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

JUDGMENT

(in Court)

Date of hearing: November 3, 2015
Date of Judgment: November 27, 2015

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

1. The Applicant is a company limited by guarantee whose primary object is promoting social justice and non-discrimination. On February 9, 2015, the Applicant issued an Originating Summons against the Respondents seeking the following distilled version of various heads of relief:

    (1) relief under the Bermuda Constitution; and

    (2) a declaration that same sex partners are entitled to the same treatment as wives and husbands under the Bermuda Immigration and Protection Act 1956 as read with section 5 of the Human Rights Act 1981;

    (3) a declaration that a proposed Immigration policy change permitting "partners" of work permit holders to reside and seek employment in Bermuda would be unlawful and contrary to section 5 of the Human Rights Act 1981 to the extent that does not equally apply to same sex partners;

    (4) declarations that the Minister's decision to treat same sex couples in a discriminatory way is unreasonable and/or in breach of a legitimate expectation.

2. By Summons dated February 20, 2015, the Respondents sought to strike-out the present proceedings on the grounds that the Applicant lacked the standing to bring the present proceedings. The application was listed for July 9, 2015. On May 11, 2015, the Applicant issued a Summons seeking a direction that the Applicant be granted leave to pursue the present proceedings as an application for judicial review. This Summons was heard on May 21, 2015. It appeared to me that the Applicant had a very strong case on standing and time and costs would be wasted by proceeding with a strike-out application as previously contemplated. On the other hand, I was doubtful as to how arguable it was that the 1956 Act and/or policy made under the 1956 was potentially required to comply with the Human Rights Act 1981 I ordered:

    "*1. The Plaintiff is directed to file an application for leave to seek judicial review in the present proceedings.*

    2. In the first instance, the application shall be dealt with on the papers.

    3. The strike-out application is adjourned with liberty to restore…"

3. The Applicant then applied by letter dated June 16, 2015 for its May 11, 2015 Summons together with the Affidavits filed in support of its Originating Summons herein to be treated as an application for leave to seek judicial review. Having regard to the Overriding Objective, I was willing to waive the requirement at this stage at least for the Applicant to file the requisite Notice of Application for Leave Form 86A and to treat the material before the Court as substantially complying with the procedural requirements for seeking leave under Order 53 rule 3.

4. On June 23, 2015, I found that grounds (2) and (3) set out in paragraph 1 above were arguable as against the 1st Respondent alone but refused leave in respect of ground (4). On July 9, 2015, after hearing a renewed application for leave to pursue ground (4) set out in paragraph (1) above (by which date the ground (2) had fallen away), I granted leave to pursue ground (4) as well.

5. Accordingly at the effective hearing of the Applicant's Originating Summons, the following relief was sought:

    (1) a declaration that same sex partners are entitled to the same treatment as wives and husbands under the Bermuda Immigration and Protection Act 1956 as read with section 5 of the Human Rights Act 1981;

    (2) declarations that the Minister's decision to treat same sex couples in a discriminatory way is unreasonable and/or in breach of a legitimate expectation.

6. However, the first head of relief remained the most clear-cut and the second head of relief the most blurred.

Factual findings

7. The following facts relied upon by the Applicant were not challenged. Bermudians in stable long-term same-sex relationships, whether unmarried or legally married in the United States, have no right to have their foreign same-sex partners residing and working in Bermuda which corresponds to the rights available to heterosexual Bermudians who marry foreign spouses. This makes it emotionally and financially difficult for Bermudians who are gay and/or lesbian by way of sexual orientation and in long-term same-sex relationships with non-Bermudians to live in their own country while sustaining such relationships.

8. In addition it was common ground that current Immigration policy does permit foreign unmarried partners who are sponsored to reside in Bermuda with their Bermudian partners, irrespective of sexual orientation. There is, however, no policy

provision for same sex partners to enjoy the same residential and working benefits accorded to foreign spouses under existing Immigration law or policy.

Legal findings: overview of the key Human Rights Act 1981 provisions

9. The first head of relief primarily relied upon two provisions in the Human Rights Act 1981 ("the HRA") which, although enacted on April 8, 1993 with full operative effect from January 1, 1995 , were seemingly first considered by this Court earlier this year. Firstly, section 30B provides as follows:

> "***Primacy of this Act***
> *30B (1)Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.*
>
> *(2)Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995.*"

10. Section 30B appears designed to give primacy to the HRA over all conflicting statutory provisions which are not explicitly stated as intended to exclude the operation of the HRA. However, it is given real vitality by an even more powerful and closely connected provision, section 29[1]:

> "*29. (1) In any proceedings before the Supreme Court under this Act or otherwise it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act.*
>
> *(2)The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions.*"

11. It is surprising that section 29 was seemingly ignored for so long. In *A and B-v-Director of Child and Family services and Attorney-General* [2015] SC (Bda) 11 Civ (3 February 2015), Hellman J held that sections 28(1) and 28(3) of the Adoption Act 2006 were inoperative to the extent that they discriminated on the grounds of marital status against same sex or unmarried couples. This was, seemingly, the first recorded instance of section 29 as read with section 30B of the HRA being directly applied.

12. I say that primary reliance was placed on sections 29 and 30B merely because these statutory provisions were fundamental to the Applicant's prayer for relief which, in effect, sought a declaration that provisions of the Bermuda Immigration and Protection Act 1956 ("BIPA") were void for inconsistency with the HRA. However,

[1] This provision was enacted with the original version of the HRA in 1981.

the more substantive provision of the 1981 Act upon which the present claim was based was the prohibition in section 5 on providing services in a manner which is discriminatory, *inter alia*, on grounds of marital status and sexual orientation. The first key provision in section 5 is the following:

> "*(1)No person shall discriminate against any other person due to age or in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.*"

13. The second key provision in section 5 is the following:

> "*(2) The facilities and services referred to in subsection (1) include, <u>but are not limited to</u> the following namely—*
>
> > *access to and use of any place which members of the public are permitted to enter;*
> >
> > *accommodation in a hotel, a temporary boarding house or other similar establishment;*
> >
> > *facilities by way of banking or insurance or for grants, loans, credit or finance;*
> >
> > *facilities for education, instruction or training;*
> >
> > *facilities for entertainment, recreation or refreshment;*
> >
> > *facilities for transport or travel;*
> >
> > *<u>the services of any</u> business, profession or trade or local or other <u>public authority</u>*." [emphasis added]

14. Although subsections (3) to (5) of section 5 set out certain exceptions and qualifications to the prohibition on discrimination contained in subsections (1) and (2), none of these provisions were said to be relevant to the present proceedings. The most fundamental issue which was joined was whether the administration and implementation of BIPA formed part of "*the services of* [a] *public authority*" within the scope of section 5(2) of the HRA. Another general provision which the Applicant prayed in aid in this regard was the following provision, enacted with effect from April 8, 1993 at the same time as the primacy provisions of section 30B:

> "31(1) *This Act applies—*

(a) to an act done by a person in the course of service of the Crown—

(i) in a civil capacity in respect of the Government of Bermuda; or
(ii) in a military capacity in Bermuda; or

(b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office,

as it applies to an act done by a private person.

(2)A reference in this Act to employment applies to—

(a) service of the Crown in a civil capacity in respect of the Government of Bermuda; or

(b) service of the Crown in a military capacity in Bermuda; or

(c) service on behalf of the Crown for purposes of a statutory body or purposes of a person holding a statutory office,

as it applies to employment by a private person; and for that purpose a reference express or implied to a contract of employment includes a reference to the terms of service.

