# The Court of Appeal for Bermuda

**CIVIL APPEAL No 15 of 2015**

Between:

**MINISTER OF HOME AFFAIRS & THE ATTORNEY-GENERAL**

Appellants

**-v-**

**MELVERN WILLIAMS**

Respondent

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**Before:** **Baker, President**
**Bell, JA**
**Hargun, AJA**

**Appearances:** Mr. James Guthrie, QC and Ms. Wendy Greenidge, Attorney-General's Chambers, for the Appellants
Mr. Peter Sanderson, Wakefield Quin, for the Respondent

**Date of Hearing:** **9 & 10 March 2016**

**Date of Judgment:** **1 April 2016**

**JUDGMENT**

*Section 11 of the Bermuda Constitution Order 1968 - Section 12 of the Bermuda Constitution Order 1968 - Section 60 of the Bermuda Immigration and Protection Act 1956 – Immigration - Naturalised British Overseas Territories Citizen - person belonging to Bermuda - right to work – discrimination - Jamaican – constitutional damages*

**PRESIDENT**

1. This is the judgment of the Court to which each member has contributed. Melvern Williams, the respondent, is a naturalised British Overseas Territory Citizen pursuant to a certificate of naturalisation dated 16 December 2014. As such he is deemed to belong to Bermuda under section 11(5)(e) of the Constitution. On 13 March 2015 his employers, D&J Construction Limited terminated his employment

on the ground that the Department of Immigration (for which the first appellant has ministerial oversight) had notified them that his employment must cease immediately. He sought a declaration that as a person who belongs to Bermuda pursuant to section 11(5) of the Constitution he has a right to engage in employment and business without discrimination pursuant to section 12 of the Constitution, and that he does not require the specific permission of the Minister to engage in employment or business. Kawaley CJ, in an ex tempore judgment, found in his favour and granted him $25,000 for loss of earnings from 13 March 2015 to the date of judgment and $5,000 for breach of his constitutional rights.

2. The appellants, who are the Minister for Home Affairs and the Attorney-General appeal against the Chief Justice's decision and there is a cross-appeal against the sum of $5,000 which it is contended is inadequate. It is not disputed that the sum of $25,000 is, subject to liability, appropriate.

3. The Chief Justice's decision was founded on two bases, (1) the true construction of section 11 of the Constitution and (2) discrimination contrary to section 12 of the Constitution.

**The Relevant Statutory Provisions**

4. Section 60(1) of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act") provides:

"(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) 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 Minster."

5. The Bermuda Constitution Order 1968 provides in Chapter 1 for the protection of fundamental rights and freedoms of the individual. Section 1 is in the form of a preamble and mentions the rights and freedoms that are set out specifically in the following sections. Section 11 is headed "Protection of Freedom of Movement".
It provides:

> "11(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Bermuda, the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion therefrom.
> 11(2) 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:-"

There is then set out a number of different circumstances, the material one for the purpose of the present case being:

> "(d) for 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"

6. Subsection (5) provides that for the purposes of the 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 or the British Naturalisation Act 1948

(c) is the wife of a person to whom either of the forgoing 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.

7. Section 12 so far as material provides:

(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 person 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.

8. The Chief Justice found in favour of the respondent on the basis that his constitutional rights had been infringed on two grounds. First, the language of section 11(2)(d) of the Constitution makes it clear that the immigration legislative regime authorised by section 11(2)(d) to restrict movement within Bermuda is not permitted to restrict the residence of persons who belong to Bermuda. Accordingly, section 60 of the 1956 Act is inconsistent with this regime. In short, the freedom of movement guaranteed by section 11 must be construed as including the right to work. Second, the respondent was entitled to the protection guaranteed by section 12 against discrimination on the ground of his place of origin. There had therefore been a violation of his constitutional right in these two respects.

**Section 11**

9. The starting point is that the respondent meets the criterion of section 11(5)(b) because he has a grant by the Governor of a certificate. He therefore "belongs to Bermuda" for the purposes of the section. Thus he does not fall within the alternative category of those who not belong to Bermuda on whom restrictions on movement or residence can be imposed under section 11(2)(d). He is therefore entitled to the freedom of movement guaranteed by section 11(1) and is not subject to the restrictions permitted in respect of persons who do not "belong to Bermuda".

