IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2016: No. 312

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN THE MATTER OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

(1) AYO KIMATHI

(2) DAVID TUCKER

Applicants

-v-

(1) THE ATTORNEY-GENERAL FOR BERMUDA

(2) THE MINISTER OF HOME AFFAIRS

(3) THE EXECUTIVE OFFICER OF THE HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT
(in Court)

Judicial review-legality of decision by Minister to ban foreign lecturer from entering Bermuda on grounds of alleged 'hate speech'-legality of decision of Executive Officer of Human Rights Commission to refer complaint about 'hate speech' to a tribunal-whether Applicants' constitutional rights to freedom of expression and freedom of conscience infringed-Bermuda Immigration and Protection Act 1956 s 36(5)-Human Rights Act 1981 s. 8A(1)(b)-Bermuda Constitution ss. 8-9

Date of hearing: April 3-5, 2017
Date of Judgment: April 28, 2017

Mr. Eugene Johnston and Mrs. Dawn Johnston, J2 Chambers, for the Applicants
Mrs. Lauren Sadler-Best, Attorney-General's Chambers, for the 1st-2nd Respondents
Mr Allan Doughty and Ms Gretchen Tucker, Beesmont Law Limited, for the 3rd Respondent

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Introductory

1. The present application, despite its various narrower strands, raises one central legal question. Did the impugned statements made by the 1st Applicant, which were undoubtedly offensive to persons of European descent and homosexuals, arguably cross the boundaries of constitutionally protected free speech into the domain of legally unprotected 'hate speech'? It was common ground that the Bermudian Constitution protects freedom of expression sufficiently broadly to make it impermissible for the State to punish or sanction the expression of opinions which are merely controversial, offensive or even shocking.

2. Mr Johnston colourfully opened and closed his submissions in the present case with recitations which have surely not been heard in this Court before. He began with references to Dutty Boukman's role in the Haitian Revolution and Bermudian-owned Denmark Vesey's role in a South Carolina slave uprising. He ended with a quotation from Aimé Cesaire's '*Discourse on Colonialism*', having reminded me of my own observations in *TN Tatem PTA-v- Commissioner of Education* [2012] Bda LR 48:

> "*25. Rose-Marie Belle Antoine has suggested the need for an activist approach for judges in societies with histories similar to our own:*
>
> > "*Just as the study of the English common law must examine the historical evolution of that law, so too must the study of West Indian law appreciate the birth of our own law grounded in slavery and colonialism. The legal thought processes and institutions will only have meaning when the historical perspective is understood...Because of this historical function of the law...the Caribbean man and judge has an active role to play in re-interpreting the legal framework to build a more... just society.' The judge and legislator must perform the role of 'social engineer'.*"[1]

[11] '*Commonwealth Caribbean Law and Legal Systems*' (Cavendish: London/Sydney, 1999), pages 12, 18.

3. These allusions helped to set the wider contextual background for the comparatively narrow and focussed (yet complicated) legal questions which arise in the present case. The 2nd Applicant organized a lecture series called '*African history and culture come alive*' in 2015 and obtained work permits for the 1st Applicant and a Professor James Small, both African-Americans, to speak at the Liberty Theatre in Hamilton on September 26, 2015. Statements made by the 1st Applicant at the public meeting were characterised by a Cabinet Minister in a newspaper article published on September 28, 2015 as 'hate speech'.

4. In a decision memorialised on October 2, 2015, the 1st Respondent (the Hon Mr. Michael Fahy, "the Minister") placed the 1st Applicant on the 'stop list' with effect from September 28, 2015.

5. Also on September 28, 2015, Mr Harold Conyers filed a complaint ("the Complaint") with the Human Rights Commission ("the HRC") against the Applicants in relation to the same statements made at the September 26, 2015 meeting. The Complaint was formalized by the 3rd Respondent ("the EO") on December 17, 2015. The Applicants' counsel asserted that (a) the Complaint interfered with his clients' constitutional rights, and (b) that no arguable breach of the Human Rights Act 1981 ("the HRA") was disclosed on the face of the Complaint and declined to engage with the EO's mediation requests. By letter dated August 2, 2016, the EO notified the Applicants that the Complaint had been referred to the Chairman of the HRC for adjudication by a Tribunal on its merits.

6. By Notice of Application dated August 12, 2016, the Applicants sought leave to seek judicial review of the Minister's decision to place the 1st Applicant on the "stop list" pursuant to section 31(5) of the Bermuda Immigration and Protection Act 1956 ("BIPA") and the EO's decisions to investigate and refer the Complaint to a Tribunal. By Order dated August 29, 2016, I granted leave to seek judicial review and stayed the prosecution of the HRC Complaint. By Notice of Motion dated September 12, 2016, the Applicants formally sought the relief set out in their Notice of Application for Leave on the grounds set out in the same document.

The controversial statements in outline

7. The Court was supplied with a DVD video recording of the 1st Applicant's entire lecture. The most explicitly offensive remarks were few and far between and came mainly towards the end of the presentation. However, two broad conclusory theses were unequivocally advanced on the foundation of a sweeping and emotive multi-media presentation:

   (a) **The problem**: white people were today pushing a homosexual agenda, a genocidal agenda, which was a modern version of the violence perpetrated during the slave era to subjugate black men and women and strip them of their culture, identity and dignity. Images of effeminized black men were being widely circulated today just as in the slave era, strong rebellious men were humiliated to deter other black men from adopting truly masculine behaviour. All forms of sexual perversion, which included child abuse,

rape, bestiality and homosexuality, emanated from Europeans and could be concisely described as "*white sex*". Support for gay rights was being promoted internationally by countries such as the United States with a view to destroying black communities. Public figures who endorsed homosexuality either did not know what was going on, were being pressured to do so or were themselves involved in homosexual activity. Gambian President Jammeh (now former President) was held up as an example of a 'real' black leader by reference to a film clip in which he described homosexuality as "*the detriment of human existence.*" Former basketball star, Magic Johnson, was condemned and ridiculed for encouraging black parents to accept their gay children's alternative sexual orientation. Black male violence in communities today was attributed to unreported homosexual child abuse. Homosexuality was a "*deep-rooted cancer...you have to root it out*". Feminism, women discussing women's issues, was equivalent to lesbianism and lesbians were predators who pursued girls relentlessly. Black women should not be engaged in a war with black men. Black men and women should rather be united in the war against the true enemy, whites (and to some extent Arabs and Asians as well): "*...interracial dating, homosexuality, you put them together...you're not producing black children. Killing the race*";