(3)In this section, "statutory" means set up by or in pursuance of a statutory provision." [Emphasis added]

15. Finally, section 2 of the HRA defines both discrimination and the prohibited grounds of discrimination:

"*(2) For the purposes of this Act a person shall be deemed to discriminate against another person—*

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—

(i) of his race, place of origin, colour, or ethnic or national origins;
(ii) <u>of his</u> sex or <u>sexual orientation</u>;
(iii) <u>of his marital status</u>;
(iv) of his disability;
(v) of his family status;
(vi) [repealed by 2013 : 18 s. 2]
(vii) of his religion or beliefs or political opinions; or

(viii) of his criminal record, except where there are valid reasons relevant to the nature of the particular offence for which he is convicted that would justify the difference in treatment.

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—

(i) which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) *which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions of the person to whom it is applied; and*

(iii) *which operates to the detriment of that other person because he cannot comply with it.*"

16. The two prohibited grounds of discrimination engaged by the present application were sexual orientation and marital status. The two alternative forms of discrimination which section 2(2) prohibits are direct discrimination (a) and indirect discrimination (b). Direct discrimination entails 'directly' or explicitly treating someone unfavourably on a prohibited ground.

17. Indirect discrimination entails treatment which is not directly or explicitly unfavourable but which has a discriminatory effect, because members of the protected classes of person listed in section 2(2)(a) (i)-(viii) will generally be unable to comply with the impugned requirement(s). Indirect discrimination will only occur where the person imposing the requirements cannot justify them and the complainant himself is unable to comply with the discriminatory condition or requirement.

18. A starting assumption, based on a straightforward reading of the above statutory provisions as a whole is that the effect of section 30B(1) on the construction of the definition of discrimination in section 2(2) of the HRA, is that the prohibition on discriminating now embraces conduct by a person acting under the purported authority of any statute which does not expressly dis-apply the primacy of the HRA. However, the main controversy in the present case centred on whether or not section 30(B)(1) operated in this suggested manner in relation to the provisions of the BIPA.

Legal findings: overview of key Bermuda Immigration and Protection Act 1956 provisions

19. The Respondents raised the broad threshold question of whether the functions performed by the Minister under the BIPA constitute "services' for the purposes of section 5 of the HRA. If they did not, section 5 was not properly engaged at all by the present application. That question is primarily a question of construction of section 5 of the HRA in its wider statutory context.

20. The most important single threshold provision in the BIPA for present purposes is section 8, which provides as follows:

> "***Conflict with other laws***
> *8. (1)Except as otherwise expressly provided, wherever the provisions of this Act or of any statutory instrument in force thereunder are in conflict with any provision of any other Act or statutory instrument, the provisions of this Act or, as the case may be, of such statutory instrument in force thereunder, shall prevail.*
>
> *(2)Subject to subsection (1) nothing in this Act shall absolve any person from any liability that he may incur by virtue of any other Act or at common law.*"

21. Section 8 appears to have been part of the BIPA from at least the date of the 1989 Revision of Bermuda's laws. Section 8 is the mirror image of section 30B, providing that the BIPA takes precedence over any other conflicting laws, except "*as otherwise expressly provided*". This seemingly acknowledges that Parliament may subsequently choose to modify the effect of section 8 in other legislative contexts.

22. However, the key substantive provisions of the BIPA which were said to be discriminatory are the following key provisions. Section 25 confers special entry rights upon wives of Bermudians[2], while sections 27 and 27A flesh out these rights as regards wives and husbands respectively. Section 60, so far as is relevant for present purposes, provides:

> "*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*

[2] Section 25 provides: "(3)Section 27 and section 30 have effect respectively with respect to the special status, as respects entitlement to land in Bermuda, or to remain or reside therein, of wives and dependent children of persons who possess Bermudian status, and of wives and dependent children of special category persons" [Emphasis added].

(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 Minister.

(2)Notwithstanding anything in subsection (1), the entitlement conferred thereby upon a special category person to engage in gainful occupation without the specific permission of the Minister shall be restricted to an entitlement to engage only in such gainful occupation as is directly within the scope an ambit of the particular service, employment or calling by virtue of which he is for the time being a special category person.

(3)For the purposes of paragraph (c) of subsection (1), a person shall have spouse's employment rights—

(a) who is married to, or is the widow or widower of, a person possessing Bermudian status (a "Bermudian spouse"); and

(b) who is living as husband and wife with that person's Bermudian spouse, or, where that spouse died, so lived up to the time of the death; and

(c) *whose Bermudian spouse is ordinarily resident in Bermuda or, where that spouse died, was so resident up to the time of the death*..." [Emphasis added]

23. These provisions appear on their face to explicitly discriminate on grounds of marital status to the extent that unmarried partners of Bermudians have no right to obtain spouse's employment rights, irrespective of how stable and longstanding their relationships may be. They also appear on their face to indirectly discriminate on the grounds of sexual orientation in a distinctive and more extensive manner. To the extent that Bermuda law does not currently recognise same sex marriage it is legally impossible for same sex Bermudian and non-Bermudian partners to marry and avail themselves of the spouse's employment rights, as heterosexual couples might do.

24. The Respondents could not challenge the straightforward construction which the Applicant placed on these provisions with much conviction. Rather, primary reliance was sensibly placed on the threshold questions of whether the BIPA provisions were required to comply with the HRA at all. Mr Perinchief's initial oral submission that the impugned BIPA provisions were permitted by the Constitution seemed to me to be wholly unresponsive to the central complaint that they conflicted with the HRA.

25. Before addressing these important issues, it is necessary to consider the distinctive rules of construction which apply to interpreting human rights legislation.

Legal findings: distinctive rules governing the interpretation of human rights provisions

26. Mr Sanderson submitted that the HRA was well recognised as being quasi-constitutional in nature and its provisions should be interpreted broadly to give the fullest effect to the rights protected: Re A & B *-v- Director of Child and Family Services and Attorney-General* [2015] SC (Bda) 11 Civ (3 February 2015); *Marshall v Deputy `Governor* [2010] UKPC 9. The preamble to the HRA makes it clear that the purpose of the Act is to give domestic law effect to international human rights conventions and further protection for the rights protected by Chapter I of the Bermuda Constitution:

> "*WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom justice and peace in the World and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations:*
>
> *AND WHEREAS the European Convention on Human Rights applies to Bermuda:*
>
> *AND WHEREAS the Constitution of Bermuda enshrines the fundamental rights and freedoms of every person whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedom of others and for the public interest:*
>
> *AND WHEREAS these rights and freedoms have been confirmed by a number of enactments of the Legislature:*
>
> *AND WHEREAS it is expedient to make better provision to affirm these rights and freedoms and to protect the rights of all members of the Community…*"

27. The fundamental rights and freedoms provisions in Chapter 1 of the Bermuda Constitution are given primacy over ordinary legislation not by a constitutional primacy clause but by virtue of the fact that the Constitution is a UK Order-in-Council. The Colonial Laws Validity Act 1865 provides that colonial laws are void to the extent of their repugnancy to laws of the Imperial Parliament extending to the colony. The HRA contains its own primacy clause (section 30B) and, in addition, expressly empowers this Court to effectively strike down legislation which is inconsistent with the HRA. This is analogous to the Court's power under section 15 of the Bermuda Constitution to strike down legislation which is inconsistent with the fundamental rights and freedoms provisions of the Constitution. In *Grape Bay Ltd. v Attorney General* [1997] Bda LR 59 , Meerabux J stated:

> "*It is not in dispute this Court is vested with full jurisdiction to make a declaration as to the alleged contravention of constitutional guarantees stipulated by sections 1 and sections 2 to 13 of the Constitution. The resulting legal position, therefore, is that the legislative power of the Legislature of*

Bermuda 'as in the case of all countries with written constitutions must be exercised in accordance with the terms of the Constitution from which the power derives'. Per Lord Pearce when delivering the advice of the Privy Council in Liyanage v R [1966] 1 All E.R. 60 at 67 ."

