In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 176

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

CENTRE FOR JUSTICE — Applicant

-v-

THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS

(acting on his own behalf and on behalf of the Government of Bermuda, including the Premier and the Parliamentary Registrar)

Respondent

-and-

PRESERVE MARRIAGE LIMITED

1st Intervener

-and-

OUTBermuda

2nd Intervener

JUDGMENT

(in Court)

Judicial review-Referendum Act 2012-constiutionality of Referendum (Same Sex Relationships) Act 2016-legality of decision of Premier to hold referendum on same sex marriage and civil union questions-legality of decision of Parliamentary Registrar to designate churches involved in referendum campaign as polling rooms

Date of hearing: June 8-9, 2016

Date of Judgment: June 10, 2016

Mr. Alex Potts, Sedgwick Chudleigh Limited, for the Applicant ("CfJ")

Mr Delroy Duncan, Trott & Duncan Limited, for the 1st Intervener ("PML")

Mr Peter Sanderson, Wakefield Quin Limited, for the 2nd Intervener ("OB")

Background

1. The present application arises out of a collision of rights. The right of the courts to uphold the rule of law has clashed with the right of the Executive and legislative branches of Government to formulate and make laws. The recently protected right not to be discriminated against on the grounds of one's sexual orientation under the Human Rights Act 1981 has clashed with older but still comparatively new rights of freedom of conscience and freedom of expression which are protected by the Bermuda Constitution. In the interests of transparency, it is helpful to look at these rights in the local historical context which has tacitly informed the way in which I have both digested the various submissions advanced and decided the present application.

2. Nearly 400 years ago, on June 15, 1616, Bermuda's first Court of General Assize sat in the original St Peter's Church in St. George's in an era in which Church and State and the Executive and the Judiciary were all closely intertwined. Religious minorities were, in the decades which followed, frequently forced to leave Bermuda in the face of persecution. The Courts were regularly involved in criminal trials for prohibited forms of sexual conduct between consenting adults based on religious prohibitions. When Methodist Minister John Stephenson arrived in Bermuda at the turn of the 19th century with the avowed aim of preaching to "African blacks and captive Negroes", a special Act of Parliament was passed to criminalize such preaching. In June1801, the Reverend was convicted of contravening this Act and sentenced to six months imprisonment, despite his attorney James Christie Esten pleading freedom of conscience as a defence.

3. Freedom of conscience and freedom of expression and the right not to be discriminated on racial and other grounds only came to be fundamental, constitutionally protected rights with the enactment of the Bermuda Constitution Order (a United Kingdom Order-in-Council) in 1968. That Constitution created an independent judiciary based on the separation of powers and general governance structure which was explicitly secular, thus completing what had been an evolving separation of Church and State. The courts were empowered to declare that legislation which was inconsistent with the fundamental rights and freedoms in the Constitution

was invalid. The antecedents for these protections included the Universal Declaration on Human Rights (1948) and the European Convention on Human Rights and Fundamental Freedoms (1950) ("ECHR"). Those international instruments were inspired by the explicit goal of deterring the 'tyranny of the majority', based on the very recent and chilling experience that a regime in a 'sophisticated' modern Western democracy, led by a man who was originally democratically elected, had perpetrated large-scale acts of genocide against an ethnic and religious minority community. Similar impulses inspired the British Government, when granting Independence to its former colonies (starting with Nigeria in 1960) and when granting self-Government to its remaining colonies (such as The Bahamas in 1963 and Bermuda in 1968), to incorporate fundamental rights and freedoms provisions into constitutions enacted by way of United Kingdom Orders-in-Council.

4. Bermuda's Parliament extended the protection of human rights through the enactment of the Human Rights Act 1981. It did so by reinforcing protections against discrimination on the grounds of race and religion by prohibiting discrimination on other grounds (notably sex) that were not constitutionally protected. That Act was not only given primacy over all other legislation unless such other legislation said otherwise. It also empowered this Court to declare that legislation inconsistent with the Human Rights Act 1981 was invalid. In 2013, the Human Rights Act was amended to prohibit discrimination on the grounds of sexual orientation, giving partial effect to rights which had by then long been recognised as an international human right under article 8 of the European Convention on Human Rights and Fundamental Freedoms.