(b) **The solution**: the "*Straight Black Pride Movement*" ("SBPM") was a way of creating a safe zone for people of African descent with shared African values who were willing to commit to (a) heterosexual relationships between black people, (b) only patronizing businesses owned by other straight black persons, (c) conducting oneself in a dignified manner and having nothing to do with homosexuals ("*we don't let freaks in our environment*"). The possibility of establishing a SBPM chapter in Bermuda was floated.

The Minister's response

8. The '*Royal Gazette*' newspaper published articles about the 1st Applicant's most offensive remarks on September 26, 28 and 29, 2015. In the second article, Cabinet Minister Ms. Patricia Gordon-Pamplin was quoted as saying that if the first article was accurate, "*the hate-mongering words attributed to the speaker are to be condemned*". The September 28, 2015 article linked the 1st Applicant to an organization called '*War on the Horizon*' and a website which states: "*In order for black people to survive the 21st century, we are going to have to kill a lot of whites-more than our Christian hearts can possibly count.*" That afternoon, as reported in the Royal Gazette the following day, the Minister stated:

> "*I have received credible information from persons in attendance at the event on Saturday and reviewed in great detail the articles written by The Royal Gazette about Mr Kimathi's speech, as well as those written by overseas publications on Mr Kimathi himself. As a result of our enquiries I am of the view that he his comments are highly offensive and that he is not the kind of person we want to visit Bermuda...The Bermuda Immigration and Protection*

Act 1956, Section 31(5) gives the minister responsible for Immigration the power to consider matters relating to any person who, not being a person who possesses Bermudian status, is outside of Bermuda and who has, while in Bermuda, conducted himself in an undesirable manner and should not be permitted to land in Bermuda in the future.

It is absolutely obvious that his comments made in relation to homosexuality and interracial partnerships among other topics that do not bear repeating are entirely offensive and propagate hatred and messages of intolerance and discrimination.

His comments are offensive and he did not have permission to sell the materials that he did. I have therefore taken the decision to add Mr Kimathi to the Bermuda stop list effective immediately."

9. This appeared on its face to be, as Mr. Johnston persuasively complained, a decision made with undue haste in circumstances where the 1st Applicant had seemingly already left Bermuda. It was only formalised in a short document dated October 1, 2015 in which the Chief Immigration Officer purported to request the Minister to place the 1st Applicant on the stop list and the Minister concurred, with effect from September 28, 2015, based on the following findings:

> *"Mr Ayo Kimathi arrived in Bermuda as a guest speaker for a forum held at the Liberty Theatre on Saturday, September 26, 2015. During this engagement, Mr Kimathi was responsible for making remarks regarding homosexuality and interracial partnership which were deemed to be offensive and propagated hatred, intolerance and discrimination. In addition, Mr Kimathi engaged in the sale of promotional materials without permission."*

10. In his Affidavit, in response to the present application, the Minister tacitly admits that he made the decision based on his own personal researches without obtaining a briefing paper from public officers or independent legal advice. Mr Johnston doubted whether he could have possibly had access to all of the information he claimed to have relied upon at the time when he made his decision. He also rightly pointed out that there was no reliable evidence, the allegation being disputed by the 1st Applicant, that promotional materials had been sold without permission. No or no serious attempt was made by the Minister to support this slender limb of the Decision.

11. Nevertheless, the Minister advanced the following cogent, retrospective, reasons for the central plank of his decision:

> *"4. I made such decision on, inter alia, the basis that at a minimum, specifically and generally, this was inflammatory and 'hate speech' not acceptable in a democratic society; particularly in a society like Bermuda where there is a cosmopolitan mix of peoples of diverse origins and races...*

8 My decision to place the First Applicant, Mr Ayo Kimathi, under the then prevailing circumstances and in light of the potential increased tensions in the community, was lawful, reasonable and proportionate."

12. What basis the Minister had for concerns "*under the then prevailing circumstances*" about "*potential increased tensions*" is not spelt out. However, exhibited to the 2nd Applicant's Affidavit sworn in support of his application is a September 29, 2015 Royal Gazette article '*Deep divisions exposed on same-sex marriage*'. This story reports on a meeting held the previous day attended by the then Minister responsible for Human Rights Ms. Pamplin-Gordon, which was described as an "*opening debate*". It is a matter of record that the same-sex marriage debate in Bermuda has been, to some extent at least, a culturally polarised and emotive one[2]. The impugned statements made by the 1st Applicant related to, or fed into, an ongoing local public debate about the rights of persons involved in same-sex relationships which was divided (to more than a minimal extent) along racial or cultural lines. He was not, however, directly involved in that debate.