28. Thus while the rights protected by the HRA do not enjoy quite as elevated a status as the fundamental rights and freedoms provisions of the Constitution, Parliament has clearly conferred on this statute quasi-constitutional status. Accordingly, the guidance famously given by the Judicial Committee of the Privy Council in *Minister of Home Affairs-v-Fisher*[1980] AC 319 can, perhaps in very slightly diluted form, direct the way human rights protected by the HRA are construed. Lord Wilberforce (at page 338) crucially stated as follows:

> "*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. <u>These antecedents</u>, and the form of Chapter I itself, <u>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</u>…*" [Emphasis added]

29. Bennion[3]cites with approval the following statement by Vancise JA in *Canadian Odeon Theatres Ltd-v-Saskatchewan Human Rights Commission and Huck* [1985] 3WWR 717 at 735, which I adopt:

> "*…a statute which guarantees fundamental rights and freedoms and which prohibits discrimination to ensure the obtainment of human dignity should be given the widest interpretation possible.*"

Legal findings: does section 5 of the Human Rights Act apply to the sphere of Immigration law at all?

<u>Section 5 in its statutory context</u>

30. It is important to distinguish the narrow question of whether section 5 applies to the Immigration context from the wider question of whether the Act generally applies to

[3] '*Statutory Interpretation*', 5th edition, at page 518.

the Crown including the Ministry responsible for Immigration matters, even though the two questions are closely connected.

31. There is no doubt that that the HRA in general terms applies to the Crown. This is confirmed by section 31 which provides:

> "(1)*This Act applies—*
>
> *(a) to an act done by a person in the course of service of the Crown—*
> *(i) in a civil capacity in respect of the Government of Bermuda; or*
> *(ii) in a military capacity in Bermuda; or*
>
> *(b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office,*
>
> *as it applies to an act done by a private person.*" [emphasis added]

32. The HRA (as of April 8, 1993) applies to acts done by Government Ministers and other public officers in the same way that it applies to acts done by private persons. This provision is fortified by section 29, which empowers this Court to declare provisions of other statutes to be "inoperative" to the extent that they are inconsistent with the HRA. In other words, the Act not only binds the Crown but, unless Parliament expressly legislates in terms which exclude the primacy of the HRA (conferred by section 30B as of April 8, 1993), the Crown cannot justify infringing the provisions of the Act by relying on legislative authority conferred by other statutes. All of these provisions were inserted into the HRA after section 5 (2), which subsection has been unchanged since at least 1989.

33. The first form of discrimination prohibited is discrimination in notices (section 3). Next sections 4 and 4A prohibits discrimination in the accommodation sphere. Section 5 prohibits discrimination in the provision of goods, services and facilities and section 6 prohibits discrimination by employers. Section 6B prohibits harassment of employees, section 7 prohibits discrimination by organizations, section 8 prohibits victimization of persons in connection with proceedings under the Act, section 8A prohibits racial incitement, section 9 prohibits sexual harassment and sections 10-12 deal with discriminatory covenants.

34. Looked at very broadly and without expressing any concluded view on the position in relation to other sections, there is no obvious basis for contending that particular Government functions are exempted from any of the various other prohibited forms of discrimination by sections in Part II of the HRA apart from section 5. So the wider context of the HRA as a whole is generally supportive of the starting assumption that the Crown in its various emanations is intended to be bound by the various prohibitions on discriminatory conduct.

35. Looked at somewhat more narrowly, the general scheme of Part II of the HRA which prohibits various forms of discrimination is for each section to articulate a general prohibition and expressly state exceptions or limitations to the general prohibitions. For example:

- subsection (2) of section 3 qualifies the general prohibition in subsection (1);
- subsections (2) and (4) of section 4 qualify the general prohibition in subsection (1);
- the proviso to subsection (1) section 4 qualifies the general prohibition in the body of the same subsection;
- subsections (3)-(5) of section 5 qualify the general prohibition in subsection (1);
- the provisos to subsections (1), (2) and (4) and subsections (6)-(9B) qualify the general prohibitions in section 6 subsections (1)-(5).

36. So looking at section 5 as part of the broader context of Part II of the HRA, as opposed to in the wider context the Act as a whole, the starting assumption would fairly be that any exceptions to the general prohibitory rule against discrimination would be explicitly spelt out.

The natural and ordinary meaning of the crucial words within the context of section 5

37. Section 5(2) provides as follows:

> "*(2) The facilities and services referred to in subsection (1) include, but are not limited to the following namely—*
>
> *access to and use of any place which members of the public are permitted to enter;*
>
> *accommodation in a hotel, a temporary boarding house or other similar establishment;*
>
> *facilities by way of banking or insurance or for grants, loans, credit or finance;*
>
> *facilities for education, instruction or training;*
>
> *facilities for entertainment, recreation or refreshment;*
>
> *facilities for transport or travel;*

> *the services of any business, profession or trade or local or other public authority*." [emphasis added]

38. Mr Perinchief, in the course of an interchange with the Bench, adopted the proposition that, applying the *eiusdem generis* rule and having regard to the preceding examples of facilities and services, it was impossible to sensibly construe "*services of any…public authority*" as encompassing the BIPA regime for regulating entering and working in Bermuda. At first blush, there appeared to be considerable force to that submission. However, on closer analysis that rule of construction does not neatly apply. Classically, the *eiusdem generis* rule entails construing general words at the end of a list of more specific terms with reference to the latter: Bennion, '*Statutory Interpretation*', 5th edition, sections 380-384. The crucial words here are far from general in character and are no less specific as the earlier examples of facilities or services to which the Act applies. However, does the wider principle, *noscitur a sociis* (it is recognised by its associates) apply?

39. This rule of construction is clearly potentially engaged. However, one has to remember Bennion's cautionary words (at page 1227):

> "*As always with an interpretative criterion, other considerations may displace the principle. For example the drafter may have specified certain terms not so as to give colour to a general phrase but to prevent any doubt as to whether they are included.*"

40. In my judgment, this is precisely what the draftsman was seeking to achieve by including the services "*of any… public authority*". Having regard to the breadth of that term (which not assigned a special definition for the purposes of the HRA), it is difficult to ascertain any coherent basis for construing section 6(2) as intending to include some public services but not others. According to the Interpretation Act 1951 section 3:

> "'*public authority' means any designated person or body of persons (whether corporate or unincorporate) required or authorized to discharge any public function—*
>
> *(i) under any Act; or*
>
> *(ii) under any Act of the Parliament of the United Kingdom which is expressed to have effect, or whose provisions are otherwise applied, in respect of Bermuda; or*
>
> *(iii)under any statutory instrument…*"

41. There is perhaps some room for doubt as to whether the function of the Immigration Department involves the delivery of services to which section 5 applies, but only if one (a) construes that section as a self-contained provision, and (b) ignores the wider context of both Part II of the Act and the Act as a whole. Statutory interpretation is a more refined process than simply looking at words in a statutory provision divorced from their wider statutory context. Fortunately, light has been shed on how the term

"services" in the human rights context should be construed by both local and overseas judicial authorities.

