[2015] SC (Bda) 46 Civ (15 July 2015

In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 127

IN THE MATTER OF THE BERMUDA CONSTITUTION

BETWEEN:

MELVERN WILLIAMS

Applicant

-v-

(1) MINISTER FOR HOME AFFAIRS

(2) ATTORNEY GENERAL

Respondents

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: July 15, 2015

Mr. Peter Sanderson, Wakefield Quin Limited, for the Applicant

Mr. Philip J. Perinchief, instructed by the Attorney-General's Chambers, for the Respondents

Introductory

1. The Applicant in this case by an Originating Summons issued on March 25, 2015 *seeks a declaration that, as a person who belongs to Bermuda pursuant to s.11(5) of*

the Bermuda Constitution "he does not require the specific permission of the Minister to engage in employment or business".

2. In addition the Applicant seeks compensation for loss and damage for interference with his constitutional rights which are particularised in his Originating Summons as follows:

> "*(1) The Plaintiff earned approximately $6,200 per month in his job at D & J Construction and seeks damages for loss of earnings in the amount of $6,200 per month from the 13 March and interest thereon until the date of judgment;*
>
> *(2) The Plaintiff… seek*[s] *constitutional damages for the anxiety, stress and hardship caused by the discriminatory interference with his constitutional rights…*"

3. The application is supported by the First Affidavit of the Applicant who deposes most significantly as follows. He exhibits a Certificate of Naturalisation as a British Overseas Territories Citizen indicating that he is of Jamaican birth and also indicating that on the 16th December 2014 the Governor issued the relevant Certificate. He also deposes that on the 13th March 2015 he was terminated from his employment "*on the grounds that the Department of Immigration (for which the 1st Defendant has ministerial oversight) had notified them that my employment must cease immediately*". He exhibits a copy of the relevant termination letter.

The constitutional provisions

4. The application is ultimately based on an analysis of a few discrete provisions of the Bermuda Constitution. Most significantly it is common ground that section 11(5) is a pivotal provision in terms of providing the central underpinning of the Applicant's case. Section 11 (5) provides:

> *"(5) For the purposes of this section, a person shall be deemed to belong to Bermuda if that person—*
>
> *(a) possesses Bermudian status;*
>
> *(b) is a citizen of the United Kingdom and Colonies by virtue of the grant by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914;*

(c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person under a decree of a court or a deed of separation; or

(d) is under the age of eighteen years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies."

5. The next provision which is of significance, having regard to the way in which the Applicant's case was advanced, is 12 of the Constitution which provides, so far is relevant for present purposes, as follows:

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

   (2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

   (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

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

   …(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not belong to Bermuda for the purposes of section 11 of this Constitution…"

The offending provisions of the Bermuda Immigration and Protection Act 1956

6. The Applicant submits that the effect of these provisions read in the way that fundamental rights and freedoms provisions are meant to be read, in a broad purposive manner, is to very clearly indicate that the following provisions of the

Bermuda Immigration and Protection Act 1956 are in violation of his constitutional rights. Section 60 of the Act provides as follows:

> "60. (1)*Without prejudice to anything in sections 61 to 68, no person—*
>
> > *(a)other than a person who for the time being possesses Bermudian status; or*
> >
> > *(b) other than a person who for the time being is a special category person; or*
> >
> > *(c) other than a person who for the time being has spouse's employment rights; or*
> >
> > *(cc) other than a permanent resident; or*
> >
> > *(d)other than a person in respect of whom the requirements of subsection (6)*[1] *are satisfied,*
>
> *shall, while in Bermuda, engage in any gainful occupation without the specific permission (with or without the imposition of conditions or limitations) by or on behalf of the Minister.*"

7. It is submitted on behalf of the Respondents that although the quoted provisions of section 60(1) clearly exclude the Applicant from the exemption from the need to seek employment permission, despite the fact that he is somebody who appears on the face of it to fall within the provisions of those persons who belong to Bermuda under section 11 (5) of the Constitution, the Minister and/or the Bermuda Legislature have the constitutional authority to regulate employment in Bermuda in the manner reflected in the current law.