The Executive Officer's Response

13. The EO deposed that she received a complaint on September 28, 2015 which was finalized in written form on December 17, 2015. The next day, she wrote to the Applicants affording them an opportunity to respond to the allegations made against them and informing them of various resolution options including conciliation and mediation. A chasing letter was sent on January 11, 2016 before the Applicants' attorneys responded by letter dated January 13, 2016. This response gave formal notice that constitutional proceedings would be commenced by the Applicants, and included the following central assertion:

> "*On a cursory reading of Conyers' complaint no violation of section 8A (1) of the Act may be found. And even if section 8A(1) was violated by Kimathi and/or Tucker, that would merely mean that that provision bore an interpretation so wide that that it would, by its very existence, contravene section 9 of the Constitution. It does not matter to our clients which of these things are true; but they believe these issues should be determined by the Supreme Court.*"

14. Undeterred, the EO requested substantive responses by letters dated January 27 and February12, 2016 before advising J2 Chambers by letter dated March 3, 2016

[2] In *Centre for Justice-v-Attorney-General* [2016] SC (Bda) 72 Civ (11 July 2016), I observed (at paragraph 88):

"*...the clash between advocates for equal rights for the LGBT community and the advocates for preserving traditional Christian values appeared to me to represent, in part at least, a collision between modern, cosmopolitan and predominantly Anglo-American and Western European values and traditional, local and predominantly African-Bermudian values.*"

that a decision to investigate the Complaint had been made. The next day the EO requested the Applicants to pursue conciliation to resolve the Complaint. On August 2, 2016 the EO wrote the Applicants' attorneys advising that:

> "*After an investigation of the complaint and based on all the facts obtained, I carefully considered the case and formed the opinion that the complaint appears to have merit. Since it appears that it is unlikely in the circumstances to settle the causes of the complaint, I have decided to refer the complaint to the Chair for a Human Rights Tribunal in accordance with Section 18.*"

15. On August 5, 2016, the EO confirmed by letter to the Applicants' attorneys that she had referred the Complaint to a Tribunal but that it was still possible to resolve the matter through mediation. These conciliatory pleas, which ironically reflected a traditionally African approach to dispute resolution, were studiously ignored in favour of a more adversarial and traditionally Anglo-American approach.

The Applicants' legal action

16. J2 Chambers sent letters before action to the Minister on behalf of the 1st Applicant on November 2, 2015 and on behalf of the 2nd Applicant on November 5, 2015. The legality of the Minister's decision was firmly defended in a letter from the Attorney-General's Chambers dated November 17, 2015 which it made it clear that the Minister would not revisit his stop list decision. The Notice of Application for Judicial Review dated August 12, 2016 sought carefully crafted forms of relief and were supported by cogently argued grounds.

Relief sought against the Minister

17. The Applicants sought the following relief in respect of the September 28, 2015 decision to place the 1st Applicant on the stop list ("the Decision"):

    (1) an order of certiorari quashing the Decision;

    (2) a declaration that that the Minister had no lawful authority to make the Decision under section 31(5) (because the power originally vested in the Governor was not capable of being delegated);

    (3) a declaration that the Decision was unlawful because its predominant purpose was to (a) prevent the public from being influenced by the 1st Applicant's views, (b) preventing proponents of homosexuality being offended by views similar to the 1st Applicant's views; favouring European culture over African culture;

(4) a declaration that the Decision was contrary to the common law principle of equality and the rule of law; alternatively

(5) declarations that the Decision constituted an unlawful contraventions of the Applicants' rights under:

(a) section 8(1) of the Constitution (freedom of conscience); and/or

(b) section 9(1) of the Constitution (freedom of expression); and/or

(c) section 12(2) (protection from discrimination on the grounds of, *inter alia*, political opinions).

Relief sought against the Executive Officer

18. The Applicants sought relief corresponding to that described in sub-paragraphs (1) and (5) of the preceding paragraph against the EO in respect of her decisions to investigate and refer the Complaint to a Tribunal.

Supporting evidence

19. The Applicants initially relied upon the 2nd Applicant's Affidavit which exhibited a draft unsworn Affidavit from the 1st Applicant. A copy of an Affidavit sworn by him in Maryland on March 29, 2017 was tendered to the Court in the course of the hearing. Looked at most broadly, the Affidavit demonstrates very clearly that the impugned statements made at the Liberty Theatre reflected the expression by the 1st Applicant of firmly held political beliefs. He states that:

- he founded 'War on the Horizon' (WOH) in 2009 to confront the threats that Africans face to their survival flowing principally from conflicts with Europeans (but Asiatic and Arab groups as well);

- amongst threats WOH identifies as facing Africans are military threats and "*the white sex assault on African people worldwide*" and "*interracial dating, sex, marriage, and mulatto baby-making*";

- the level of the threats faced by Africans if not addressed will result in them suffering the same fate as indigenous peoples of the Americas and Caribbean;

- WHO has joined an international movement for survival called the Straight Black Pride Movement ("SBPM");

- the 2nd Respondent asked him to come to Bermuda to talk about African culture and the threats Africans face. Nothing he said was inconsistent with his beliefs;

- the Minister's Decision was intended to make an example of the 1st Applicant to black Bermudians by showing "*how power can be wielded*

against them when they speak out of turn (meaning: against white interests). I was to be the example";

- Around the same time as his lecture, the Government hosted lectures about homosexuality which reflected the Western worldview and left the African worldview out of account. Homosexuality never existed in traditional Africa and Africans are entitled to be "homophobic";

- The decisions of the Minister and the HRC were unlawful and "*based on the same imperialistic thinking that led to Africans being enslaved and then colonised. Thinking that must be extricated from Bermuda for the Island to thrive*".

20. Mr Johnston also explained why Mr Kimathi, the 1st Applicant, uses the moniker '*The Irritated Genie*'. The name symbolized a spirit of resistance and was taken from a book of the same name on the Haitian Revolution[3].

21. The 2nd Applicant, Mr Tucker, also demonstrated that he had sincerely held beliefs about the importance of a knowledge and preservation of African culture and history for the well-being of people of African descent. He has brought various speakers to Bermuda to address these topics. He deposed that:

    - the "*relationship between Africans and Europeans has too often been predicated on the European erasing , or perverting, African cultural practices and the ideologies which underpin them...*";

    - "*I see the cultural endorsement of homosexuality, and extending the reach of homosexuality into the institution of marriage, as an imminent threat. And there are many who feel the same as I do*";

    - Professor James Small and the 1st Applicant were recommended as potential speakers by speakers that he had brought to Bermuda in March 2015. He does not micro-manage speakers and merely gives them a broad topic;

    - the purpose of the lecture series was "*to deliver pertinent-but sometimes bruising-information to African people*";

    - the 1st Applicant chose to "*speak about homosexuality as a threat to Africans the world over*" and his presentation was "*balanced and appropriate*" and well-received. Although the way the speech was reported was "*most problematic*", there was nothing in the first Royal Gazette story which amounted to "*hate speech*" in any event;

[3] 'Jacob H. Carruthers, '*The Irritated Genie: An Essay on the Haitian Revolution*'.

