In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 197

A

-v-

THE ATTORNEY GENERAL

EX TEMPORE JUDGMENT

(in Court)

Application for declaration of constitutional invalidity of statutory provisions discriminating against one class of belonger and in favour of another class of belonger- right to own land--right to control local companies and benefit from local trusts-Bermuda Constitution, sections 11(5) and 12-Bermuda Immigration and Protection Act 1956, section 72(1)-Companies Act 1981, sections 113, 114 and Third Schedule.

Date of hearing: October 23, 2017

Mr Peter Sanderson, Benedek Lewin Limited, for the Petitioner
Mrs Lauren Sadler-Best, Attorney General Chambers, for the Defendant

Introductory

1. By an Originating Summons issued on 5th June 2017, the Applicant (whose place of origin is the United Kingdom) seeks the following relief.

2. Firstly, a declaration that, as a person who belongs to Bermuda pursuant to section 11(5) of the Constitution and has a right to engage in employment or any business or profession without discrimination pursuant to section 12 of the Constitution, he is not subject to the "60/40" restrictions for the ownership of local companies as set out at sections 113, 114 and the Third Schedule of the Companies Act 1981, and that the words "or belongs to Bermuda" must be read into section 113(1)(b) (and (f) as regards trusts) of the Companies Act.

3. The Appellant further seeks a declaration that as a 'belonger', the discriminatory provisions of Part VI of the Bermuda Immigration and Protection Act 1956 ("BIPA") regarding ownership of land do not apply to him, and that the definition of "restricted person" in section 72(1) of BIPA must be read so as to exclude all persons who belong to Bermuda, not just Bermudians, from the definition of restricted person.

4. The essence of the present application is to seek vindication of the proposition that as regards matters such as employment, business and professional activities, the Bermuda Constitution creates one class of 'belonger' and does not entitle Parliament to discriminate as between:

- those who possess Bermudian status; and
- those who "*belong to Bermuda*" for the purposes of section 11(5) of the Constitution who do not.

The evidence

5. The present application was supported by an Affidavit sworn by the Applicant which made the following key averments in paragraphs 5 and 9 respectively:

> "*5. Pursuant to the 60/40 rule I am not allowed to own shares or be a director of a company unless 60 percent of the ownership and control of the company is in the hands of Bermudians. This is a hindrance to my ability to engage in business in Bermuda. It means that I am required to have a 60% majority of Bermuda partners in any local business venture I am part of and these disabilities also diminish my attractiveness to a business.*
>
> *9.Pursuant to part 6 of the Bermuda Immigration and Protection Act 1956 ("BIPA"), I am a restricted person in terms of ability to acquire land…*"

6. The deponent then goes on to set out the various restrictions that apply under the 1956 Act, including restrictions in respect of acquiring land without a licence.

The issues in controversy

7. The Respondent in this case did not advance any positive opposition to the proposition that the relevant statutory provisions did on their face discriminate against persons who belong to Bermuda for the purposes of Section 11(5) but who did not possess Bermudian status. The only opposition which was raised addressed two issues. Firstly the issue of standing was raised, albeit shortly prior to the present hearing. And, secondly, the entitlement of the Applicant to damages if he succeeded was also disputed. In the event Mr Sanderson for the Applicant abandoned his claim to damages and so the only real issue in controversy was the question of standing.

8. Before addressing the standing issue, it is perhaps helpful to consider the merits of the application because the standing issue to my mind is closely intertwined with the merits of the discrimination argument.

The relevant provisions of the Bermuda Constitution

9. In this case the Applicant relies on the following constitutional provisions. It is conceded that he is a person who falls within the provisions of section 11(5)(b) of the Constitution[1], which includes, in brief, a citizen of the United Kingdom who has been naturalized as a citizen of the United Kingdom in respect of Bermuda[2].

