provisions of the DPA be declared invalid on the grounds that they were enacted for a religious purpose. It was in any event undesirable, having regard to the need to respect the autonomy of Parliament, for the Court to be scrutinising the motives of legislators. It was also important to remember that the requirement that legislation be enacted for secular purposes in no way restricted the constitutional freedoms of religious groups to lobby Parliament and to seek to gain legislative

recognition for their beliefs. This finding meant that the Applicants could only validly complain that the effect of the impugned provisions in the DPA was to interfere with their fundamental rights to a legally impermissible extent.

Approach to the interpretation of fundamental rights and freedoms provisions in the Bermuda Constitution

9. The practical effect of the agreed governing principles on the Court's approach to considering whether an application for constitutional redress establishes an answerable case of interference with a fundamental right may be summarised as follows. The Court should define the legal scope of the relevant right as broadly as possible and set the evidential bar for establishing an interference as low as possible with a view to ensuring that the importance of the right in question is vindicated rather than disappointed. The Court should not rifle through its deck of legal cards with a view to finding a 'get out of jail free' card for the Executive. Every judge is in this regard required, as it were, to be a fundamental rights and freedoms activist.

10. Where an applicant establishes a *prima facie* case (a case that calls for an answer from the Crown) in relation to an interference which can potentially be justified, the Court is required to balance more evenly the interests of the State (the public generally or other relevant categories of people) with the rights of the aggrieved citizen (or Bermuda resident or visitor) who has established a legally recognisable interference with a fundamental right. It is at this stage of the analysis that there is greater room for differing legal policy approaches, depending on how much importance individual judges place upon individual liberty as opposed to Executive or Legislative authority and/or collective, community rights.

11. Unusually, in the present case, the Respondent chose to fight mainly on the terrain which most favoured the Applicants, choosing to stand or fall on the proposition that the Applicants could not make out a *prima facie* case of interference with their fundamental rights. This stance was justified as regards other complaints which the Court did not find it necessary to formally deal with.

Findings: were the Applicants' freedom of conscience rights under section 8 of the Constitution contravened?

12. The rights protected by section 8(1) may be summarised as follows:

    (1) freedom to hold religious and non-religious beliefs;

(2) freedom to change such beliefs;

(3) freedom to manifest and propagate such beliefs in "*worship, teaching or practice*".

13. The sincerity of the beliefs asserted by the Applicants and the assertion by Out that many others share such beliefs was not disputed. Not only was same-sex marriage legally recognised in Bermuda following *Godwin-v-Deroche*; it is recognised in various parts of the (primarily Western) world. The battle for ownership over rights of access to a legally recognised form of marriage in Bermuda and elsewhere is irresistible proof of the fact that a belief in marriage (as a legally recognised institution) is sincerely held by many people. The Crown's sole response to the applications was to submit that a constitutional complaint about interference with rights under section 8(1) could not be made in relation to same-sex marriage.

14. The most coherent line of authority relied upon by the Crown, European Convention on Human Rights ("ECHR") case law was not relevant at all. This was because article 12 of the ECHR, which guarantees the right to marry to men and women and permits governments to choose what form of marriage to recognise, has not been incorporated into the Bermuda Constitution. The position is different in Britain and the Caribbean Overseas Territories, where article 12 of the ECHR has been incorporated into local law. However, the Chief Justice described the freedom of conscience arguments as "blindsiding" or surprising arguments, and admitted that he had previously assumed that the ECHR cases were relevant to the Bermuda law position.

15. The effect of the DPA's revocation provisions is to force persons wishing to achieve legal recognition for their same-sex relationships to enter into a new State-mandated union described as a "domestic partnership", irrespective of whether or not such an institution is consistent with their beliefs. Prior to the DPA coming into force, same-sex couples who believed in the institution of marriage could manifest their beliefs by participating in legally recognised marriage ceremonies. Just as PMB and its members genuinely believe that same-sex marriages should <u>not</u> be legally recognised, the Applicants and many others equally sincerely hold opposing beliefs. It is not for secular institutions of Government, without constitutionally valid justification, to direct the way in which a citizen manifests their beliefs.

16. The Applicants do not seek the right to compel persons of opposing beliefs to celebrate or enter into same-sex-marriages. They merely seek to enforce the rights of those who share their beliefs to freely manifest them in practice. Persons who passionately believe that same-sex marriages should not take place for religious or cultural reasons are entitled to have those beliefs respected and protected by law. But, in return for the law protecting their own beliefs, they cannot require the law to deprive person who believe in same-sex marriage of respect and legal protection for

their opposing beliefs. The Applicants succeeded in establishing a case to answer, with the burden shifting to the Crown to justify the interference.

17. The Crown made no attempt to justify any interference which was established. It is unclear what justifications could have been advanced. Section 8(5) (b) of the Constitution makes it clear that each group of believers is merely entitled to defend their right to practise their own beliefs, not to force their beliefs on others. This reinforced the Applicants' broad complaint that the revocation provisions, which reflected and gave legal effect to the beliefs of others, were interfering with their ability to practise their beliefs in an impermissible way.

Discrimination on the grounds of creed; section 12 of the Constitution

18. Section 12 of the Constitution prohibits discrimination on the grounds of, amongst other things, "*creed*". Discrimination was defined so as to include laws (or actions under laws) which conferred advantages or disadvantages wholly or mainly attributable to a group by reference to, *inter alia*, "creed".

19. It is impossible to avoid distinguishing between the position of (a) those Applicants whose main complaint is that the revocation provisions deny them the opportunity enter into same-sex marriages, and (b) those Applicants (Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr Gordon Campbell) who complain solely about the impairment of their ability to manifest their beliefs by celebrating same-sex marriages. Out falls into the same category to the extent that it seeks to represent non-LGTB persons (such as family members or ministers of religion) who are likewise affected. The discrimination which category (b) Applicants complain of is very clearly "*wholly or mainly attributable to*" their creed, as the definition in section 12(4) of the Constitution requires. Category (a) Applicants (Mr Ferguson, Out on behalf of LGBT persons and Ms Jackson) clearly are hindered in their ability to manifest their beliefs. But the discrimination they experience is mainly because of their sexual orientation (but for which there would be no impediment to their beliefs as they would be able to access heterosexual marriage on equal terms).

20. No attempt was made by the Crown to justify any interference with section 12 rights which might be established. As with section 8, it is unclear what potentially valid justifications might have been advanced. The section 12 rights of Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr Gordon Campbell have also been interfered with in a legally impermissible way.

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6 June 2018