- the Minister "*made an example of Kimathi (and to a lesser degree me and anybody who is sympathetic to the views expressed by Kimathi) to further a clear political agenda*";

- the present proceedings were delayed because he lost his job in mid-December 2015, shortly after the Applicants' attorneys threatened the Government with legal action;

- the Complaint is ludicrous because all that the presentation did was to point out cultural differences between the races: "*To point out that pederasty is a particularity of European (Western) culture is not to incite violence or hatred, but to point out a fact. It cannot be right to impose any legal sanctions on a person who points out these things...* [the]*complaint is that Kimathi-and I share a similar view to Kimathi-is promoting a 'race first' policy...It is a Pan-African vision that Conyers rails against, and asks the HRC to deem as unlawfully discriminatory*".

Preliminary views on the primary purpose and function of the fundamental rights and freedoms provisions in the Bermuda Constitution and their application to the present case

22. On its face this application raised what appeared to me the most difficult questions about the limits of free speech in relation to public debate or 'political speech' which this Court has been confronted with in the post-1968 Constitution era. The remarkable certainty with which the various actors defended their starkly opposing positions betrayed an increasingly familiar trait in modern public debate: the ability to perceive one's own position with remarkable clarity while the faculty for empathetically apprehending the opposing perspective appears to be completely impaired. The Court must strain every sinew to effectively hear and understand all legal and cultural perspectives Reflecting extra-judicially on the modern role of the courts against their 400 year history in Bermuda, I have suggested the following mission statement:

> "*The modern judicial oath is based on wording which first appeared in statutory form in the Promissory Oaths Act 1868 (UK). It is straightforward to conclude that discharging the judicial oath in a modern democracy is giant leap forward from the days when the Judiciary would best be described by the following motif: "All men are certainly not equal and, accordingly, some men have more rights than others." It is far more complicated, on the other hand, to actually achieve the ideal of doing right to all manner of people within a legal system when all manner of people not only expect, but are constitutionally entitled to equality before the law.*

A judge 100 years ago operated within a society where only male property owners could vote, stand for election or serve as judges. It would take another 56 years for the first black judge to be appointed and 66 years for the first female judge to be appointed. The electorate was predominantly white male and exclusively landowning. It is difficult to imagine that persons of indeterminate citizenship status expected to have their views and interests given full voice by the Judiciary. Likewise, it is difficult to imagine that judges conceived of their mission as requiring them to recognise, or fully recognise, the perspectives and sensitivities of persons of indeterminate citizenship status. The Chief Justice in 1916 was not just likely to be socially connected to the political establishment. He was constitutionally connected as well, through serving as President of the Legislative Council (now the Senate). Doing right to all manner of people "after the laws and usages of Bermuda" required recognition of limited voting rights and policies of segregation. Bermuda's constitution 100 years ago was explicitly based on the assumption, having regard to economic demographics of the day, that the propertied white male's worldview held sway in the Judicial and other branches of Government...

Have pity, then, on the plight of a 21st century Bermudian judge who is required to do right to all manner of peoples, without regard to the various grounds on which discrimination is prohibited under both section 12(3) of the Bermuda Constitution and section 2(2)(a) of the Human Rights Act 1981:

- *Race;*
- *Place of origin;*
- *Political opinions;*
- *Colour or creed;*
- *Ethnic or national origins;*
- *Sex or sexual orientation;*
- *Marital status;*
- *Disability;*
- *Family status;*
- *Religion or beliefs;*
- *Criminal record;*
- *Mental health.*

...

And so while ordinary citizens seem increasingly driven towards viewing the world through the narrow lens of "people like them", it is central to the task of the modern Bermudian judge not simply to identify and understand the perspective of every litigant. The judge must also consciously identify and neutralise his or her own subconscious prejudices. To do otherwise is to make no serious attempt to fulfil the judicial oath."[4]

23. The important submission of Mr Johnston in his oral reply that the Court must construe the Bermudian Constitution with the Bermudian historical context in mind is well understood. Attacking modern manifestations of historic racial discrimination must be an important constitutional mission. But the other side of that coin is the need to suppress with equal vigour new manifestations of discrimination as well. The constitutional road to equality is not a one way street. My own starting hypothesis is that the scale of the challenges posed by historical racism in Bermuda, where persons of African descent are a clear majority, are far less than those faced in the United States where they are a significant but comparatively small minority. And the Court's starting assumption also is that the predominant aim of the fundamental rights provisions in the Constitution is not merely to promote pluralism and justice, for the ordinary many and the 'chosen' few. Those fundamental rights and freedoms, found in Chapter I of a Constitution which in subsequent sections establish democratic governance structures, constitute an umbrella under which the executive and legislative branches of Government must operate. Our fundamental rights and freedoms are to a significant extent designed to protect minorities from the 'dictatorship of the majority'.

24. All parties agreed that the European Convention on Human Rights ("ECHR") case law was, in a general sense, highly persuasive authority because of the legislative history of our own fundamental rights provisions. Mrs Sadler-Best was accordingly entitled to invite the Court to look critically at the character of the 1st Applicant's impugned statements by drawing parallels with Hitler's propaganda. That legislative history and its impact on how fundamental rights provisions must be interpreted was most authoritatively explained by the Judicial Committee of the Privy Council in the Bermudian case of *Minister of Home Affairs-v-Fisher* [1980] AC 319 at 328-329:

[4] '*400th Anniversary of Bermuda's Courts: The Judiciary's Modern Mission*', Centre for Justice Panel Discussion, December 7, 2016 at pages 2-4.