5. In *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 82 Civ (27 November 2015); [2015] Bda LR 106, I held that provisions of the Bermuda Immigration and Protection Act 1956 providing residential rights to foreign spouses of Bermudians (a) afforded different immigration treatment to foreign heterosexual spouses of Bermudians and foreign same sex partners of Bermudians, and that (b) this differential treatment constituted discrimination in the provision of goods and services contrary to section 5 of the HRA. I further declared that the relevant provisions of the Act which omitted any comparable rights for foreign same sex partners in stable relationships with Bermudians were inoperative so that the Minister was legally obliged to provide comparable residential rights to such persons on such administrative terms as he might decide. This decision took place against the backdrop of campaigns for same sex same marriage to be legalised in Bermuda and created the prospect that statutory provisions including, *inter alia*, the Matrimonial Causes Act 1974 incorporating the common law definition of marriage, might on similar grounds be held to be inoperative for inconsistency with the Human Rights Act prohibition of discrimination on the grounds of sexual orientation.

6. The Government could have appealed this decision. They did not. The Minister merely sought a year's suspension of my judgment, not because so long was required

to implement the narrow requirements of the *Bermuda Bred Company* decision. Rather because he ambitiously, and in human rights terms admirably, intended to embark upon a comprehensive legislative regime to recognise same sex relationships across the entire legal landscape. Conscious that the political landscape in which these issues were likely to be debated resembled a minefield, at a subsequent hearing I erred in favour of giving deference to the litigation rights of the applicant in that case and suspended the decision for only three months[1]. Again, the Minister could have appealed this decision but did not.

7. A passing comment in my main judgment in *Bermuda Bred*, made after explaining that how the judgment was to be implemented was entirely a matter for the Minister's decision, was to note that "*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*". As every lawyer knows, international obligations do not become part of Bermudian (or British) law until they are formally incorporated by local legislation. National governments generally enjoy considerable 'wiggle room' (or a generous margin of appreciation, in international law-speak) in terms of when and how they give effect to international obligations in domestic law. However, it was suggested in argument in the present case that my legally clear words were seized upon to suggest that the Government was under an immediate obligation as a matter of Bermudian law to introduce "*some coherent legal framework for the recognition of same-sex relationships formed by Bermudians*". Be that as it may, it was the political deadlock created by the Government's attempts to introduce legislation providing for same sex civil unions that resulted in the idea of a referendum to inform the way in which Government should legislate to give effect to its international human rights obligations.

8. The consensus that a core value underpinning good governance in a modern democracy was the existence of fundamental rights and freedoms which would protect minorities from abuse at the hands of an elected Executive and Legislature because fundamental rights could not be diluted or negotiated by the electorate emerged out of this historical context. This consensus took root in Bermudian soil. Accordingly, in 2012 when the Referendum Act 2012 Bill was introduced to the House by then Premier Ms Paula Cox, a lawyer and noted devotee of good governance principles, she straightforwardly explained that referendums were intended to resolve a variety of matters, excluding human rights issues. When the prospect of a referendum on same sex relationships was initially raised, Attorney-General Trevor Moniz, a lawyer with an equally acute appreciation of the nuances of our democratic system of Government, was quoted as stating that a referendum was inappropriate for dealing with such human rights issues.

[1] *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 88 Civ (7 December 2015); [2015] Bda LR 113.

9. These high but perhaps not widely understood principles were trampled on (at worst) or fudged (at best) in a scramble of political expediency and the Referendum (Same Sex Relationships) Act 2016 was passed by Parliament, apparently with bipartisan support. It took effect on March 28, 2016. On May 9, 2016, the Premier published a notice appointing June 23, 2016 for the holding a referendum ("the Referendum") on two questions:

> *(1) Are you I favour of same sex marriage in Bermuda?*
>
> (2) *Are you in favour of same sex civil unions in Bermuda?*

10. It was against this background that CfJ, describing itself as "*a non-governmental, non-profit and non-partisan organisation, established to promote and protect the rule of law, human rights and civil liberties in Bermuda*" applied to this Court on May 3, 2016 (before the Referendum date had been publically announced) for leave to issue judicial review proceedings. The primary relief sought was a declaration that the holding of the Referendum was unconstitutional and an injunction restraining the Government from proceeding with it.