In re Amin [1983] 3 WLR 258(HL)

42. Mr Perinchief relied on the majority judgment of the House of Lords on almost identical statutory words in the Sex Discrimination Act 1975 in *In re Amin* [1983] 3 WLR 258. This was potentially high persuasive authority as the statutory provision under consideration was a provision on which section 5(2) of the HRA was substantially based. Section 29 of the Sex Discrimination Act 1975 (UK) provided as follows:

> "*(2) The following are examples of the facilities and services mentioned in subsection (1)—*
>
> *(a) Access to and use of any place which members of the public or a section of the public are permitted to enter;*
> *(b) Accommodation in a hotel, boarding house or other similar establishment;*
> *(c) Facilities by way of banking or insurance or for grants, loans, credit or finance;*
> *(d) Facilities for education;*
> *(e) Facilities for entertainment, recreation or refreshment;*
> *(f) Facilities for transport or travel;*
> *(g) The services of any profession or trade, or any local or other public authority*." [Emphasis added]

43. Although the primary basis for disposing of the appeal was an issue arising under the Immigration Act 1971, the majority also held that granting permission to enter the UK was not a service within section 29(2) of the 1975 UK Act. Lord Fraser (with whom Lords Keith and Brightman agreed) opined (at 268) as follows:

> "*My Lords, I accept that the examples in section 29(2) are not exhaustive, but they are, in my opinion, useful pointers to aid in the construction of subsection (1). Section 29 as a whole seems to me to apply to the direct provision of facilities or services, and not to the mere grant of permission to use facilities. That is in accordance with the words of subsection (1), and it is reinforced by some of the examples in subsection (2). Example (a) is 'access to and use of any place' and the words that I have emphasised indicate that the paragraph contemplates actual provision of facilities which the person will use. Example (d) refers, in my view, to the actual provision of schools and other facilities for education, but not to the mere grant of an entry certificate or a special voucher to enable a student to enter the United Kingdom in order to study here. Example (g) seems to me to be contemplating things such as medical services, or library facilities, which can be directly provided by local or other public authorities.*"

44. This reasoning, viewed through 21st century lens, seems so restrictive and technical that it turns modern notions of interpreting human rights provisions generously on

their head. It seems designed to limit the scope of the sex discrimination provisions rather than to amplify them. It is difficult to extract the distinction between the direct and indirect supply of services from the relevant statutory language. It is also difficult to see why as a matter of policy Parliament should be deemed to have intended that both individuals and public and private entities who provide direct access to services should be prohibited from discriminating and those who provide indirect services should not.

45. Nor is the broader argument that marketplace services alone are covered by subsection (2) persuasive. In the Immigration context, there is no 'bright dividing line' between the services of say, entertaining passport applications, processing visa applications and generally regulating residence and employment on the part of non-Bermudians in Bermuda. As I acknowledged in the course of the hearing, it is true that it must in the public interest be permissible to discriminate (to the extent permitted by section 12(4)(b) of the Bermuda Constitution) when formulating legislative and administrative rules relating to the entry of persons to Bermuda from different countries (e.g. on health or public safety grounds). This does potentially support the argument that if the draftsman has actually contemplated the application of section 5 to Immigration services, some express qualifications would have been made. This factor is not, in my judgment, dispositive for two principal reasons:

    (a) to the extent that section 12(4)(b) of the Constitution is viewed as preserving the 'right' to discriminate in relation to the entry to Bermuda of person who do not belong to Bermuda (as Mr Perinchief suggested), the local Legislature is arguably not competent to derogate from such 'rights' through ordinary legislation such as the HRA. Local legislation can expand constitutional rights but not derogate from them. Section 28 of the HRA provides:

        "*28.For the avoidance of doubt it is hereby declared that—*

            (a) *the provisions of this Act are in addition to and not in derogation of Part I of the Constitution*…"; and

    (b)in any event, the present application is grounded in a complaint that the relevant BIPA provisions discriminate against Bermudians, so no need to formally consider the implications of section 5 of the HRA for place of origin discrimination complaints made by persons who do not belong to Bermuda arises.

46. Mr Sanderson invited the Court to be guided by the dissenting judgment of Lord Scarman (with whom Lord Brandon agreed) in *Amin*. He suggested that the following passages (at 275-276) were more in touch with the current times in terms of interpreting human rights provisions liberally:

"*Entry into the United Kingdom for study, a visit, or settlement is certainly a facility which many value and seek to obtain. And it is one which the Secretary*

of State has it in his power under the Immigration Act to provide: section 3(2) of that Act. The special voucher scheme which he has introduced does provide to some this very valuable facility, namely the opportunity to settle in this country.

Upon the literal meaning of the language of section 29(1), I would, therefore, construe the subsection as covering the special voucher scheme provided by the Secretary of State.

It is, however, said that the kind of facilities within the meaning of the subsection are essentially 'market-place activities' or activities akin to the provision of goods and services, but not to the grant of leave to enter under the Immigration Act. Reliance is placed upon subsection (2) as an indication that this was the legislative intention of the section and upon the decision of the Court of Appeal which interpreted the section in this way in Kassam's case.

In Kassam's case, Stephenson L.J. found the submission, which is now made to the House in this case, namely that in giving leave to immigrants to enter the country and to remain here the Secretary of State provides a facility to a section of the public, so plausible that he was tempted to accede to it: loc.cit. 1042 E. I agree with him so far. I have yielded to the temptation, if that is a fair description of selecting a sensible interpretation of a statutory provision. He, however, did not. He appears to have accepted the submission that section 29 was concerned with 'market-place activities'. If he did not restrict the section to the full extent of that submission, he certainly took the view, which was also expressed by Ackner L.J. and concurred in by Sir David Cairns, that the section applies only to facilities which are akin to the provision of goods and services. Ackner L.J. held that 'facilities' because of its juxtaposition to goods and services must not be given a wholly unrestricted meaning but must be so confined.

I reject this reasoning. I derive no assistance from subsection (2) in construing subsection (1) of section 29. I can find no trace of this House accepting any such assistance when in Race Relations Board v. Applin [1975] A.C. 259 (the "foster-parent" case) this House had to consider the directly comparable

provision in section 2(1) and (2) of the Race Relations Act 1968. Section 29(2) does no more than give examples of facilities and services. It is certainly not intended to be exhaustive. If some of its examples are 'market-place activities' or facilities akin to the provision of goods and services, others are not: I refer, in particular, to examples (a), (d), and (g). And, if the subsection cannot, as I think it cannot, be relied on as a guide to the construction of subsection (1), one is left only with Ackner L.J.'s point as to the juxtaposition of goods, facilities and services in subsection (1). This is too slight an indication to stand up to the undoubted intention of Parliament that the Act is to bind the Crown." [Emphasis added]

47. This reasoning is more consonant with a modern approach to interpreting statutory human rights provisions. Lord Scarman's approach has even greater force in the context of construing section 5(2) of the HRA, which provision not only binds the Crown (as did the UK Sex Discrimination Act 1975), but also:

    (a) has primacy over other legislation;

    (b) empowers this Court to declare conflicting statutory provisions to be inoperative; and

    (c) forms part of a wider statutory human rights code in which each prohibited form of discrimination is drafted in broad terms and made subject to explicit exceptions or 'carve-out' provisions.