10. The underlying thrust of the respondent's argument is that freedom of movement includes the right to seek employment without restriction. The Chief Justice accepted this argument, concluding that the right to reside in section 11, although it does not expressly say so, includes such a right by necessary implication. We observe that the heading of section 11 is the "Protection of Freedom of Movement". There is no mention of right to work or seek work either in the heading or anywhere in the body of the section. This could be said to be a startling omission on the part of the draftsman. Secondly, what is being construed here is a provision in a constitution. We were referred to *Minister of Home Affairs v Fisher* [1980] AC 319 which is relied on by Mr. Sanderson for the respondent. Lord Wilberforce said at 328:

> "These antecedents (of the Bermuda Constitution) and the form of chapter 1 itself call for a generous interpretation avoiding what has been called 'the austerity of tabulated legislation', suitable to give to individuals the full measure of fundamental rights and freedoms referred to. 3. Section 11 of the constitution forms part of chapter 1. It is thus to "have effect for the purposes of affording protection to the aforesaid rights and freedoms" subject only to such limitations contained in it "being limitations being designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice...the public interest"

The issue in *Fisher* was whether the word "child" in section 11(5)(d) was limited to children born in wedlock and it was held that it was not. But this construction did no violence to the language of the subsection.

11. Mr. Sanderson relied on *The Attorney-General v Grape Bay Limited* [1998] Bda LR 6, *Oliver v Buttigieg* [1967] 1 AC 115 and *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 as supporting his submission that the preamble in section 1 was an aid to his construction of section 11 because the word "liberty" imports the right to live and work and pursue such business as a person may choose. We are not persuaded that these authorities advance his argument.

12. In our judgment, perhaps the most helpful words on constitutional interpretation for present purposes come from Lord Hoffman in *Matadeen and Another v Pointu and Others* [1999] 1 AC 98, 108 B-G:

> "It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government

> in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitution Court in *State v Zuma*, 1995 (4) BCLR 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

13. The hurdle that Mr. Sanderson has to overcome in the present case is that there is simply no reference to employment in section 11, but it is quite clear and specific as to what it does include. There is, however, very clear reference to employment in section 12 and the equivalent of section 12(4)(b) could very easily have been included in section 11. Mr. Sanderson's response is that unless you import the right to employment into the right of free movement and the right to reside, the right may be of no value.

14. Before the Chief Justice, Mr. Sanderson relied on a number of cases which demonstrated the importance the common law has attached to the right to work summarised by Lord Denning MR in *Nagle v Feilden and others* [1966] 1 All ER 689 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."

We agree with the Chief Justice that these cases do not assist in the interpretation of section 11 of the Bermuda Constitution.

15. A key, perhaps the key, factor in the Chief Justice's very liberal interpretation of section 11 was *Salem v Chief Immigration Officer of Zimbabwe and Another* 1995 (4) SA 280 (ZC). This was a first instance decision by Gubbay CJ in which the respondents did not appear and did not file any evidence in response to the applicant's claim. The court held that a female citizen of Zimbabwe married to an alien national of another country, entitled by virtue of protection of freedom of movement under section 22(1) of the Zimbabwe Constitution to reside permanently with her husband in Zimbabwe, was sufficient to entitle her husband to written authority to remain in Zimbabwe on the same standing as any other alien who was a permanent resident of Zimbabwe, including the right to engage in employment.

16. The Chief Justice accepted the unopposed argument that the "right to reside in any part of Zimbabwe" in section 22 of the Zimbabwe Constitution necessarily imported the ability to engage in gainful employment. He said that a generous and purposive interpretation was required and that "reside" was an ambiguous word. He concluded:

> "It follows, in my view, that, unless the protection guaranteed under s 22(1) of the Constitution embraces the entitlement of a citizen wife, residing permanently with her alien husband in Zimbabwe, to look to him for partial or total support, depending upon her circumstances, the exercise of her unqualified right to remain residing in this country, as a member of a family unit, is put in jeopardy."

17. Mr. Guthrie QC, who appeared before us for the appellants, submitted that the Chief Justice had no basis for saying that section 22 meant anything other than its ordinary meaning and that he fell into the error identified by Lord Hoffman in *Matadeen* at 108E. We agree that *Salem,* a case in which the court heard argument from one side only, is little or no authority for the liberal construction of section 11 of the Bermuda Constitution advanced in the present case. We cannot agree with Kawaley CJ that *Salem* provides powerful support for the respondent's proposition

that section 11 should be construed as including the right to seek employment without any restrictions.

18. The other point relied on by the Chief Justice as favouring the respondent's construction of section 11 was his view that section 12 as well as forming a freestanding limb of constitutional complaint informs the interpretation of section 11. He found at para 30:

> "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 person(s) 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."

19. In our judgment the Chief Justice was in error in concluding that section 12 informs the interpretation of section 11. Section 11 is dealing with freedom of movement and section 12 is dealing with discrimination. Each section is separate and freestanding.

20. Mr. Sanderson expanded his argument in support of the Chief Justice's decision submitting that there is nothing radical about importing ability to work into freedom of movement. Freedom of movement is useless in most cases if one cannot work. Work is necessary to provide a means of support. Ability to work is an aspect of freedom of movement. In addition to *Salem*, on which he relied strongly, he also referred to *Sesana and Ors v Attorney General* [2007] 2 LRC 711, a case from the Botswana High Court, which involved freedom of movement under the Botswana Constitution and the incorporation in it of the right to liberty. However, we do not think that how the particular facts of that case engaged the Botswana Constitution assist in the construction of section 11. In the end we gained little help from looking at freedom of movement in other countries.

