In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015 No: 40

IN THE MATTER OF AN APPLICATION BY BERMUDA BRED COMPANY

AND IN THE MATTER OF THE HUMAN RIGHTS ACT1981

AND IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

BETWEEN:

BERMUDA BRED COMPANY

Applicant

-v-

THE MINISTER OF HOME AFFAIRS

1st Respondent

-and-

THE ATTORNEY-GENERAL

2nd Respondent

EX TEMPORE RULING ON SUSPENSION OF DECLARATION

(in Court)

Date of hearing: December 7, 2015

Mr Peter Sanderson, Wakefield Quin Limited, for the Applicant
Mr Philip J Perinchief, Attorney General's Chambers, for the Respondents

Introductory

1. In this matter the Court has been asked to settle the terms of the final Order[1] and, most controversially, to suspend the final Order. Initially, the period of suspension sought by the Respondents was a period of 12 months.

2. Having heard arguments[2] in opposition from the Applicant and as a result of interchanges with the Court, the minimum period of suspension sought has been indicated to be a period of four to six months.

The Respondents' case for a suspension

3. The principles governing the power of this Court to suspend declaratory relief have never been considered in Bermuda before. And Mr Perinchief put before the Court an array of cases from Canada (principally) which demonstrate that the courts do have the power to suspend declarations that have the effect of creating a legal vacuum. Most of the cases cited were distinguishable from the present facts.

4. One of the leading cases is the case of *Schacter-v-Canada* [1992] R.C.S. 679. And in *Scachter* what was in issue was a declaration of invalidity, and the concern was that there might be a legal void that Parliament should be given a chance to fill. Lamer CJ at page 715 said this:

> "*A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public.*"

5. The next case that was referred to was the case of *Egan-v-The Queen* [1995] 2 S.C.R. 513. In this case there was an issue of the need for social security legislation to be amended to deal with same sex rights. The minority or dissenting opinion there was in support of the conclusion that the Old Age Security Act needed to be amended. And that minority approach[3] was adopted by the same judges as the majority in *Attorney General for Ontario-v-M and H* [1999] 2 S.C.R. 3, which was also concerned with the

[1] Further to the decision in this case in *Bermuda Bred Company-v-Minister of Home Affairs* et al[2015] SC (Bda) 82 Civ (27 November 2015).
[2] In the course of the hearing, I accepted Mr Perinchief's submission that I should disregard a purported '*Amicus Curiae*' letter received by the Court from the Gay and Straight Alliance of Bermuda opposing the Respondents' application for a stay, and disclosed to the parties. It is improper for non-parties to communicate with the Court in respect of pending cases. Third parties interested in public interest litigation should make a formal application to intervene in the proceedings.
[3] In favour of declaratory relief combined with a suspension of the declaration.

issue of unmarried same-sex couples being discriminated against by virtue of the term "spouse" in the Family Law Act. Again, there, there was a need for legislative change because legislative action was needed.

6. The *Attorney General of Canada-v-Bedford* [2013] 3 S.C. R.1101 was a case concerning the regulation of prostitution. And in that case at paragraph 167, the Supreme Court of Canada (McLachlin CJ) said this:

> "*167. On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in Schachter v. Canada [1992] 2 S.C.R. 679) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.*"

7. Clearly, that case involved a legal vacuum which does not exist here. A similar case was *Estate Agency Affairs Board-v-Auction Alliance (Pty) Ltd* [2014] ZACC 3 (Constitutional Court, South Africa). It involved the Financial Intelligence Centre Act and the Court held (Cameron J at paragraph 45):

> "*[45] An order of full retrospective force would render unlawful all section 32A searches the Board undertook after the Constitution came into effect, and all section 45B searches undertaken under FICA from December 2010, when Chapter Four (sections 45A-45F) came into effect. The High Court did not grant a fully retrospective order. Instead, it ordered that both declarations of invalidity would operate prospectively only. In striking down section 32A, it spelled out that its order would 'not affect the validity of any criminal, civil and administrative proceedings that have relied on documents obtained through inspections, searches and seizures' conducted under the provision. It did not specify that the exemption from invalidity would apply only to finalised cases.*"

8. In this case, the Court declined to make a retrospective order of invalidity. It is right to point out that the Respondents did put before the Court the Hong Kong Court of Final Appeal decision in *Koo Sze Yiu-v- Chief Executive of Hong Kong Special Administrative Region*[4], where the issue of suspension of a declaratory order was also considered. In summary, the circumstances of the cases relied on by the Respondents were generally quite different.

[4] FACV Nos. 12 and 13 (Judgment dated July 12, 2006).