48. These three distinctive factors which are applicable to section 5(2) of the HRA, but which were not applicable to the statutory provision considered by the House of Lords in *Amin*, are potent indicators of a legislative intent to give the fullest possible effect to the human rights protected. Mr Sanderson aptly cited the observation of Lord Steyn in *Fisher-v-Minister of Public Safety and Immigration* [1998] AC 673 at 686 on the fluid nature of public as contrasted with private law, with the result that "[a] *dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow.*" I decline to follow the *Amin* majority decision in construing section 5(2) of the HRA, and prefer the broader approach to construction adopted by Lord Scarman in his dissenting judgment in that case.

Canada (Attorney-General)-v-Davis 2013 FC 40

49. The Applicant further relied upon *Canada (Attorney-General)-v-Davis* 2013 FC 40. This was a first instance Canadian Federal Court decision which dealt with a very similar point of construction. The question was whether the Canadian Border Service

Agency ("CBSA") provided services for the purposes of section 5 of the Canadian Human Rights Act. The Canadian Act prohibited discrimination "*in the provision of goods, services, facilities or accommodation customarily available to the general public*". MacTavish J accepted that previous Court of Appeal authority had decided that purely enforcement activities under the Food and Drug Act did not constitute "services" for Canadian Human Rights Act purposes. However, she further opined as follows:

(a) "*[39] In this case, Ms. Davis presented herself at a Canadian POE. She was indeed seeking "something of benefit" to her: namely her re-admission to Canada. It was in this context that she came into contact with CBSA officers, and the events that ensued took place "in the context of a public relationship", as contemplated by Watkin*";

(b) "*[45] This is not to say that everything that the CBSA does will necessarily constitute a service customarily available to the general public within the meaning of section 5 of the CHRA. There may well be enforcement activities carried out by the Agency that would not meet the test for "services" established by the Federal Court of Appeal in Watkin. It is, however, neither necessary nor appropriate to try to identify those activities in this case. Each situation giving rise to a human rights complaint will have to be examined in light of its own particular circumstances in order to determine whether the specific activities in issue constitute "services" for the purposes of section 5 of the Act.* "

50. Mr Perinchief for the Minister submitted that the latter finding was not a very broad one. It leaves open the possibility that certain types of enforcement action would not constitute "services". That qualification has no limiting effect on the present analysis because enforcement action is not potentially raised by the legal and factual matrix upon which the Applicant in the present case relies. Here, the individuals on whose behalf the Applicant notionally seeks relief are seeking to access something of benefit to them. Namely, entry to Bermuda under Immigration laws which are applied to them (in relation to their same-sex non-Bermudian partners) in a non-discriminatory manner.

51. Accordingly, I find *Canada (Attorney-General)-v-Davis* highly persuasive in that it confirms that the term "services" in a human rights statute should be broadly construed according to the natural and ordinary meaning of the words in their context. Regulating access on the part of foreigners to Canada was a service in that something of benefit was being offered to the public. The decision left open the possibility that purely enforcement action on the facts of individual cases might not be caught by the "services" concept.

52. This decision provides clear and strong support for interpreting section 5(2) of the HRA, a broadly similar provision to section 5 of the corresponding Canadian legislation, as embracing statutory provisions empowering Bermudian Immigration authorities to regulate who does or does not require work permit approval to seek employment in Bermuda.

A & B-v-Director of Child and Family Services [2014] SC (Bda) 11 Civ (3 February 2015)

53. Mr Sanderson also strongly relied upon an even more pertinent decision of this Court (Hellman J) to the effect that section 5(2) of the HRA applied to adoption services provided under the Adoption Act 2006. In *A & B-v-Director of Child and Family Services* [2014] SC (Bda) 11 Civ (3 February 2015), the applicants were a same sex couple who wished to jointly adopt a child in Bermuda. They could not meet the statutory requirement that a joint application be made by a married couple.

54. A & B complained that the relevant requirement in section 28 of the Adoption Act discriminated against them (a) directly, on the grounds of marital status, and (b) indirectly, on the grounds of sexual orientation. The applicants sought a declaration under section 29 of the HRA that the 2006 Act was inoperative insofar as it was inconsistent with the HRA. Hellman J granted a declaration that the word "marriage" in section 28(1) and (3) of the 2006 Act was inoperative with the result that any non-married couple (including same-sex couples) could make joint applications for adoption. This was a landmark decision in which the powerful legislative tool created by section 29 of the HRA in 1999 was judicially deployed for the first time. Mr Perinchief confirmed that the Crown had not appealed this decision and that he was accordingly bound to accept that it was correctly decided. However, he contended that it dealt with a different statutory context and was accordingly of limited assistance in the present case.

55. Looked at narrowly, it may be right that the context of a public authority providing adoption services is somewhat different to the Immigration Department context. But *A & B* serves as an interesting counterpoint to *In re Amin*, demonstrating that (a) the HRA wording found in section 5(2) is also derived from the UK Race Relations Act, not simply the Sex Discrimination Act, and (b) that the term "services" in the Race Relations Act context has been construed quite liberally. The following passages in Hellman J's judgment are instructive for present purposes:

    (a) "*16. 'Services' are not defined within the 1981 Act. However in Marshall v Deputy `Governor [2011] 1 LRC, PC, Lord Phillips, giving the judgment of the Board, accepted at para 15 that section 6 of the 1981 Act, which prohibits discrimination by employers, must be given an interpretation that is generous and purposive. By parity of reasoning the same approach would apply equally to the other provisions of the 1981 Act, including section 5*";

    (b) "*17. In Applin v Race Relations Board [1975] AC 259, the House of Lords held that the provision by a couple of private individuals of foster care facilities to children in local authority care was a service within the meaning of section 2 of the Race Relations Act 1968 ("the 1968 Act"): the section did not define the meaning of "services" but gave a non-exhaustive list of examples. Lord Morris observed at 274 E that the range and sweep of the examples was very wide*";

(c) *"20. Applying a generous and purposive approach to the construction of section 5 of the 1981 Act, I am satisfied that it prohibits discrimination in the provision of adoption services.*"

56. The first passage confirms that the Privy Council, considering section 6 of the HRA in an appeal from Bermuda, *Marshall-v-Deputy Governor* [2010] UKPC 9, has approved the general principle of adopting a broad approach to construing the rights created by this legislation. In this regard, Lord Phillips opined as follows:

> "*15. Mr Crow QC for the appellants submits that these provisions must be given an interpretation that is generous and purposive, drawing an analogy with cases that concern constitutional rights – see Minister of Home Affairs v Fisher [1980] AC 319; Reyes v The Queen [2002] UKPC 11; [2002] 2 AC 235 at para 26. This submission is supported by the approach recently taken to the HRA by Lord Neuberger of Abbotsbury, when giving the judgment of the Board in Thompson v Bermuda Dental Board [2008] UKPC 33 at para 29. The Board accepts this submission as, indeed, did Mr Rabinder Singh QC for the respondents. The Board considers, however, that Mr Singh was correct to submit that this approach to interpretation cannot go so far as to distort the meaning of the words of the legislation.*"

57. This citation reveals that similar sentiments were previously expressed by the Judicial Committee in *Thompson-v-Dental Board* [2008] UKPC 33. In that case, Lord Neuberger opined as follows:

> "*29. First, there is the purpose of the 1981 Act. The preamble, in express terms, goes much wider than race, which is all that was referred to in the preamble to the U.K. 1968 Act. That point is made equally, if not more, clearly by the various paragraphs of section 2(2)(a) of the 1981 Act. In interpreting a statute which is aimed at discrimination relatively generally, it cannot be appropriate to lean in favour of a narrow construction of an expression such as "national origins" (although their Lordships are not suggesting that an artificially wide construction is thereby warranted). In relation to the Ealing case, the Bermudian 1981 Act is plainly intended to have a much wider reach than the U.K. 1968 Act.*" [emphasis added]

58. These highly authoritative pronouncements about the approach to interpreting terms of general application in the HRA to my mind furnish strong support for construing the terms "*services*" in section 5(2) in a broad rather than a narrow fashion. And in my judgment construing the word as encompassing Immigration services, and potentially the services provided by any other public authority, involves no distortion of the statutory language and does not entail adopting an artificially wide meaning.