The Applicant's Case

Freedom of movement

8. The Applicant's counsel, Mr. Sanderson, relied on a number of authorities in addition to the plain words of the Constitution itself to fortify his application. Firstly it is I think helpful to refer to the Fisher case which is still, 35 years later, one of the leading Commonwealth authorities on the approach to be followed in interpreting fundamental rights and freedoms provisions in Commonwealth constitutions. This case, reported as *Minister of Home Affairs-v-Fisher* [1980] A.C.319, the judgment of the Board being delivered by Lord Wilberforce, contains the following statement which has been followed by numerous subsequent courts (at 328):

[1] Section 60(6) applies to the spouses of United States consular officers or employees.

"*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…*"

9. That was a case, coincidentally, which concerned section 11 of the Constitution as well. And the Privy Council, upholding the Bermuda Court of Appeal, that the word "child" in section 11 (5) of the Constitution should be given a broad interpretation so as to include children born <u>out of</u> wedlock as well as children born <u>in</u> wedlock. The essence of the Applicant's case is that the relevant provisions of section 11 of the Bermuda Constitution do not just provide a right to freely move about Bermuda or reside in Bermuda but also, by necessary implication, incorporates the right to unrestricted work as well.

10. Another case which perhaps can be looked at briefly at the outset is *Minister of Home Affairs-v-Carne and Correia* (2014) 84 WIR 163[2]. Mr. Sanderson relied in particular on the following passage from my own Judgment in that case:

> "*70. The reference in section 11(5) to "citizen of the United Kingdom and Colonies" was amended by section 51(3)(a)(ii) of the British Nationality Act 1981 to refer, thereafter, to a "British Dependent Territories Citizen". Such citizens were renamed "British overseas territory" citizens in all UK legislation (including subordinate legislation) by section 2 of the British Overseas Territories Act 2002. There seems little room for doubt that a naturalised British overseas territories citizen (in respect of Bermuda) belongs to Bermuda under section 11(5) of the Constitution.*"

11. This *obiter dictum* was not, as I understood it, challenged by Mr. Perinchief for the Respondents. And so the argument proceeded on the essentially common basis that the Applicant does in fact fall within section 11(5)(b) of the Bermuda Constitution.

12. Reference was also made to the local case of *Attorney-General-v- Grape Bay Ltd* [1998] Bda LR 6 for the purpose of explaining the status of section 1 of the Bermuda

[2] [2014] Bda LR [47]; [2014] SC (Bda) 9 Civ (2 May 2014)

Constitution which was described by the Court of Appeal for Bermuda (Kempster JA giving the judgment of the Court) at page 17 as follows:

> "… *'It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow'…*"[3]

13. In that case an attempt was made to embellish the express provisions of section 13 by reference to section 1 of the Constitution, an attempt which was essentially rebuffed by the Court. But it was significant to Mr. Sanderson's argument for the following reason. Section 11 does not explicitly protect the right to work at all and he sought to argue that the right to reside incorporates by necessary implication the right to work in reliance on the broad intention manifested in section 1 to protect the right to "liberty". Section 1 provides as follows:

> "*1. Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:*
>
> *(a) life, liberty, security of the person and the protection of the law…*"

14. Mr. Perinchief, I should note, sought to use section 1 to similar effect, albeit for a different purpose. Namely, to suggest that the reference to "*public interest*" could be used to embellish the jurisdiction reserved to the Minister under section 11 in terms of exercising an overall policing function.

15. Mr. Sanderson relied on a number of cases which were designed to demonstrate the importance the common law has attached to the right to work. One such case is *Nagle-v-Feilden and Others* [1966] 1 All ER 689 where Lord Denning observed at 693:

> "*The common law of England has for centuries recognised that a man has a right to work his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having governance of it.*"

16. It seemed to me that this and similar cases that were referred to dealing with the extent to which members of a profession could legitimately be shut out of it were not

[3] Citing Lord Morris in *Olivier-v-Buttigieg*[1967] 1AC 115 at 128 (JCPC, Malta).

directly on point. One such case was *The Case of the Tailors, &c. of Ipswich*[4] where Lord Coke (I believe[5]) observed:

> *"It appears, that without an act of parliament, none can be in any manner restrained from working in a lawful trade*."