> *"Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 United Kingdom, but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (United Kingdom S.I. 1968 No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. 2. 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. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. 3. Section 11 of the Constitution forms part of Chapter I. It is thus to "have effect for the purpose of affording protection to the aforesaid rights and freedoms" subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice... the public interest.'"*

25. The Canadian Charter of Rights has long been recognised as being sufficiently similar to Chapter I of Bermuda's Constitution to enable Canadian case law, upon which Mr Doughty often relies, to be of considerable assistance to this Court. The Canadian Charter, like the ECHR, guarantees freedom of conscience and freedom of expression but expressly permits the State to limit those freedoms in the public interest. In stark contrast, the First Amendment to the United States Constitution broadly provides:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press..."*

26. The Supreme Court of the United States has developed limited exceptions, for instance in relation to obscenity and public communications likely to harm, children. In terms of incitement, it appears that only "fighting words" likely to incite immediate violence are unprotected. Moreover even violent advocacy is apparently protected by the right to free speech:

> *"In Brandenburg v. Ohio, the Supreme Court struck down an Ohio statute that criminalized advocating violent means to bring about social and economic change. The Court found that the statute failed to*

distinguish between advocacy, which is protected by the First Amendment, and incitements to "imminent lawless action," which are not protected. These cases illustrate that 'fighting words' require an immediate risk of a breach of peace in order to be proscribable. What speech is proscribable, therefore, appears highly dependent upon the context in which it arises."[5]

27. The United States' legal position has no direct relevance to the way in which the Bermudian constitutional provisions are interpreted. But they do form part of the context against which the facts of the present case must be viewed. The 1st Applicant is apparently a US citizen. There was no suggestion made to this Court that Mr Kimathi's most controversial views have attracted legal sanctions in the US. Bermuda has extremely close cultural ties with the United States and via the electronic media and cyberspace is often (popular discourse suggests); for many Bermudians at least, almost an extension of the United States. An illustration of how US-centric framing of cultural issues occasionally affects black majority Bermuda is the arguably odd local celebration (by some) of the African-American minority-inspired 'Black History Month'.

28. My starting assumption in favour of the Applicants therefore is that they were genuinely surprised, not by the fact that the controversial remarks attracted criticism, but by the formal legal response on the Ministerial and HRC fronts. Such a response would seemingly not have been provoked in the United States where similar statements are, by the Minister's own account, freely accessible on the 1st Applicant's website. My corresponding starting assumption in favour of the Respondents is, therefore, that they were genuinely shocked and outraged by the content and tone of the reported statements by the 1st Applicant, which posited a rather raw racially separatist agenda which appeared to the Respondents to lie well outside the limits of the recognised local standards for public debate.

Did the Minister possess the requisite statutory power?

29. The preliminary submission that the power to place persons on the stop list under section 31(5) of BIPA was not seriously arguable and can be dealt with shortly. It is clear that:

    (1) section 21 (1) of the Constitution provides that the Governor's powers shall generally be exercised in accordance with the advice of the Cabinet or a Minister;

    (2) section 21(2) provides that this general rule does not apply in relation to:

[5] Kathleen Ruane, '*Freedom of Speech and the Press: Exceptions to the First Amendment*', Congressional Research Service, September 8, 2014 at page 4. No US authorities were cited in argument, it being tacitly agreed that freedom of speech in the US was less restricted than under Bermudian law. This conclusion was explicitly supported by *R-v-Keegstra* (1990) 3 SCR 697 at 743 (per Dickson CJ) upon which the 3rd Respondent relied for other purposes.

> *"(a) any function relating to any business of the Government for which he is responsible under section 62 of this Constitution;*
>
> *(b)any function conferred upon him by this Constitution which is expressed to be exercisable by him in his discretion, or in accordance with the recommendation or advice of, or after consultation with, any person or authority other than the Cabinet; or*
>
> *(c)any function conferred upon him by any other law which is expressed to be exercisable by him in his discretion or which he is otherwise authorised by such law to exercise without obtaining the advice of the Cabinet*";

(3)section 10 of BIPA contemplates that any decisions made by the Governor will either be on the advice of Cabinet or in his discretion in relation to his special responsibilities; and

(4)section 31(5) empowers the Governor to place persons on the stop list without conferring the additional power to act in his discretion. Section 31(8) reserves to the Governor an overlapping power to exercise the powers under the section in his discretion in relation to his special reserve powers under section 62 of the Constitution;

(5) section 27(2) of the Interpretation Act 1951 empowers the Governor to delegate to a designated Minister any powers he is required to exercise in accordance with the advice of Cabinet; and

(6)the Governor has delegated the powers under section 31(1), (5) and (6) of BIP to the Minister pursuant to section 27(2) of the Interpretation Act 1951 on July 20, 1981 (B.R. 42/1981).

30. The complaint that the Governor and not the Minister was the sole repository of the power to place a person on the stop list must accordingly be rejected.

31. It is true that the Governor has a potentially overlapping power in relation to concerns falling within the scope of his areas of special responsibility under section 62 (1) of the Constitution (external affairs, defence, internal security and the Police), but section 62(2) permits even those powers to be delegated. No complaint was made that the grounds for the Decision fell within the ambit of section 62(1) of the Constitution and therefore beyond the powers of the Minister on that basis. Section 31(9) (the powers which have not been delegated) appears to contemplate that it is for the Governor on a case by case basis to determine whether he wishes to act under section 31 because his reserve powers are engaged:

> *"(9)Notwithstanding any provision to the contrary, where the Governor is of the opinion that the exercise of any power or the discharge of any duty conferred or imposed by or under this section relates to matters for which he is responsible under section 65 of the*

Constitution (which includes, amongst others, matters of external affairs and internal security) the Governor may exercise such power or discharge such duty acting in his discretion."