11. An important footnote must be added to this background in the interests of fairness and completeness. By the time the present application was heard, the Premier had publically gone on record as supporting same sex civil unions. Thus although the principle of a referendum to decide human rights questions was subject to obvious and deserved criticism, the motivations of the Government in convening the Referendum appeared on their face to be to give effect to human rights and this Court's previous decisions rather than to suppress them.

The application for leave

12. The application for leave to seek judicial review was heard on May 23, 2016. Formally an ex parte hearing, the Applicant's counsel properly gave notice to the Attorney-General's Chambers. In granting leave, I expressed my provisional view that the most obvious legal concern disclosed by the evidence was the validity of the Parliamentary Registrar's notice designating as polling stations various churches who were actively involved in PML's campaign against both same sex marriage and civil unions. The Second Memari Affidavit asserted that six of the 12 churches designated as polling stations were on record as being involved in the vote no campaign of PML. It seemed obvious to me that it was an essential (if implicit) element of any modern democratic voting system that a polling station should be a neutral location not owned

by or identified with a party involved in the relevant electoral (or referendum) campaign.

The Interveners' applications

13. For reasons that I will give later, I grant the applications of PML and OB to intervene in the present proceedings. I do so unabashedly adopting a very generous view of the Court's discretion in the context of an expedited hearing on complicated issues in a somewhat unusual context in which each Intervener had very strong interests in the outcome of the present proceedings.

The relief sought by the Applicant

14. In its Notice of Application, the Applicant sought the following relief:

1. *A declaration that the Referendum (Same Sex Relationships) Act 2016, and any purported Referendum held thereunder, is unconstitutional and/or unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene certain fundamental rights and freedoms guaranteed under the Constitution, namely those rights provided for by sections 6(8), 8(1), 9(1), and/or 10(1) of the Constitution;*

2. *A declaration that the Referendum (Same Sex Relationships) Act 2016, and any purported Referendum held thereunder, is unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene certain fundamental rights and freedoms guaranteed under the Human Rights Act 1981, namely those rights provided for by sections 2(2) and/or 3(1) of the Human Rights Act 1981;*

3. *A declaration that the Referendum (Same Sex Relations) Act 2016, and any purported Referendum held thereunder, is unlawful and/or inoperative, in that the provisions and effect of the Referendum (Same Sex Relationships) Act 2016, when read with the Referendum Act 2012, contravene and/or are repugnant to certain fundamental rights at common law, including rights of natural justice, equality of treatment, and the rule of law;*

4. *A declaration that the Referendum (Same Sex Relations) Act 2016, and any purported Referendum held thereunder, is unlawful and /or legally void and/or legally inoperative, in that section 39 of the Referendum Act 2012, which prohibits the exercise of undue influence in the context of a Referendum, has already been breached and/or will inevitably be breached (unless the holding of such a purported Referendum is restrained);*

5. *A declaration that the decision of the Parliamentary Registrar to designate Holy Trinity Church Hall, St Patrick's Church Hall, First Church of God Hall, Seventh-Day Adventist Church Hall, Calvary Gospel Church Hall, and/or Allen Temple*

Church Hall as polling rooms for the holding of the proposed Referendum was procedurally unfair, substantively unfair, Wednesbury unreasonable, and/or contrary to the express or implied provisions of the Referendum Act 2012, and/or the Human Rights Act 1981, and/or the Constitution, with a consequential quashing of such decision by the Court;

6. *A permanent injunction prohibiting or restraining the Government of Bermuda, its servants or agents, from holding any purported Referendum , or taking any further steps or actions associated with holding any purported Referendum, of the sort contemplated by the Referendum (Same Sex Relationships) Act 2016*

Standing to seek relief

15. The Respondent submitted that CfJ lacked standing to seek declaratory relief in relation to an alleged breach of constitutional rights and/or a breach of the Human Rights Act 1981. This was essentially because (a) it was not a victim as required by both the Constitution and the Human Rights Act 1981, and (b) because the issues raised were premature and the conditions for granting declaratory relief were not met. For reasons which I will give later, I reject the lack of standing arguments.