Conclusion: does section 5(2) include Immigration services?

59. Like Hellman J in the *A & B* case, "[a*]pplying a generous and purposive approach to the construction of section 5 of the 1981 Act, I am satisfied that it prohibits discrimination in the provision of* [Immigration] *services*". This conclusion is to my

mind fortified if one asks the following rhetorical questions. Is it conceivable that Parliament, in providing that the HRA should bind the Crown, that the HRA should enjoy primacy over other legislation and that the Court should be empowered to declare inoperative conflicting statutory provisions, did not intend all public authorities supplying services to the public to be obliged to do so in a non-discriminatory manner? Did Parliament intend the concept of what public services were embraced by section 5(2) to be subject to doubt and worked out on a case by case basis? Why did Parliament not expressly exclude certain public authorities from the ambit of section 5(2) to limit the breadth of the broad terms used, as was done in other instances within the scheme of the Act?

60. Mr Perinchief was, understandably, unable to posit any coherent and easy to apply test for determining what sort of public services supplied by public authorities fall within section 5(2) and which do not. To the extent that there is a general legal policy imperative to ensure that the law is predictable[4], adopting a generous and purposive view of what type of public service falls within section 5(2) is more likely to achieve this end.

61. Even if one applies the fine distinction apparently developed by the Canadian courts of distinguishing enforcement action by agencies with enforcement functions from the purview of services which must be human rights compliant, this test would not be met by the provisions of the BIPA which are under attack in the present case. This conclusion does not rule out the possibility that enforcement action taken under or in connection with the same statutory provisions might not be held in appropriate circumstances to be exempt from the requirement to be HRA compliant in section 5 (services) terms.

Findings: do the HRA's primacy provisions trump the BIPA's primacy provisions?

62. The argument that the BIPA primacy provisions trump the HRA primary provisions was the Respondents' last main stand in attempting to defeat the present application without seeking to prevail on the substantive merits. The submission was advanced without fortification by reference to authorities, whether judicial or academic, and relied on the bare words of the key BIPA statutory provision. However, the argument went to the root of this Court's jurisdiction to grant the relief sought under section 29 of the HRA.

63. The Applicant's response to this argument equally relied on the bare words of the relevant HRA provision, coupled with alternative reliance on the fact that the later HRA provision should in the event of any conflict be viewed as repealing the earlier BIPA provisions by implication.

64. I am bound to find that there is a clear conflict between the two primacy provisions, which I also considered briefly above, and which merit fuller attention at this stage. Firstly, the BIPA primacy provision, which appears to have been in force when the Laws of Bermuda were revised in 1989, provides as follows:

[4] Bennion, 5th edition, Section 266, pages 789-807.

"***Conflict with other laws***
8. (1)Except as otherwise expressly provided, wherever the provisions of this Act or of any statutory instrument in force thereunder are in conflict with any provision of any other Act or statutory instrument, the provisions of this Act or, as the case may be, of such statutory instrument in force thereunder, shall prevail.

(2)Subject to subsection (1) nothing in this Act shall absolve any person from any liability that he may incur by virtue of any other Act or at common law."

65. This provision, possibly the earliest such primacy provision enacted by way of local legislation, unambiguously provides that BIPA provisions will prevail over any other statutory provisions in the event of any conflict. The *caveat*, which contemplates that it may be "*otherwise expressly provided*", may be viewed as the draftsman doffing his hat at the doctrine of Parliamentary supremacy. It is explicitly acknowledged that subsequent legislation may later expressly override provisions of BIPA. In effect, it signals to future draftsman that clear language will be required to override the primacy for BIPA secured by section 8. Does section 30B of the HRA expressly override section 8 of BIPA? It provides:

"***Primacy of this Act***
30B (1)Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.

(2)Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."

66. It is difficult to fairly construe section 30B as expressly providing that the HRA is to have primacy over the BIPA because it does not say so in terms. The legislative intent to expressly modify earlier legislation generally is made plain; a two year transitional period was provided between January 1, 1993 and January 1, 1995. This was presumably to enable Parliament, if it wished, to amend other legislation to either:

(a) bring it into conformity with the HRA; or

(b) to expressly provide that the provisions of section 30B would not apply to such extent as might be specified.

67. So the Respondents had a two-year window between 1993 and 1995 to amend section 8 of the BIPA to expressly provide that it took precedence not just generally, but specifically notwithstanding section 30B of the HRA. That opportunity was scorned. It is impossible to read section 8 of the BIPA as intending to expressly override the HRA. Yet to my mind that is still not sufficient to justify viewing section 30B of the HRA as expressly overriding section 8 of the BIPA. The conflict between the two provisions as a matter of primary construction is irreconcilable. This conflict engages the following supplementary rule of construction, which is formulated by Bennion as follows:

"*Section 80. Implied amendment*

Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."

68. Applying this canon of construction to the conflict between BIPA section 8 and HRA section 30B, section 30B must properly be read as amending section 8 of the BIPA by implication to exclude the HRA from the class of other legislation which the BIPA takes primacy over. In other words, I accept the Applicant's central submission that the HRA takes primacy over the BIPA. This has the crucial result that this Court's jurisdiction under section 29 of the HRA to declare conflicting provisions of other legislation to be inoperative may potentially be deployed in relation to the impugned provisions of the BIPA.

Findings: is the Applicant entitled to a declaration that certain provisions of the BIPA are inoperative because they conflict with section 5 of the HRA?

The conflict defined

69. I have dealt with the two threshold jurisdictional questions of whether the BIPA provisions involve services so as to engage section 5 of the HRA and whether the HRA enjoys primacy over the BIPA in such detail because this reflects the way in which the present case was argued. The Applicant's Skeleton Argument advanced the substantive point in the following brief and conclusory manner:

"*5.1 The 1956 Act provides for spouses of Bermudians to be able to live and work in Bermuda, provided certain conditions are met. It makes no such provision for same sex partners of Bermudian. It is submitted that this is directly discriminatory on the basis of marital status, and indirectly discriminatory on the grounds of sexual orientation, for the same reasons as were held in A&B-v-Director of Child and Family Services. It is submitted that ss. 25 & 60 of the 1956 Act ought to be read so as to allow bona fide same sex partners of Bermudians to reside and work in Bermuda, subject to the same conditions that are imposed on spouses of Bermudians as to good character, the Bermudian partner's continued ordinary residence, etc.*"

70. Mr Sanderson fleshed out the bare bones of this submission in oral argument. Firstly, he referred to the provisions of section 25 of the BIPA, subsection (1) of which defines who may enter Bermuda and reside without the Minister's permission. Section 25 further provides as follows:

"*(3) Section 27 and section 30 have effect respectively with respect to the special status, as respects entitlement to land in Bermuda, or to remain or*

reside therein, of wives and dependent children of persons who possess Bermudian status, and of wives and dependent children of special category persons." [Emphasis added]

71. The complaint was that this section, and sections 27 and 27A which confer preferred residential rights on wives and husbands of Bermudians, discriminate directly against unmarried Bermudians directly (on marital status grounds) and indirectly against gay and lesbian Bermudians (on sexual orientation grounds). These provisions purported to authorise the Minister to regulate the entry into Bermuda of long-term foreign partners of Bermudians which discriminated against those Bermudians who were unmarried or in same sex relationships. The direct discrimination was self-evident and quite obvious. No or no coherent counter-argument was advanced on behalf of the Respondents. The fact that the statutory provisions said to be inoperative because they conflicted with the HRA could not be attacked as unconstitutional was entirely beside the point.