The statutory power to place persons on the stop list

32. The Decision was purportedly based on the lawful exercise of the following power conferred originally on the Governor (but subsequently delegated to "The Minister") by section 31 of BIPA:

> "(5) *The Governor may take into consideration the case of any person who, not being a person who possesses Bermudian status, is for the time being outside Bermuda; and where it appears to the Governor—*
>
> *(a) that any such person is a person who has, while in Bermuda, conducted himself in a manner which is undesirable; or*
>
> *(b) that any such person is a person whose landing in Bermuda appears undesirable in view of information or advice received from any official or other trusted source,*
>
> *the Governor may cause that person's name to be entered on a list (in this Act referred to as "the stop list") to be maintained by the Governor.*" [Emphasis added]

33. The effect of placing a person on the stop list under section 31 (5) is explained in part by section 31(7):

> "*(7) For the purposes of this section a person arriving in Bermuda shall be deemed to be an exceptionable person if he does not possess Bermudian status and if—*
>
> *...(g) if he is a person whose name is for the time being entered in the stop list maintained under subsection (5)...*"

34. On the face of the written record of the Decision, it is clear beyond serious argument that the Minister purportedly acted under section 31(5)(a). The crucial question is, the decision as to whether conduct has engaged the statutory provision or not being expressly a matter for the judgment of the Minister, what conduct potentially qualifies as "*undesirable*". The special meaning of this term is to be found in section 2 of the Act:

> "'*undesirable person' means a person who is, or who has been, so conducting himself (whether within or outside Bermuda) as to be, or to be likely to be, prejudicial to the proper maintenance of peace, good order, good government or public morals in Bermuda; and*

"undesirable", in relation to the conduct of any person, shall be construed accordingly." [Emphasis added]

35. I consider it appropriate to adopt this definition of 'undesirable' even though it is ancillary to the primary definition of a term ("undesirable person") which no longer appears in the Act. Mr Johnston belatedly placed this definition before the Court and neither he nor Mrs Sadler-Best dissented from my provisional view that the subsidiary definition survived the apparent repeal of the original governing term in the definition. Despite this apparent consensus, I have sought to reassure myself that there are principled grounds for reaching this conclusion. The conundrum is as follows:

    - it seems likely that the term "undesirable person" did at some time appear in the Act and has since been repealed;

    - it is not immediately obvious whether the definition was retained intentionally, for use in connection with the term "undesirable", which only appears in section 31(5) of BIPA;

    - it is accordingly initially unclear whether the parameters of the term "undesirable" are limited by the section 2 statutory definition or by the natural and ordinary meaning of the word "undesirable"; and

    - the only vaguely similar term to "undesirable person" in section 31 is "exceptionable person", a term which appears in the headnote to the section, in subsections (1), (4) and (6) and is separately defined in subsection (7) (and referred to in section 2). This makes it more improbable that the definition of "undesirable person" was accidentally retained given that it continued to have vitality in defining the meaning of "undesirable".

36. In my judgment, the definition of "undesirable" is linguistically and substantively severable from the definition of "undesirable person" which clearly has no subsisting legal effect. It is better for the liberty of persons potentially affected by section 31(5) that the scope of the intrusive power should be fettered rather than unfettered. The Cambridge Dictionary defines 'undesirable' as "*not wanted, approved of or popular*"[6], which is an extremely broad meaning. I adopt an interpretation which preserves the second limb of what amounts to a double-barrelled definition of two terms in section 2 of BIPA, rather than allowing the second limb to perish. In so doing, I find support in the following general principles of construction articulated by Lord Lowry in the House of Lords case of *Director of Public Prosecutions-v-Hutchinson; Smith* [1988] UKHL11 (at page 18):

[6] http://dictionary.cambridge.org.

> *"My Lords, the accepted view in the common law jurisdictions has been that, when construing legislation the validity of which is under challenge, the first duty of the court, in obedience to the principle that a law should, whenever possible, be interpreted ut res magis valeat quam pereat, is to see whether the impugned provision can reasonably bear a construction which renders it valid. Failing that, the court's duty, subject always to any relevant statutory provision such as the Australian section 15A, is to decide whether the whole of the challenged legislation or only part of it must be held invalid and ineffective. That problem has traditionally been resolved by applying first the textual, and then the substantial, severability test. If the legislation failed the first test, it was condemned in its entirety. If it passed that test, it had to face the next hurdle. This approach, in my opinion, has a great deal in its favour."*

37. The BIPA definition of "undesirable person" appears to be substantially similar to the definition of the same term in the legislation of at least some Commonwealth Caribbean jurisdictions. In *Myrie-v-Barbados* [2013] CCJ 3 (OJ), the Caribbean Court of Justice was concerned about restricting the right of entry in the context of a treaty which was designed to promote free movement rights. The central holding was that in this distinctive treaty context of enhanced foreign entry rights, the concept of "undesirable person" had to be given a more restrictive meaning than in the ordinary national immigration law context. The Court noted in passing that:

> *"[68] The concept of "undesirable persons" in Community law must be understood and construed against the background of Article 226(1)(a) and (b) RTC. Undesirability is meant to be concerned with such matters as the protection of public morals, the maintenance of public order and safety and the protection of life and health. In most, if not all, Member States the refusal or non-admittance of foreigners is primarily founded on national immigration legislation which usually allows national authorities broad discretionary powers."*

38. An example of such national legislation is afforded by Grenada through the Eastern Caribbean Court of Appeal deportation case of *Minister for Immigration-v-Nettlefield* [2003] ECSC J-0128-8 where the relevant statutory provision was cited by Redhead JA:

> *"[23] I now analyse the Immigration Act Cap.145. For the purpose of this analysis the relevant sections are:*
>
> *Section 2:*
> *'undesirable person' means a person who is or who has been conducting himself to be a danger to peace, good order, good government or public morals."*

39. Albert Redhead JA (with whom Sir Dennis Byron CJ and Ephraim Georges JA (Acting) concurred) concluded after considering a constitutional freedom of movement provision similar to section 11 of the Bermuda Constitution, the fact that the minister was entitled by the statute to act on confidential information from foreign sources and persuasive case law on the executive character of the deportation power:

> "*[41]...I therefore agree with Mr. Wildman's submission that the learned trial Judge cannot and is not in a position to make the determination whether a person is an undesirable person.*
>
> *[42] Secondly, the authorities to which I have referred clearly show that the Minister when he is making a deportation order he is not even performing a quasi-judicial function but an executive function. If that is so then of course the learned trial Judge cannot interfere with the exercise of that power unless it is shown that he exceeded the power given to him under the Act.*"

40. These Caribbean authorities, which were not cited in argument provide general support for the proposition that the definition of "undesirable person" found in section 2 of BIPA confers a scope of regulatory jurisdiction which is similar to that asserted by legislatures in other jurisdictions with similar fundamental rights and freedoms regimes. That jurisdiction is regarded in these cases as somewhat broad and quintessentially calling for the Executive branch of Government to make the decision on the merits as to whether or not the foreign national should be excluded. However, the question of construing the exclusionary power in a narrow way so as to avoid infringing conflicting constitutional rights did not arise in either *Myrie* or *Nettlefield.* So these decisions do not to my mind materially either:

    (a) undermine the Applicants' submission that the term undesirable person should be construed strictly so as to avoid infringing their constitutional rights; or

    (b) strengthen the Minister's contention that the State's power to regulate the entry of foreign nationals is a broad one and should be liberally construed.

41. I accordingly saw no need to invite supplementary submissions on these authorities which merely confirmed the arguments advanced by counsel.

42. The Crown's power to exclude aliens is, in a general sense a broad power as Mrs Sadler-Best submitted: *Re Bar-Am et al* [1986] Bda LR 14 (Court of Appeal) (a deportation case where section 31(5)(b) formed part of the background to the impugned decision); *Attorney-General for the Dominion of Canada-v-Cain* [1906] A.C. 542 (Privy Council). In the latter case, Lord Atkinson noted (at 547) that:

> *"It has already been decided in Musgrove v. Chun Teeong Toy*[7] *that the Government of the Colony of Victoria, by virtue of the powers with which it was invested to make laws for the peace, order and good government of the Colony, had authority to pass a law preventing aliens from entering the Colony of Victoria."*

43. The definition of undesirable conduct in BIPA (apart from adding "*public morals*") reflects the language of the *Musgrove* decision and the terms of section 34 of the Bermuda Constitution:

> "***Power to make laws***
> *34 Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Bermuda."*

44. However, and more significantly still for present purposes, the definition of "undesirable person" also reflects in a general way the language of section 9(2)(a) of the Constitution, which permits reasonably required restrictions to be placed upon free speech "*in the interests of defence, public safety, public order, public morality or public health*". On the facts of the present case, therefore, there was considerable overlap between the statutory conditions attached to the exercise of the stop list power and the constitutional prerequisites for interfering with free speech (and indeed freedom of conscience, section 8(5)(a)). In light of the statutory definition of undesirable conduct, no challenge could convincingly be made to the validity of section 31(5) on its face.

45. However Mr Johnston rightly submitted that, in the context of a challenge to the constitutionality of the application of the statute to the Applicants in all the circumstances of the present case, construing the constitutional rights themselves in a generous manner at least potentially meant construing the scope of the statutory powers strictly in accordance with the terms defining the scope of the statutory power. This submission was supported by reference to various cases on construing legislation in line with the presumption that Parliament does not intend to override fundamental or international treaty rights: *Wheeler-v-Leicester City Council* [1985] AC 1054; *Cashman-v-Parole Board* [2010] Bda LR 45 at paragraph 21; *R-v- Home Secretary, ex parte Simms* [2000] 2 AC 115; *R-v-Lyons* [2003] 2 AC 115.

[7] [1891] A.C. 272.

Was the predominant purpose of the Decision an unlawful one and/or contrary to the common law principle of equality and the rule of law and/or did the Minister and the EO discriminate against the Applicants on the grounds of their political beliefs?

46. The challenge based on the allegedly unlawful predominant purpose of the Decision was not seriously pursued at the hearing. It was not properly open to the Court to make the findings originally sought by the Applicants in the absence of cross-examination. The Applicants' evidence as to what they perceived the predominant motive for the Decision to be was essentially speculative. It was contradicted by the First Affidavit of Michael Fahy. Mrs Sadler-Best's arguments on this issue were irresistible. In her '*Submissions on behalf of the 1st-2nd Respondents*', it was asserted:

> "*20. There is no evidence, nor is there any basis on which to suppose that the purpose alleged by the Applicants formed a predominant or substantial part of Minister's Fahy's decision...*
>
> *22. It is further submitted that the Minister's decision in no way represents a preference for one group of persons over another. There is no clearer evidence than the fact that no action was taken in relation to Professor James Small who also presented on the same occasion and in keeping with the stated theme 'African History and Culture Come Alive. This theme was known to the Minister in advance, when Tucker sought permits for both Kimathi and Professor Small...Professor Small's focus is also African culture and concerns relating to those of African ancestry...*"

47. The application for the declaratory relief set out in paragraph 6 of the prayer in the Applicants' Notice of Application for leave to apply for judicial review is dismissed. This ground was closely linked to the complaint that the Minister and the EO discriminated against the Applicants contrary to section 12 of the Constitution on the grounds of their political beliefs, which complaint is summarily dismissed for similar reasons. There is no sufficient evidential support for a finding that the Applicants were treated differently to others in a comparable position.

48. For the avoidance of doubt the application for the relief set out in paragraph 7 of the prayer in the Notice of Application (the common law /rule of law point) which was not pursued is also refused.

Legal findings: is the 1st Applicant entitled to relief under the Bermuda Constitution despite his absence from Bermuda?

49. There being no serious attempt to impugn the validity of the Decision under traditional non-constitutional judicial review principles, the 1st to 2nd Respondents made an attempt to deliver a pre-emptive strike on the main base of the Applicants' case. The Minister contended that only the 1st Applicant could challenge the Decision and that he could not seek constitutional relief because he was not "in Bermuda". The Applicants responded that his present absence mattered not because:

    (a) the Constitution properly construed could be invoked by someone excluded from Bermuda;

    (b) the Decision was based on the 1st Applicant's conduct whilst in Bermuda; and

    (c) the 2nd Applicant had standing to complain that his rights to present further lectures by the 1st Applicant had been impermissibly interfered with.