Decision: application for declarations that the Referendum (Same Sex Relationships) Act 2016 and any referendum under it are void and/or inoperative for contravening the Constitution and/or the Human Rights Act and/or fundamental common law rights including the rule of law

16. The application for declarations in terms of paragraphs 1-3 of the Originating Notice of Motion is refused for reasons which I shall give more fully later. However, in broad summary, I have found that:

    (a) the principle that referendums ought not to be used to obtain mandates for human rights issues is not a legally enforceable principle but rather possesses the status of a constitutional convention. It also admits of exceptions (e.g. when a constitutional amendment is required to create new rights or modify existing ones);

    (b) the Referendum is not concerned with the existence or scope of rights which are protected by the Constitution and which Parliament is not competent to alter;

    (c) convening a Referendum which might result in a diminution or extinction of rights presently enjoyed under the Human Rights Act 1981 through a change in the law is legally permissible;

(d) the Referendum Act 2012 does not create supervisory role the courts over referendums. This calls for judicial restraint rather than judicial activism;

(e) decisions relating to the convening of referendums are matters falling within the province of the Executive and Legislative branches of Government; and

(f) the Court does possess the jurisdiction to ensure that the Referendum is conducted in a lawful manner. However, the Applicant failed to demonstrate that the Referendum could not be held in a manner which met the minimum requirements of the Constitution, the Referendum Act and/or the common law.

Decision: application for a declaration that breaches of the prohibition on undue influence in referendums will inevitably occur unless the Referendum is restrained

17. For reasons which I will more fully give later, this ground of complaint is also refused. In short, the constitutionally protected freedom of conscience and freedom of expression rights of the churches and their members which were represented before the Court by PML override all other countervailing concerns. Respected and reputable religious leaders should be presumed to be likely to adhere to the law. Preaching will only amount to undue influence in extreme and exceptional circumstances. This Court will make no attempt to curtail or dilute the exercise freedom of conscience and freedom of expression rights in connection with campaigning for the Referendum by giving guidance as to what may or may not amount to undue influence.

Decision: application for an order quashing the decision of the Parliamentary Registrar to designate six church halls as polling rooms on the grounds that, *inter alia*, it was unreasonable and/or contrary to the express and/or implied provisions of the Referendum Act 2012

18. For reasons which I shall give more fully later, I grant an Order quashing this decision. In brief, however, I find that this complaint was not primarily advanced at all on the grounds of undue influence as such. The evidence of the commendable steps taken by the Parliamentary Registrar to ensure that no intimidation or influence in more nuanced forms takes place is entirely beside the point.

19. I find that the statutory scheme by necessary implication must be read as requiring polling to take place at neutral locations to ensure an appearance of a fair electoral or referendum process. Had the Premier appointed an Ad Hoc Committee of the sort

contemplated by section 53 and described in Schedule 6 of the Schedule to the Referendum Act 2012, and had the entire process not been fast-tracked, this embarrassing and to my mind glaring error would not have been made. The Parliamentary Registrar would have had more time and the assistance of other objective and detached minds to carefully consider such matters.

20. In construing the statutory scheme and applying what some may well view as overly high standards of fairness, I have had I mind not just the civil and political rights of Bermudian voters of all persuasions to be able to participate in a credible referendum process. I have also approached this issue conceiving of Bermuda as leading international financial centre with an economy primarily dependent on international business. A domicile serving a clientele which relies upon the courts to uphold the highest standards of good governance and respect for the rule of law.

21. I am bound to find that the decision to designate the churches in question as polling rooms was unreasonable and/or irrational in the recognised public law sense. Bearing in mind the breaches of good referendum practice which have occurred, I exercise my discretion in favour of granting the relief sought mindful of the fact that the Advance Poll may be affected by this decision. In this regard, I take into account the fact that the Respondent was on notice of this potential finding as long ago as May 23, 2016. He has had an opportunity to cure the glaring defect yet chose , I regret to say, to contest this head of relief on hopeless grounds.

Decision: application for injunctive relief

22. It follows from the above findings that the application for an injunction restraining the conduct of the Referendum must be refused.

Costs

23. I shall hear counsel if necessary as to costs after I have delivered full Reasons for this decision.

Dated this 10th day of June 2016 _____
IAN RC KAWALEY CJ