72. The indirect discrimination complaint required only marginally more analysis. Because same sex marriage was neither possible nor recognised under existing Bermudian law, the relevant statutory provisions discriminated against Bermudians in stable same-sex relationships in an indirect way. Because while a heterosexual Bermudian at least had the option of marrying his or her partner with a view to receiving the benefit of spousal rights, this option was not available to homosexual Bermudians in that foreign same-sex marriages were not recognised and local same-sex marriage was not legally possible. Section 2(2) of the HRA, it bears recalling, provides that a person commits indirect discrimination in the following way:

> "(b) *if he applies to that other person a condition which he applies or would apply equally to other persons generally but—*
>
> *(i)which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and*
>
> *(ii)which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions of the person to whom it is applied; and*
>
> *(iii)which operates to the detriment of that other person because he cannot comply with it.*"

73. It was not disputed that the percentage of Bermudians of a homosexual orientation who could comply with the marriage requirements of the relevant BIPA provisions was considerably smaller than those of a different sexual orientation. Nor was it disputed that the marriage requirement operated to the detriment of Bermudians in

stable same sex relationships analogous to marriage. No attempt was made to justify the differential treatment on other grounds.

74. The same reasoning was applied to section 60 of the BIPA, which provides so far as is essentially relevant for present purposes as follows:

> "*60(1) Without prejudice to anything in sections 61 to 68, no person—*
>
> *(e) other than a person who for the time being possesses Bermudian status; or*
>
> *(f) other than a person who for the time being is a special category person; or*
>
> *(g) other than a person who for the time being has spouse's employment rights; or*
>
> *(cc) other than a permanent resident; or*
>
> *(h) 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 Minister*…" [Emphasis added]

75. It was again submitted that unmarried Bermudians are clearly discriminated against (on marital status grounds) in that their non-Bermudian partners cannot acquire spouse's employment rights. Bermudians with same-sex non-Bermudian partners are indirectly discriminated against (on sexual orientation grounds) in that their foreign marriages are not recognised and local same-sex marriage is not legally possible. Again, no or no coherent countervailing arguments were advanced.

Findings on merits of discrimination case

76. Since the merits of the discrimination complaints were not seriously disputed, only the application of the HRA to the entry and employment sphere of operation of the BIPA, the Applicant's case can properly be accepted with only minimal analysis. Not only are the discrimination complaints clearly meritorious on the basis of a straightforward reading of the relevant statutory provisions. Judicial authority provides further support for the Applicant's case.

77. The most eminently persuasive authority is the English House of Lords decision of *Ghaidan-v-Godin-Mendoza* [2004] 2 AC 557. This concerned the application of section 3 of the Human Rights Act 1998 (UK), which (more weakly than section 29 of our own HRA) requires legislation to be given a Convention-compliant interpretation so far as is possible. The question there was whether the Rent Act's creation of a

statutory tenancy in favour of the surviving spouse of a tenant who died should be construed so as to extend to the same-sex partner of a deceased tenant. It was argued that literally read, the statutory provisions discriminated on the grounds of sexual orientation in breach of article 14 of the ECHR[5]. Although the first instance judge declined to modify the ordinary meaning of the statute, the Court of Appeal unanimously and the House of Lords by a strong majority (four to one) held that a modified interpretation was required to resolve the conflict between the Human Rights Act and the words of the statute literally read.

78. The House of Lords affirmed that the term "spouse" should be read as including the same-sex partner in an open relationship akin to that of husband and wife. It is clear from the dissenting judgment of Lord Millett (at paragraph 96 *et seq*) that the UK had yet to enact the Civil Partnerships Act; the Bill was at that time before Parliament. The English legal landscape when *Ghaidan* was decided more than 11 years ago was therefore essentially the same as it is in Bermuda today. There was no legal mechanism whereby same-sex partners can obtain official legal sanction for the stability of their relationships with a view to accessing the various legal benefits conferred by marriage. *Ghaidan* is persuasive for another legal reason. The prohibition of discrimination on the grounds of sexual orientation (introduced by way of amendment to section 2(2)(a)(ii) with effect from August 8, 2013) under the HRA may be viewed as creating rights broadly analogous to the rights protected by articles 8 and 14 of the ECHR. Mr Sanderson quite appropriately commended to the Court the following observations of Baroness Hale in *Ghaidan-v-Godin-Mendoza* [2004] 2 AC 557 at 604-605. They powerfully articulate the higher level general principles which underpin both the specific protections designed to prohibit discrimination on the particular grounds of sexual orientation and the important function performed by human rights protections generally in a democratic society:

> "131. *When this country legislated to ban both race and sex discrimination, there were some who thought such matters trivial, but of course they were not trivial to the people concerned. Still less trivial are the rights and freedoms set out in the European Convention. The state's duty under article 14, to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the Convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another.*
>
> *132. Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom: see Pretty v United Kingdom (2002) 35 EHRR 1, 37, para 65. Second, such treatment is damaging to society as a*

[5] This is a deliberately compressed description of the legal issues consciously translated into Bermudian legal terms. The actual analysis entailed an interaction between the right to family life (article 8) and the right to enjoy that right without discrimination on any grounds (article 14). ECHR case law establishes that sexual orientation is an impermissible ground of discrimination in relation to the enjoyment of the fundamental rights protected by the Convention.

whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not." [emphasis added]

79. These principles, articulated in a very similar legal context to our own[6], reflect the position Bermudian courts should adopt in the context of the application and development of Bermudian law. Baroness Hale's eloquent judicial observations echo no less stirring statements made by Lois Browne-Evans MP (as she then was)10 years earlier in our own House of Assembly speaking in a nonpartisan capacity on a conscience vote in support of ending criminal prohibitions on consensual sexual acts between adult men in private:

> "*…Human rights, they are for all people... We must realize that every human being, however, formed, shaped or colour or whatever sexual origin or sexual preference has the right to the same rights and privileges as anyone of us...*"[7]

80. These high-flown principles have particular resonance in the judicial domain as they speak to the same fundamental values which underpin the judicial function. The Judicial Oath set out in the First Schedule to the Bermuda Constitution states as follows:

> "*I,....., do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of ..... and will do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill will. So help me God.*" [Emphasis added]

81. Against this background, the broad approach of Hellman J in *A & B-v-Director of Child and Family Services* [2014] SC (Bda) 11 Civ (3 February 2015) is highly persuasive and I fully endorse it. He explained an important conceptual distinction between the ECHR regime and our own HRA regime in the following way:

> "*13. Where direct discrimination is alleged, ie discrimination contrary to section 2(2)(a) of the 1981 Act, the court is required to engage in a factual*

[6] I do not ignore an important sociological distinction, which is immaterial for present purposes, namely Bermuda's history of institutionalised racial discrimination against the ethnic majority population.
[7] Speech during the House of Assembly debate on Private Member's Bill introduced by Dr. John Stubbs, May 13, 1994.

inquiry as to whether discrimination on a prohibited ground has taken place. If it has, then that is an end of the matter: the discrimination was unlawful.