10. The next provision that is relevant is section 12(4). I should start off with subsections (1) and (3) of that section, which provide:

> "*(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…*
>
> *(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.*"

11. Those are the primary anti-discrimination protections in the Constitution which are of course subject to very important, and carefully delineated, exceptions. Subsection (4) provides crucially as follows:

[1] Section 11(5)(b) as enacted reads as follows:
"*(b)is a citizen of the United Kingdom and Colonies by virtue of the grant by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 [1914 c.17] or the British Nationality Act 1948 [1948 c.56]*"

[2] As a result of United Kingdom legislative changes (principally the British Nationality Act 1981 and the British Overseas Territories Act 2002), section 11(5)(b) applies to persons naturalised as British Overseas Territories citizens under the British Nationality Act 1981 in respect of Bermuda.

"*(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…"

12. It is noteworthy that the business, profession and residence rights are, on their face, to be enjoyed equally by persons who do "*belong to Bermuda*" under section 11, and not solely by reference to the possession or enjoyment of Bermudian status. There are two other provisions which may be distinguished from section 12(4)(b) of the Constitution upon which the Respondent was unable to rely.

13. Firstly Section 12(4)(d), which provides:

"(d) whereby persons of any description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society…"

14. That exception, it seems to me, is designed to facilitate any exceptional measures being taken, for example to exclude from Bermuda persons coming from a particular part of the world where, at a particular point and time, there may be contagious diseases. The other provision which permits discrimination in favour of Bermudians ahead of other persons who "*belong to Bermuda*" is subsection (5) of section 12, which again it was implicitly conceded did not apply here. That subsection provides:

"*(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it requires a person to possess Bermudian status or belong to Bermuda for the purposes of section 11 of this Constitution or to possess any other qualification (not being a qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes.*"

15. So the circumstances in which there can be a two-tier legislative scheme for persons who belong to Bermuda by virtue of possessing Bermudian status and persons who "*belong to Bermuda*" by virtue of some other gateway are limited, and cannot be relied upon in the present case.

Relevant judicial authority

16. The one authority that Mr. Sanderson relied upon in support of this way of reading these constitutional provisions is the Court of Appeal's decision in *Minister of Home Affairs and Attorney General-v-Melvern Williams* [2016] Bda LR 40, where Sir Scott Baker (P) gave the judgment of the Court, and made the following crucial findings which merit reproduction in full (starting at paragraph 24):

> "*24. The Chief Justice held that section 12 gives rise to a separate free-standing ground of complaint. It arises on this way. Section 12(1) provides that 'no law shall make any provision which is discriminatory either of itself or in its effect.' 'Discriminatory' is defined in section 12(3) as meaning affording different treatment to different persons attributable to place of origin as one of the things protected. Section 12(4) provides for certain exclusions from the general non-discrimination rule in section 12(1). These include 12(4)(b) people who do not belong to Bermuda in relation to work. As the respondent does belong to Bermuda he is not within this exclusion and is protected by section 12(1). One turns therefore to section 60(1) of the 1956 Act which plainly prohibits someone in the respondent's shoes from engaging in any gainful occupation without the specific permission of the Minister…*
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> *26. Although not formally conceding that the appeal must fail on indirect discrimination Mr Guthrie did not pursue the point with any great vigour in the light of Thompson v Bermuda Dental Board(Human Rights Commissioner Intervening) [2008] UKPC 33 . In order to practise in Bermuda a dentist must register with the Bermuda Dental Board, which has a policy of limiting registration to Bermudians or the spouses of Bermudians. Consequent on the policy, the Board refused to register Dr. Thompson, a citizen of the United Kingdom, to practise as a dentist in Bermuda. The question was whether Dr. Thompson had been subjected to direct or indirect discrimination contrary to the Bermudian Human Rights Act 1981 as amended.*
>
> *27. That case concerned the Human Rights Act 1981 as amended rather than section 12 of the Constitution but the distinction is irrelevant for present purposes. Lord Neuberger, giving the advice of the Board said at para 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 1982 Act…'…