17. Such authorities demonstrate in a general way the importance of the right to work but in my judgment they do not really assist in shedding light on how section 11 of the Constitution should be construed. A much more pertinent case was the Zimbabwe Supreme Court decision of *Salem-v-Chief Immigration Officer of Zimbabwe and Another* 1995 (4) SA 280 (ZC)[6] where Chief Justice Gubbay engaged in what might be called by the conservative an orgy of judicial activism. In that case the 'applicant' did not have any direct constitutional protection himself in terms of belonging to Zimbabwe. Rather, he was married to a Zimbabwean, who argued that it was an incident of her right to reside in Zimbabwe as a citizen to have a husband living with her and afforded the right to engage in gainful employment. And Gubbay CJ observed in what was a unanimous decision:

> *"I agree that a generous and purposive interpretation is to be given to the protection expressed in section 22."*

18. And so a similar provision to section 11 in its general scope in the Zimbabwe Constitution was interpreted so broadly as to extend to the spouse of a citizen the right to work in Zimbabwe as an incident of a citizen's right to reside in the country. The position of the Applicant having himself an express constitutional right to belong to Bermuda in the present case is, it goes without saying, far stronger. But what is instructive about this decision to my mind is that it signifies that it is possible to construe the right to reside in the country, where you are given that right, as incorporating the right to make a living in the country. Whether or not this Court would ever adopt such a generous interpretation as the Supreme Court of Zimbabwe does not have to be considered here. But this authority is persuasive authority for construing a provision conferring a right to belong in a country and reside in it as incorporating, by necessary implication, the right to be able to sustain oneself economically there without any restriction.

19. I should note here that Mr. Perinchief very rightly pointed out that section 60 of the Bermuda Immigration and Protection Act does not, by its terms, deprive the Applicant of the right to work. It merely imposes the requirement that he obtains the permission of the Minister to work. But the question that is placed before the Court is whether or

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[4] (1572-1616) 11 Co Rep 53 at 54a.
[5] Although I could not find his name in the report of the case, it appears that this Kings Bench judgment was correctly attributed to the Chief Justice appointed in 1613.
[6] Available at: http://www.refworld.org/docid/3ae6b6d628.html.

not as a matter of principle even that restriction is compliant with the Bermuda Constitution.

Discrimination

20. The other limb of the Applicant's argument was, as I have mentioned, the complaint that he has been discriminated against in contravention of section 12 of the Constitution. And in that regard reference was made to *Thompson-v-Bermuda Dental Board (Human Rights Commissioners intervening)*[2009] 2 LRC 310[7], which was a decision of the Privy Council which considered the question of discrimination for the purpose of the purpose of the Human Rights Act of discrimination on the grounds of, inter alia, place of origin. Lord Neuberger, delivering the advice of the Board, said this at paragraph 26:

> "*[26] In their Lordships' view, discriminating against someone because he or she is not Bermudian, or indeed on grounds of nationality or citizenship, is discrimination on grounds of 'race, place of origin, colour, or ethnic or national origins' within section 2(2)(a)(i) of the 1981 Act…*

21. Lord Neuberger went on to note at paragraph 41:

> *[41] In this connection, it is clear, both on the evidence and as a matter of common sense, that the proportion of persons who are not of Bermudian national origins or whose place of origin is not Bermuda (using those expressions on the above assumption) who have Bermudian status is considerably smaller than the proportion of persons who are of Bermudian national origins or whose place of origin is Bermuda. Accordingly, at least on the face of it, if there were no direct discrimination, then, unless it could be justified under section 2(2)(b)(ii) of the 1981 Act, Dr Thompson would be able to succeed in his claim based on indirect discrimination.*"