14. However, where indirect discrimination is alleged, ie discrimination contrary to section 2(2)(b) of the 1981 Act, the court is required to undertake a more complex inquiry. This includes consideration of whether the allegedly discriminatory condition was justifiable. If it was justifiable it will not be discriminatory."

82. In the present case, no attempt to justify the indirect discrimination has been made. I read the language of section 2(2)(b) ("*which he cannot show to be justifiable*") as imposing an onus on the respondent to an indirect discrimination complaint to justify the discrimination on rational grounds. I see no need to consider and reject a justification which has not been advanced by the Respondents in this case. The central finding in *A & B*, which I was invited to follow, was made in a parallel but similar statutory context to that under present consideration. A statutory provision conferred an entitlement on married couples which a same-sex couple were unable to obtain access to. Hellman J made the following pivotal finding:

> "*42. Pursuant to section 29 of the 1981 Act, I find that section 28 of the 2006 Act authorizes or requires direct discrimination against unmarried couples because of their marital status, and indirect discrimination against same-sex couples because of their sexual orientation. So as to remedy this situation, and again pursuant to section 29 of the 1981 Act, I declare the word "married" in subsections 28(1) and 28(3) of the 2006 Act to be inoperative.*"

83. Implicit in this finding is the assumption that, as was tacitly agreed in the present case, foreign same-sex marriages would not be recognised under existing Bermudian law.

84. A point which to my mind was not fully addressed in argument was the extent to which section 29 of the HRA, unlike section 3 of the Human Rights Act 1998 (UK), may be viewed discretionary rather than mandatory in nature. Section 3(1) of the UK 1998 Act, applied in the *Ghaidan* case upon which Mr Sanderson relied, provides as follows:

> "*(1) So far as it is possible to do, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*" [emphasis added]

85. However, section 4 of the UK 1998 Act also gives the UK courts the power to grant a "*declaration of incompatibility*". It is possible that the combined effect of the mentioned UK provisions is broadly the same as the powers conferred upon this Court by the following provision of the HRA:

> "*29. (1) In any proceedings before the Supreme Court under this Act or otherwise it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act*

unless such provision expressly declares that it operates notwithstanding this Act.

(2)The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions." [emphasis added]

86. It may very well be that for most practical purposes "may" in section 29(1) will mean "must". However, declaring statutory provisions to be inoperative is not a trifling matter and this Court will always be astute to avoid unforeseen consequences from a judicial "rewriting" of the offending legislative provisions.

87. Finally, Mr Sanderson referred the Court to a recent European Court of European Rights decision, *Oliari and others-v-Italy (Applications Nos. 18766/11 and 36030/11)*, Judgment dated July 21, 2015. This decision indirectly suggests that Hellman J was correct in *A & B* to decline to follow an earlier European Court of Human rights decision[8] which adopted a somewhat technical restrictive approach to a discrimination complaint founded on the grounds of marital status and sexual orientation.

88. In this most recent case Italy was found to have contravened the applicant's right to family life under article 8 of the ECHR by failing to establish a statutory mechanism by which same-sex unions could be legally recognised. The Court held:

> "*167. The court notes that the applicants in the present case, who are unable to marry, have been unable to have access to a specific legal framework (such as that for civil unions or registered partnerships) capable of providing them with the recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship*."

89. This decision provides further support for the Applicant's case in that the ECHR extends to Bermuda and there is a presumption, when interpreting legislation that Parliament did not intend to legislate inconsistently with international treaty obligations assumed by or on behalf of Bermuda. How will the Minister apply the present decision in practice and decide what same-sex relationships qualify for equal residential and employment rights presently available in connection with marriage? That is entirely for the Minister.

90. However, the Crown in right of Bermuda appears to be under a positive international law duty under article 8 of the ECHR to create some coherent legal framework for the recognition of same-sex relationships formed by Bermudians. The European Court of Human Rights made the following finding in *Oliari-v- Italy*:

> "*1. In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the*

[8] *Gas-v-France*(2014) 59 ECHRR 22.

Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."[9]

91. Accordingly, and subject to determining the precise scope of the Order, the Applicant is entitled in principle to a declaration that sections 25 and 60 should be inoperative to the extent that they purport to authorize the Respondent to contravene the HRA. It is not clear to what extent, if any, declaratory relief ought properly to be given in relation to sections 27 and 27A as well

The precise terms of the Order

92. The present application was based on the combined effect of direct marital status discrimination and indirect sexual orientation discrimination. Subject to hearing counsel, the appropriate declaration to which the Applicant is entitled is one in the following terms:

> *"Sections 25 [, 27, 27A] 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 stable relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses by the said sections 25 and 60 respectively*."

93. It may well be arguable that a similar declaration might be granted based on a complaint of marital status discrimination alone. However the merits of that discrete complaint as a standalone basis for obtaining section 29 relief was not addressed evidentially or by way of legal argument. Subject to hearing counsel, I would decline to grant a declaration in wider terms.

Findings: alternative legitimate expectation argument

94. The Applicant sought alternative relief based on the contention that, by virtue of the interaction between article 8 of the ECHR and the HRA, there was a substantive legitimate expectation that the Minister would adopt policies which afforded the unmarried couples generally and/or same-sex partners of Bermudians employment rights comparable to those enjoyed by foreign spouses of Bermudians.

95. In light of my findings in relation to the interpretation of the BIPA as read with the HRA, no need to fully explore this alternative head of relief properly arises. The legal merits of this limb of the Applicant's case were, in any event, less than clear if the existing policy framework is analysed on the premise that the existing statutory Immigration framework (ignoring the impact of the HRA) prevails.

96. The legitimate expectation argument is dismissed.

[9] At paragraph 192 the Court, noting that the law was evolving in this area, expressly rejected the further claim that the Convention required that same sex couples be afforded access to marriage.

Conclusion

97. The Applicant's claim for a declaration pursuant to section 29 of the HRA on the grounds that sections 25 and 60 of the BIPA are inoperative to the extent that they are directly discriminatory on marital status grounds and indirectly discriminatory on sexual orientation grounds was only seriously opposed on jurisdictional grounds. The merits of the discrimination arguments were not challenged in any coherent or convincing terms.

98. The Respondents' submission that no jurisdiction to grant the relief sought because the relevant BIPA provisions do not involve the provision of "services" which are caught by the prohibition on public authorities discriminating in the provision of services which is contained in section 5 of the HRA is rejected. The supplementary argument that the HRA does not have primacy over the BIPA is also rejected.

99. Subject to hearing counsel on the precise terms of the final Order to be drawn up to give effect to the present Judgment and as to costs, the Applicant is entitled to a declaration under section 29 of the HRA substantially in the following terms:

> "*Sections 25 [, 27, 27A] 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 stable relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses by the said sections 25 and 60 respectively*."

Dated this 27th day of November, 2015 _____
IAN RC KAWALEY CJ