29. Whilst 'place of origin' and 'national origins' are different, in our judgment nothing turns on the distinction in the present case. The respondent was indirectly discriminated against because his place of origin is Jamaica. The section 12(4)(b) exclusion from the general section 12(1) protection from discrimination applies to those who do not belong to Bermuda. The respondent is a person who belongs to Bermuda by virtue of section 11(5)(b) but does not possess Bermudian status within the meaning of the 1956 Act and requires a work permit in order to engage in gainful employment. As was said by the Chief Justice the effect of the constitutional legislation had been to create two categories of 'belongers': those belongers who possess Bermuda status and are able to work without the requirement of a work permit and other belongers who do not and require a work permit to do so. As a matter of common sense, as noted by Lord Neuberger in Thompson, the proportion of persons whose place of origin is not Bermuda who have Bermudian status is considerably smaller than the proportion of persons whose place of origin is Bermuda. As a result, the statutory requirement that those belongers who do not possess Bermudian status must have a work permit in order to engage in gainful employment has a disproportionately prejudicial effect on belongers whose place of origin is not Bermuda. This requirement is indirectly discriminatory and there is no reason why belongers should be treated differently based upon the distinction as to whether their place of origin is Bermuda or a place other than Bermuda. No case has been advanced on the basis of justification."

The impugned statutory provisions: incompatibility with section 12 of the Constitution

17. The statutory provisions complained of can be referred to briefly. The first statutory provision is accurately referred to in shorthand in the Originating Summons as the "60/40 rule". The crucial provision of which the Applicant complains is section 113 of the Companies Act 1981, which reads as follows:

"(1) *In this Part and in the Third Schedule the following shall be deemed to be "Bermudian"—*

…

(b) any person who has Bermudian status by virtue of the law relating to immigration from time to time in force;…

(f) a trust of which the majority of the trustees are persons with Bermudian status by virtue of the law relating to immigration from time to time in force and the trust is established for the benefit of Bermuda, Bermudians or things Bermudian…."

18. Part I of the Third Schedule imposes requirements that a local company carrying on business in Bermuda must be "*controlled by Bermudians.*"[3]

19. It is self-evident that these provisions treat, in relation to the ability to own and control a company[4], persons such as the Applicant, who belongs to Bermuda, differently and less favourably to persons who belong to Bermuda and who also are "Bermudian" as that term is currently defined in section 113(1)(b) and (f) of the Companies Act 1981.

20. The position in respect to BIPA is equally straightforward. Again, it is helpful to focus on not just the well know restrictions that are imposed on non-Bermudians in relation to the acquisition of land under Part VI of BIPA. Rather, it is helpful to look at way the term "*restricted person*" is defined in section 72(1):

"*'restricted person' means—*

(a) in the case of an individual, a person who does not possess Bermudian status…"

21. So again, clearly, this offends the provisions of section 12 of the Bermuda Constitution, which envisage that in relation to the ability to enjoy, *inter alia*, residential rights as well as business rights in Bermuda, there should be no different treatment as between different categories of persons who "*belong to Bermuda*". Discrimination is only permitted against those persons who do <u>not</u> belong to Bermuda as the Applicant by common accord does.

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[3] Section 114 provides, *inter alia*:

"*(1) No local company shall carry on business of any sort in Bermuda unless—*

(a) it is a company which, at the relevant time, complies with Part I of the Third Schedule or is a wholly-owned subsidiary of such a company; or

(b) it is a company mentioned in Part II of the Third Schedule…"

[4] And, for the same reasons, to be a trustee or beneficiary of a trust.

The Applicant's standing

22. I now turn to the question of standing and whether or not, as Mrs Sadler-Best has urged the Court to do, relief should be refused because there is insufficient evidence before the Court of more than an academic or hypothetical prejudice arising from these provisions in relation to the Applicant.

23. The main point that the Applicant makes in response to the standing objection is that had the standing point been taken earlier, at the outset by way of responsive evidence to the Applicant's opening evidence, by way of reply the Applicant could have fortified what he put before the Court and adduced more tangible evidence of the prejudice that he suffers. But beyond that, the Court was urged to take the view that as a matter of principle the present case is far removed from those cases where the Court might properly hold that the relief should be declined on standing grounds.