The Applicant's case against suspension

9. Mr Sanderson for the Applicant relied in particular upon a South African case which was very similar to the present case. Because in *National Coalition for Gay and Lesbian Alliance for Equality-v- Minister of Home Affairs* [2000] 4 LRC 292, the specific complaint was of differential immigration treatment under the Aliens Control Act 1991, which allowed spouses of South African citizens to apply for and gain authorisation for Immigration permits but did not allow same-sex partners to do so. In that case the Court held, having considered many of the Canadian authorities cited by the Respondents in this case, that because the relevant statute could be amended, without being struck down altogether, by reading in amending words, that the relief which should be given should be immediate. At paragraph 88 the Court (Ackermann J) said this:

> "*[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. In order to apply the above criteria, those administering the Act are entitled, within the ambit of the Constitution and bearing in mind what has been said in this judgment, to take all reasonable steps, by way of regulations or otherwise, to ensure that full information concerning the permanent nature of any same-sex life partnership, is disclosed.*
>
> *[89] No case has been made out for the suspension of an order giving effect to such reading in. Permanent same-sex life partners are entitled to an effective remedy for the breach of their rights to equality and dignity. In the circumstances of this case an effective remedy is one that takes effect immediately.*"

Adjudication

10. In the present case on of the primary motivations for seeking a suspension has been the plea that Minister wishes to have regard to a wide array of indirectly affected areas of the law with a view to creating, in effect, a coherent scheme dealing with same-sex relationships. Mr Sanderson put before the Court the Press Release which was issued by the Minister on the day that judgment in this case was handed down. And reference was made there to matters such as bankruptcy, the rights of people cohabiting as life partners, estates, wills, succession rules, health insurance legislation, pensions legislation, social insurance, mortgage and land transfer legislation, legislation relating to registration of changes to names and how to handle permanent residents in a similar position. And that list was said not to be exhaustive.

11. Subsidiary reliance was also placed on the fact that there was a risk that the Court would be swamped by an array of applications in relation to these and other areas. And finally, reliance was placed, in seeking a stay, on the fact that Immigration Department staff would face difficulties in having to deal with a rush of applications pursuant to the present judgment without having a proper legislative or administrative framework in place.

12. In my judgment the Court has to balance the right of the Applicant, and any applicant, to effective relief for an Order they have become entitled to with the legitimate need of the Executive to respond to a difficult judgment by administrative or legislative need. In this case, the Order which it is agreed should be made is in substance a declaration in the following terms:

> "*Sections 25 and 60 of the Bermuda Immigration and Protection Act 1956 shall be inoperative to the extent that they authorise the Minister to deny the same-sex partners of persons who possess and enjoy Bermuda status, and who have formed permanent relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses by the said sections 25 and 60 respectively*."

13. That declaration is in substance a reading in that does not create any legal vacuum and does not directly require the Minister to do anything other than to create, at a minimum, administrative frameworks for dealing with applications under those sections of the Immigration Act; and, perhaps, should he see fit, to create a special legislative framework to underpin that administrative response.

14. The proposition that this Court should suspend its declaratory relief to a litigant which has succeeded to assist the Government to ward off other applications is an understandable result for a Government to seek to achieve from its vantage point. But the Court's duty is to uphold the rule of law and, most importantly, to ensure that relief is given to litigants which is effective in individual cases. It is highly

speculative what other applications might be made. And it would be wrong in principle, as Mr Sanderson submitted, for this Court to grant relief which had the effect of depriving other persons not before the Court to seek relief in respect of presently unidentified claims.

15. On the other hand, I am bound to take into account the notorious fact that the Public Service generally is under considerable resource stress. And it seems to me that in dealing with a human rights matter the Court should be sensitive to the human impact of the Immigration Department staff being confronted at a minimum with the possibility of a number of applications to be dealt with by administrative procedures which do not yet exist. It is also clearly desirable that legislative clarity be given (if possible) to the area, bearing in mind that immigration in Bermuda is a particularly sensitive area which has always required clear rules for it to operate in a way which causes least controversy and injustice. The South African case cited by Mr Sanderson represents the high end of human rights adjudication, the South African Constitutional Court being, in my experience, an extremely activist court operating in relation to a an immigration case in a country which is far larger than Bermuda and where immigration matters do not raise the same sensitive concerns[5].

16. And so, taking all of those matters into account, I do find, just, that this is an appropriate case for the Court's declaratory relief to be suspended, for a short time, to enable the Minister at a minimum to put the necessary administrative processes into place to deal with applications that may be made. Even if the suspension that I grant does not afford sufficient time for legislative action to be taken, there is in direct terms no need for legislative action to be taken for the Applicant's members to be given effective relief to which the Court has found they are entitled.

17. And so the declaration I have found the Applicant is entitled to is granted, but suspended until February 29, 2016.

Dated this 7th day of December, 2015 _____

IAN RC KAWALEY CJ

[5] In the course of argument I acknowledged that the sphere of immigration raised regulatory challenges everywhere.