22. Mr. Sanderson also relied in support of his case of discrimination on the case of *Bohn-v-Republic of Vanuatu and Others* [2013] 5 LRC 211. This was a case where the applicant was a non-indigenous citizen who had moved to Vanuatu and become naturalized and was prevented from exercising certain rights under the Representation of the People Act 1982. In that case Lunabek CJ observed at page 223:

> "*It is clear that s 23A of the Representation of the People Act 1982 places emphasis on the person's 'race' and 'place of origin' to qualify as a candidate for elections to Parliament in rural constituencies. It clearly infringes the applicant's constitutional rights under art 5(1) in its operation and effect.*"

[7] [2008] UKPC 33.

23. Finally, I think, on the question of discrimination, reference was made to another Zimbabwe Supreme Court of Zimbabwe decision, *Commercial Farmers Union-v-Minister of Lands, Agriculture and Resettlement and Others* [2001] 2 LRC 521. This was a case which also concerned the issue of discrimination and in this case there was the additional linkage to the present case of reliance being placed on the right to reside in Zimbabwe. And the Supreme Court there, giving a joint judgment, made the following observations at page 532:

> "*It is equally wrong to discriminate against foreign workers of foreign origin who are lawful permanent residents of Zimbabwe.*"

24. Although the terms of section 23 of the Zimbabwe Constitution do not appear in the judgment, my own researches suggest that in broad terms the relevant constitutional rights are similar to those under section 11. Section 22 (1) of the Zimbabwe Constitution provides:

> "*(1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe and immunity from expulsion from Zimbabwe.*"

25. The section goes on to permit departures from that absolute right in the case, *inter alia*, under subsection (3)(d)(i) "*the impositions of restrictions on the movement or residence in Zimbabwe of any person who is neither a citizen nor regarded by virtue of a written law as permanently resident in Zimbabwe*". The complaint in this case involved in the discrimination in terms of harassment of permanent residents of Zimbabwe from overseas with a different place of origin, which disturbed both their right to work and their express constitutional right, in effect, to "belong to" Zimbabwe.

Damages

26. Finally Mr. Sanderson in support of his client's damages claims referred the Court to two authorities. Firstly he relied on the following passage from '*Halsbury's Laws'* Volume 13(2009)/4, paragraph 851:

> "*In most cases where breach of a constitutional right is established, the complainant is entitled not only to a declaration but also to damages; these are to be awarded not only to compensate (in those cases where the complainant has suffered loss) but also to reflect the sense of public outrage, emphasise the importance of the constitutional right which has been breached, and deter further breaches.*"

27. An illustration of the application of those principles in practice was provided by a decision of the Privy Council on appeal from St Christopher and Nevis, *Innis-v-Attorney General* [2009] 2 LRC 546[8]. In this case the judgment of the Board was delivered by Lord Hope. And the following passages in particular were relied upon by Mr. Sanderson:

> "*[27]This case is not, as Mr Charkham pointed out, one where a fundamental right or freedom protected by the Constitution has been breached, and the word "redress" does not appear in section 96 of the Constitution. The word that section 96(1) uses is "relief". Ramanoop was a case of unlawful arrest and detention. In Merson the appellant had been verbally and physically abused after arrest by police officers. In Taunoa the appellants had been subjected to segregation, isolation and frequent strip searches during their detention. But the fact that the guidance that was offered in those cases was given in that context does not deprive it of its value in case such as this, where the provision that has been breached is to be found elsewhere in the Constitution. Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.*
>
> *[28]Applying those principles to this case, the Board is satisfied that a relatively substantial award is justified. No reliable guidance can be obtained from the award made by the trial judge, due to the absence of an explanation for it and his use of the expression 'exemplary damages'. Archibald JA (Ag) was prepared to accept the amount of $65,000 which the respondent's counsel had proposed as appropriate by way of an award of compensatory damages. But this figure too is not a reliable guide, as it did not separate out the constitutional element from the contractual award. In Horace Fraser v Judicial and Legal Services Commission and the Attorney-General the trial judge awarded $10,000 for distress and inconvenience caused by the breach of the constitutional right, and the Board saw no reason to disturb that award. But the breach in that case was due to an error by the Commission in failing to follow its own procedures, whereas in this case the Executive chose to ignore the constitutional right because it was an obstacle to the appellant's removal from her post quickly. Its act struck at the very heart of the protection to which the appellant was entitled under section 83(3). This was a breach of a substantially higher order than that with which the court was concerned in Fraser. There is much more to this case than the element of distress and inconvenience that the award was directed to in that case. The summary nature of the dismissal, for which no reason was given, must have*