24. The starting point for analysing the standing issue and the complaint that the relief sought should be refused because the complaints are lacking in substance, is to consider the words of section 15(1) of the Constitution. This governs the enforcement of fundamental rights and that subsection reads as follows:

> "*(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.*

25. One of the grounds on which the Court can refuse relief is under the proviso to section 15(2):

> "*Provided that the Supreme Court 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.*"

26. But to my mind, there is a fundamental distinction to be drawn between the situation where an Applicant is seeking to obtain relief in respect of administrative action and the situation such as the present where the Applicant is complaining that the law of the land is, on its face, unconstitutional. It seems to me that the starting assumption must be that if there is a law which is unconstitutional that the Court should be inclined to so declare. The suggestion advanced on behalf of the Respondent that the Court, in effect, should be reluctant to uphold the Constitution is one which in my judgment flies in the face of the Privy Council's injunction in the case of *Minister of Home Affairs–v-Fisher* [1980] AC 319 that constitutional provisions in relation to fundamental rights and freedoms should be given a broad

and purposive construction designed to give the fullest effect to constitutional rights[5].

27. It would be a very odd Court that construed its role as to avoid upholding the Constitution rather than to be enthusiastic to do so. And so my primary reason for rejecting the academic and premature standing point is that, as a matter of principle, this Court should be willing to grant relief to any private citizen (or indeed and public interest party) who manages to advance a credible case that the Constitution has been infringed by legislation. That contravention is in and of itself something which warrants the intervention of the Courts.

28. It is clear that when the question of standing is being analysed in a constitutional context, as illustrated by *Mirbel-v-The State and others* [2011] 2 LRC 196, that the sort of question that is typically in issue is whether or not there really is any substance to the complaint that is being made. Not whether, assuming there is a substantively a meritorious case, whether the applicant's interest is too remote. But even if this Court were required to adopt a restrictive approach to standing, which in my judgment it is not, in this case the evidence before the Court clearly demonstrates that this particular Applicant is prejudiced by these legislative provisions. And it seems self-evident that he has brought these proceedings with a view to achieving a tangible and substantive benefit to himself.

29. And so the lack of standing argument fails.

30. Significantly, Mrs Sadler-Best was unable to identify any constitutional authorities which supported her standing argument. One case to which she referred was *R –v-Secretary of State for the Home Department ex parte Salem* [1999] UKHL J0211-3. This was a case not dealing with standing in the present sense at all, but dealing with the question of whether, in circumstances where the legal basis for judicial review proceedings had fallen away between the time when leave was refused at the High Court level and leave had been further refused at the Court of Appeal level, the House of Lords should entertain an academic appeal. That case could not be further removed from the present one.

31. In her bundle of authorities placed before the Court, counsel also referred to the case of *The People-v- Rattigan* [2015] IECCA 7 which invited this Court to have regard to the presumption of constitutionality. That was a case where the Irish Court did not have the authority to declare an Act of Parliament to be unconstitutional.

[5] Lord Wilberforce (at page 328, in a case concerning another sub-paragraph of section 11(5) of the Bermuda Constitution) as follows:

"*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. Section 11 of the Constitution forms part of Chapter I.*"

Relief

32. And so it remains to consider the question of relief and costs. There are two different routes to the relief which the Applicant seeks.

Companies Act 1981

33. As far as the Companies Act provisions are concerned, the Applicant in effect asked the Court to re-write section 113(1)(b) (and (f)) of the Companies Act to add the words "*or who belongs to Bermuda*"[6].

34. I have some diffidence about the propriety of granting relief precisely in that form. And that is because the Companies Act 1981 is a post-1968 law which is indeed, as Ms Sadler-Best argued, to be construed subject to the presumption of constitutionality. But having found there to be a conflict between the Constitution and the relevant law, the Court's jurisdiction to declare and invalidity arises from the Colonial Laws Validity Act 1865, which provides that any colonial law which is inconsistent with an act of the Imperial Parliament shall be void to the extent of the repugnancy[7].