21. We were told that there is no freestanding right to work in any of the Westminster Constitutions. There are, however, various international instruments that include the right to work for example Art 23.1 of the Universal Declaration of Human Rights, Article 6 of The International Covenant on Economic, Social and Cultural Rights, Article 15 of the African Charter on Human and Peoples' Rights and Articles 39 and 41 of the Indian Constitution. None of these, however, assists in the true construction of section 11 of the Bermuda Constitution. All that they indicate is that such rights can be expressly articulated if the draftsman so wishes.

22. Finally, Mr. Guthrie submitted that while the right to work may be an incidental, parasitic or unenumerated right attached to another right, for example to the right to form a trade union which is protected by section 10 of the Constitution, it is not a free-standing right enforceable under section 15.

23. Whilst arguments can be advanced that the right to freedom of movement ought to include the right to seek employment, the question in the present case is the true construction of section 11. It contains no reference to the right to seek employment and we can see no basis for implying such a right.

**Discrimination**

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.

25. Mr. Guthrie submitted that on the ordinary meaning of the expression the respondent's place of origin is Jamaica. He is of Jamaican birth and if he was discriminated against on the basis that he was of Jamaican birth that would be a plain case of discrimination. However, the particular provision in section 60(1) of the 1956 Act of which it is alleged the appellant fell foul is (a), which refers not to place of origin but to Bermudian status. The requirement for the permission of the Minister for a work permit is not based on an applicant's place of origin but on his lack of Bermudian status. Mr. Guthrie points out that there are five categories of Bermudian status, none of which equates directly with 'place of origin'. Whilst this may be an answer to a claim of direct discrimination it still leaves open indirect discrimination.

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…"

28. In 2000, the 1981 Act had been amended and the word 'ancestry' replaced by 'ethnic or national origins' so that the discriminatory ground in section 2(2)(a)(i) thenceforth read: (1) "of his race, place of origin, colour or ethnic or national origins." The Privy Council concluded that there was no direct discrimination but Lord Neuberger said at paras 40 and 41:

> "40. … on the assumption that the Court of Appeal was right in its view as to the restricted meaning of 'place of origin' and (by implication) 'national origins', their Lordships consider that the Court of Appeal's conclusion that there could have been no indirect discrimination against Dr. Thompson cannot possibly be supported.
> 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 s2(2)(b)(ii) of the 1981 Act, Dr. Thompson would be able to succeed in his claim based on indirect discrimination. There was no suggestion that the discrimination could be so justified."

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.

30. For completeness, were further support to be needed for this approach, it is to be found in *Attorney-General v Antigua Times Ltd* [1976] AC 16, 30, *Hamel-Landry v Law Council and Another* [2013] 2 LRC 36, *Bohn v Republic of Vanuatu* [2013] 5 LRC 211, 223 and *BS Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* [2001] 2 LRC 52, all of which were relied on by Mr. Sanderson.

**Damages**

31. Mr. Sanderson argued that the sum of $5,000 for constitutional damages is inadequate. The Chief Justice found that the respondent's constitutional rights had been violated on two bases. We have concluded there was one basis, discrimination, rather than two but this makes no difference to assessing the appropriate sum; the facts are essentially the same. The Chief Justice said that what happened was not trivial but was 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. He pointed out that the law had operated unchallenged since 1968. The leading authority is *Innis v Attorney General* [2008] UKPC 42. Lord Hope giving the opinion of the Board referred at para 24 to various authorities giving guidance on the principles to be applied. He referred in particular to Lord Scott of Foscote in *Merson v Cartwright* [2005] UKPC 38, [2006] 3LRC 264 at para 18 where he said that the purpose of a vindicatory award was not to teach the executive not to misbehave. Its purpose was to vindicate the right of the complainant to carry on his or her life free from

unjustified executive interference, mistreatment or oppression. He added that the appropriate sum would depend on the nature of the infringement and the circumstances relating to it. He summarised the law at para 27:

> "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."

32. In our judgment each case depends very much on its own facts and little is to be gained in looking at the amount of awards in other cases, particularly those in which the award was in a different currency. We cannot fault the Chief Justice's approach. Whilst $5,000 is in our view at the lower end of an appropriate bracket it was not wrong in principle or outside what was reasonable.

**Conclusion**

33. The appeal succeeds to the limited extent that the appellants were not in breach of section 11 of the Constitution. They were however in breach of section 12 on the ground that they indirectly discriminated against the respondent. His award of damages will remain undisturbed and we shall hear counsel as to the appropriate form of declaration.

*Signed*

Baker, P

*Signed*

I agree

Bell, JA

*Signed*

I agree

Hargun, JA (Acting)