[8] [2008]UKPC 42.

> *been acutely distressing in itself. There was a risk that this would have an adverse effect on the appellant's future employment prospects. And the Executive must be deterred from resorting to similar breaches in the future to further its own interests. Adequate vindication of the appellant's constitutional right is especially important in such circumstances.*
>
> *[29]Taking all these factors into account their Lordships are of the opinion that an appropriate award for the contravention of section 83(3) of the Constitution would be $50,000. In the result their assessment of the total award is the same, although for reasons that he did not set out in his judgment, as that which was arrived at by the trial judge.*"

Findings: Merits of Applicant's case

28. And so, turning to the relevant constitutional provisions again, the case for the Applicant can be summarised as follows. Under section 11(5) (b) of the Constitution the Applicant "*belongs to Bermuda*". Under section 11(2)(d) of the Constitution, the Bermuda Legislature is given the competence to make provisions in relation to "*the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion of any other person.*" That language, it is contended, makes it clear that the Immigration legislative regime which is authorised by section 11(2)(d) to restrict movement within Bermuda is not permitted to restrict the residence of persons who belong to Bermuda. It follows that section 60 of the 1956 Bermuda Immigration and Protection Act is inconsistent with this regime. Rather than simply saying that persons who belong to Bermuda are free from restrictions on the right to seek employment in Bermuda, it favours those who possess Bermudian status, one category of 'belonger', and includes other categories of persons who do not even belong to Bermuda at all.

29. That analysis is supported by reference to the anti-discrimination provisions of section 12 and in particular the fact that under section 12(4), it is said that "*nothing in subsection 1*", namely the prohibition on discriminating through legislation, "*shall apply to any law to the extent that such law makes provision…(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not belong to Bermuda for the purposes of section II of, this Constitution*".

30. Section 12, to my mind, in addition to providing a freestanding limb of constitutional complaint also informs the interpretation of section 11 itself. It does that because it links the concepts of movement or residence in Bermuda with employment or engaging in any business or profession in Bermuda. It provides very powerful support for the proposition that section 11 itself should be construed as conferring on persons who belong to Bermuda not just the right to reside in Bermuda but also, by necessary implication, the right to, *inter alia*, seek employment in Bermuda without any

restrictions or, indeed, without being discriminated against insofar as one is able to exercise any such rights.

31. The contrary argument which Mr. Perinchief was compelled to advance was in my judgment a very strained one. As far as section 11 was concerned, the suggestion that the Minister and/or the Legislature in regulating employment was able to give deference to persons who belong to Bermuda in respect of one category and not to another seemed to be inconsistent with the scheme of section 11 itself.

32. Firstly, it must be conceded that the Constitution itself does, as Mr. Perinchief argued, give some priority to persons who possess Bermudian Status. That much is clear not just from the various provisions relating to voting rights and the right to be elected to the Legislature but also from the express provisions of section 12 itself. Section 12(8) provides as follows:

> "*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 whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by section 7, 8, 9, 10 and 11 of this Constitution, being such a restriction as is authorised by section 7(2)(a), 8(5), 9(2), 10(2) or 11(2)(a), as the case may be.*"

33. This provision was used by the Respondents' counsel to seek to rely, in terms of justifying the otherwise clearly discriminatory terms of the relevant provisions of the Bermuda Immigration and Protection Act, on section 11 (2) (a) of the Bermuda Constitution. What section 11(2)(a) of the Constitution provides is as follows:

> "*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—*
>
> *(a) for the imposition of restrictions on the movement or residence in Bermuda or on the right to leave Bermuda of persons generally or any class of persons that are reasonably required—*
>
> *(i) in the interests of defence, public safety, public order, public morality or public health; or*
>
> (ii) *for the purpose of protecting the rights an freedoms of other persons,*
>
> *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...*"

34. This exception is one which is an exception to the general provisions relating to various fundamental provisions, not least those of section 10 ("*Protection of freedom of assembly and association*". Section 10(2)(a) is in substantially the same terms as section 11(2)(a). In my judgment it is impossible to accept the view that section 11(2)(a) can be used to justify differential treatment of different categories of persons who belong to Bermuda in the Immigration context. Because that interpretation would be inconsistent with the terms of section 11(2)(d) of the Constitution as read with section 12(4)(b) of the Constitution. Those provisions read together make it clear that in terms of the regulation of "*the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion therefrom of any such person*"[9], persons who belong to Bermuda are treated as one genus or class, and are not to be divided up into different categories at the whim of the Legislature.

35. That contextual analysis apart, it seems to me that the legislative competence which is being preserved by provisions such as subsection (2)(a) of section 11 is really designed to permit legislation in relation to a variety of what might be called regulatory matters other than the basic right to reside in Bermuda. Examples of the sort of legislation which might be justified under section 11(2)(a)(i) would be a variety of criminal provisions designed to protect the public generally and designed to apply to the public at large, whether persons belong to Bermuda or not. As far as sub-paragraph (ii) of subsection (2)(a) is concerned, the right to pass legislation for the purpose of "*protecting the rights and freedoms of other persons*", it seems to me, is designed to preserve the right to pass legislation generally that preserves the fundamental rights and freedoms of other persons. And that interpretation is supported by the fact that the term "*rights and freedoms*" appears in section 1 of the Constitution itself.

36. It was further argued by Mr. Perinchief that the reference to "*public interest*" in section 1 of the Constitution could somehow be used to fortify the power of the Legislature to legislate in a way which would derogate from the fundamental rights. That argument was not supported by any relevant authority. Section 1 itself makes it clear that the limitations to the fundamental rights and freedoms are set out in the relevant provisions of the sections which follow. And I think it is really not of any consequence that the protection of freedom of movement which is guaranteed by section 11 is not explicitly referred to in section 1 at all. It may well be that this is simply a drafting error. But the Privy Council in the Fisher case had no problem with granting relief under section 11 despite the fact that section 11 was not referenced in the declaratory provisions of section 1.

[9] Section 12(2)(d).

37. And so, for those reasons, I am bound to conclude that the Applicant has demonstrated that his constitutional rights have been infringed.

Relief

<u>Declaratory relief</u>

38. Mr. Perinchief assisted the Court by confirming that the status of section 60 of the Immigration Act is in substance that of an existing law. That was relevant because section 5(1) of the Bermuda Constitution Order provides as follows:

> "*(1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

39. What that means in practice was illustrated by the approach adopted by the Court of Appeal in *Attride-Stirling-v-Attorney-General* [1995] Bda LR 6, where (at pages 5-6) Huggins JA, delivering the judgment of the Court (in which Sir James Astwood (P) and Harvey da Costa JA concurred), held:

> "*The Defence Act 1965 came into force before the establishment of The Bermuda Constitution. Accordingly it now takes effect*
>
> > *'as if [it] had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.' (Section 5(1) of the Bermuda Constitution Order 1968)*
>
> *How that is achieved is exemplified by <u>Attorney General of St. Christopher, Nevis and Anguilla v Reynolds</u> 1979 3 All E.R. 129. We are satisfied that we should not, as we are asked to do, declare the provisions of section 27 (and more particularly sub-section (4)0 to be void, for they are unobjectionable in so far as they relate to conscientious objectors who seek exemption from combatant duties only. We think it enough that we should declare that Part II of the Act should be read as excepting from reporting under section 17(2) any persons who can show that they conscientiously object to serving in a military organization. We declare accordingly and make no further order.*"