35. And so it seems to me that the formal order that I should grant, subject to hearing Counsel on what the terms of the final order should be as regards section 113(1)(b) and (f) of the Companies Act is to declare that the definition of "Bermudian" is void and of no effect to the extent that it is construed as excluding persons who "belong to Bermuda" for the purposes of section 11(5) of the Bermuda Constitution.

BIPA

36. As far as the definition of restricted person in the section 72(1) of BIPA is concerned the position is somewhat different, at a technical level at least. The Bermuda Immigration and Protection act 1956 is technically an existing law, even though it is entirely possible that some of the precise wording that is involved may have been brought into force after 1968. But the basic restrictions on which complaint is made potentially fall under the category of "existing laws", and section 5 of the Bermuda Constitution Order provides that the existing laws shall be read subject to such adaptations, modifications and qualifications as may be required to bring them into conformity with the Constitution[8].

[6] I.e. after each reference to "Bermudian" or "Bermudian status".
[7] 28 and 29 Victoriae, Cap 63, section 2.
[8] Section 5 provides:

> "*(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.*"

37. And so it seems to me that, in this respect, the Court is empowered to actually rewrite the subsection and to say that the "*restricted person*" definition should instead of reading simply "*a person who does not possess Bermudian status*" should also include the words "or belong to Bermuda" as the Applicant's counsel has suggested.

38. But if I am wrong in characterizing this as an "existing law" then I would say, as in the case of the Companies Act provisions, that that definition is void and of no effect to the extent that it is read as including in the category of restricted person, persons who belong to Bermuda for the purposes of section 11(5) of the Bermuda Constitution.

39. Again, I will hear counsel as to the terms of the final Order to be drawn up, which it is quite possible they may be able to agree.

Costs

40. As far as costs are concerned the Court of Appeal recently in a case called *Barbosa*[9] ruled that the standard measure of costs (in constitutional cases) should be costs on an indemnity basis.

41. Mrs Sadler-Best invited the Court to take into account the fact that the Respondent has not mounted vigorous opposition. That seems to me is a factor which goes to the amount of costs. The Respondent has sensibly, accepting that this Court is bound by the *Williams* decision, decided not to launch a full-blooded assault on a decision of the Court of Appeal before the Supreme Court. The concept of indemnity costs for constitutional applications is not based on the notion of punishing the Respondent for the way in which it has conducted litigation, but rather on upholding the importance of constitutional rights and encouraging constitutional litigants to vindicate their rights in the knowledge that they are likely to be as fully as possible compensated in costs. And so in deciding that indemnity costs are appropriate in this case, I in no way criticise the exemplary way in which the Respondent has conducted the present proceedings.

42. The further issue which was raised by Mrs Sadler-Best, diligently seeking to limit the Crown's costs exposure, was whether the fact that the damages issue had been abandoned should have some impact on the costs award. It seems to me that in the unique circumstances of this case there is no justification for concluding that a disproportionate amount of the successful Applicant's costs have been devoted to a point on which the Applicant has not ultimately succeeded. Because the Applicant's skeleton argument runs to just under five pages and there is one paragraph of five lines which deals with the damages issue, making reference the main case which supported the finding on the merits of the present application.

43. And so in these circumstances it seems to me that a negligible amount of time was expended by the Applicant on the damages issue and it is impossible to identify any principled basis on which it would be proper to award any costs to the

[9] *Minister of Home Affairs and Attorney-General-v-Barbosa* [2017] COA (Bda) 5 Civ (30 March 2017).

Respondent in respect of this issue, even though the Respondent's arguments did prevail.

44. Clearly the Applicant has achieved substantial success in obtaining the declaratory relief which he sought. And in these circumstances costs should follow event and the Applicant is granted his costs on an indemnity basis, to be taxed if not agreed.

Dated the 23th day of October, 2017 _____

IAN RC KAWALEY CJ