40. In this case, it seems to me, that's section 60(1)(a) should now be read as follows:

"60.(1) *Without prejudice to anything in sections 61 to 68, no person—*

> *(a) other than a person who for the time being possesses Bermudian status or who otherwise is deemed to belong to Bermuda for the purposes of section 11(5) of the Bermuda Constitution.;...*"
> [modifying words underlined]

41. For completeness I should mention that thanks to the diligent researches of Mr. Perinchief during the luncheon adjournment, it appears that the relevant provisions of the Bermuda Immigration and Protection Act 1956 which were in force when the Bermuda Constitution took effect in 1968 were in fact in section 57 of the 1956 Act, which provided as follows:

"*(1) Without prejudice to anything in the succeeding provisions of this Part of this Act, no person-*

> *(a) other than a person who for the time being possesses Bermudian status; or*
>
> *(b) other than a person who for the time being is a special category person,*

shall, while in these Islands, engage in any gainful occupation without the specific permission (with or without the imposition of conditions or limitations) by or on behalf of the Board of Immigration. "

42. The provision was amended in 1968 to substitute the word "*Member*" for "*Board of Immigration*" but there is no indication that the power in section 5(2) of the Bermuda Constitution Order invested in the Governor to "*by order*" amend existing laws to bring them into conformity with the Constitution was ever exercised in relation to section 57.

Damages

43. The Applicant's claim for damages has, as I have indicated, two limbs to it. Firstly, the loss of earnings or compensatory element and secondly the breach of constitutional rights element.

44. The compensatory element is quite straightforward. The Respondents chose not to challenge the Applicant's evidence and so I award the sum of $25,000 for loss of earnings. That is rounding up, somewhat, the $24,800 amount which Mr. Sanderson sought representing some four months' loss of earnings.

45. How serious a breach of constitutional rights is this? Mr. Sanderson broadly relied on the notion, it seemed to me, that any breach of constitutional rights is serious and ought to be acknowledged by the Court awarding damages following the principles set out in the cases and textbook authorities to which he referred. Mr. Perinchief in response suggested that this breach should be viewed leniently having regard to the fact that at its foundation was a dispute as to the correct interpretation of the law.

46. In this case what has happened to the Applicant has not been trivial but is not as serious a breach of constitutional rights as is reflected in the Executive itself terminating somebody's employment or being directly involved in the arbitrary or unlawful arrest of a citizen. Rather it is a somewhat more detached breach of constitutional rights based on perhaps, a political view being taken of a potentially significant change of Immigration law. It is a notorious fact that in Bermuda as in many other countries, especially in a time of recession, Ministers of Immigration are under pressure to be seen to be protecting the rights of local citizens.

47. Unfortunately, it seems to me, the position here is not as complicated as it might be in other cases. Because the way in which the Bermuda Constitution is framed clearly creates one class of person who belongs to Bermuda, so it was simply not a credible interpretation to place on the Immigration legislative function, a question having been raised as to whether it permitted the Minister to give preference to those holding Bermudian status[10]. That notwithstanding, Bermuda Immigration law has operated in this manner since 1968 without any challenge. And it never is a straightforward thing to concede that an established view of the law has in fact been misconceived. And so, taking all those matters into consideration, it seems to me that the appropriate award of damages in this case for breach of the Applicant's constitutional rights is the modest sum of $5000.

[After hearing counsel]

<u>Costs</u>

48. Costs to the Applicant to be taxed if not agreed.

Dated this 15th day of July 2015 ____________________________

IAN RC KAWALEY CJ

[10] There is no suggestion that the question was raised until after the Applicant's employment had already been terminated. The Minister's and/or the Department of Immigration's actions in causing the Applicant's employer to cease employing him without a work permit would have accordingly been based on a straightforward reading of the relevant provisions of the 1956 Act.