50. Mrs Sadler-Best's standing challenge was based on very tenuous grounds. It relied on the fact that section 1 of the Constitution provides so far as is material as follows:

> "*1. Whereas <u>every person in Bermuda</u> is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following...*" [Emphasis added]

51. Firstly, this section is recognised as having the status of a preamble rather than as having substantive legislative effect: *Grape Bay Limited-v- The Attorney-General* [2000] 1 WLR 574 (JCPC, at paragraphs 23-24). However, it is in any event clear that the natural and ordinary meaning of the words "*every person in Bermuda*" means, depending on the context, either 'every person [while] in Bermuda' or 'every person [in relation to] Bermuda'. Both meanings apply to the facts of the present case.

52. The Decision unarguably was made predominantly by reference to statements made by the 1st Applicant in Bermuda and the effects the Minister determined they had. This is clear from the Minister's initial press statements and the formal record of the Decision. The Decision relates to the conduct of the 1st Applicant whilst he was in Bermuda. In my judgment if he has been legally penalised in an unconstitutional way in relation to his conduct in Bermuda, the fact that he was not in Bermuda either at the time of the impugned decision or at the time of the application for legal redress cannot affect his right of access to this Court.

53. However, more broadly still, I consider it self-evident without reference to authority that any person whose constitutional rights have arguably been infringed by Governmental action "in Bermuda' should be entitled to seek relief whether or not they were in Bermuda at any time said to be material. The confiscation of property located in Bermuda which was legally owned by a person resident abroad, for instance, must be subject to potential challenge under section 13 of the Bermuda Constitution without regard to where the property owner resides.

54. However, Mr Johnston produced highly persuasive authority for the proposition that foreign residents excluded from entering a country may test the extent to which the application of immigration laws has contravened their fundamental rights. The ability of the American applicant aggrieved by being refused entry to the United Kingdom to invoke Convention rights under the Human Rights 1998 (UK) was conceded by the Secretary of State in *R (Farrakhan)-v-Secretary of State for the Home Department* [2002] Q.B. 1391 (at paragraph 34). Subsequent authority suggests that the extra-territorial effect of article 10 is viewed as deriving from the words not present in our own section 9, which makes it clear that under the ECHR freedom of expression may be enjoyed "*regardless of frontiers*": *R (on the application of Naik)-v-Secretary of State for the Home Department* [2011] EWCA Civ 1546 at paragraphs 28, 31; *Cox-v-Turkey* (2012_ 55 E.H.R.R.13 at paragraph 31.

55. This distinction between article 10 and section 9 is not in my judgment significant in the immigration context and in relation to the particular facts of the present case. Even applying a narrow territorial approach to freedom of expression, the 1st Applicant's connection with Bermuda is sufficient to enable him to seek relief for an alleged breach of his section 9 rights. Mr Johnston made good this submission with reference to *Cox-v-Turkey* (2012) 55 E.H.R.R. 13, rightly arguing that in the present case the absence of the words "*regardless of frontiers*" in section 9 is immaterial.

56. Without deciding this further point, the scheme of the Constitution does not appear to me to be designed to deny persons who do not belong to Bermuda any freedom of movement rights at all (nor indeed any other fundamental rights). Section 11 confers freedom of movement rights in generous terms but permits the Executive and the Legislative branches of Government to restrict those rights more rigidly than in the case of persons who do belong to Bermuda. If some rights are conferred by section 11 on persons who do not belong to Bermuda, it makes no sense to assume that such persons can never invoke other fundamental rights at all.

57. Section 11 states in very broad terms that: "*(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Bermuda, the right to reside in any part thereof, the right to enter Bermuda...*" [emphasis added]. Section 11(2) permits restrictions to be placed upon the subsection (1) rights in various cases including:

> "*(d) for the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion therefrom of any such person*" [emphasis added].

58. The drafting of section 11 provides very arguable additional grounds for rejecting the submission that only persons resident in Bermuda can complain about the contravention of fundamental rights under the Constitution, even though (quite sensibly) no breach of section 11 was complained of in the present case.

59. Be that as it may I find that the 1st Applicant has standing to complain about the Decision because he has sufficient interest to complain about the legality of his being placed on the stop list based upon statements he made while on a lawful visit to Bermuda.

60. In these circumstances no need to decide the 2nd Applicant's standing to seek relief strictly arises. However, if I was required to decide the standing issue in his case, I would have found that he had standing to seek relief because, as Mr Johnston argued, the 2nd Applicant's freedom of expression rights are also engaged. The position is essentially the same as the UK resident family members complaining that their right to family life had been interfered with by the denial of entry of their foreign family members: *Abdulaziz, Cabales and Balkandali-v-United Kingdom* (1985) 7 EHRRR 471, cited in *R (Farrakhan)-v-Secretary of State for the Home Department* [2002] Q.B. 1391 (at paragraph 35).

Legal findings: the test for demarcating the boundary between protected and unprotected free speech under section 9 of the Bermuda Constitution

Introductory

61. Before considering the specific arguments advanced in argument, it is helpful to summarise the previous decisions of this Court on freedom of expression issues and to consider the relevant constitutional provisions.

62. Section 9 of the Constitution protects freedom of expression in the following terms. Firstly, the right is defined in a broad and unrestricted manner:

> "(1) *Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*"

63. Not forgetting the fact that this broad protection (like the counterpart protections under other fundamental rights provisions in Chapter I) is clearly only directed at protection against intervention by the State, the right is formulated in unconditional terms. Limitations however follow:

> "(2) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*

(a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or

(b)that imposes restrictions upon public officers or teachers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

64. It appeared to me to be common ground that that the onus of proof operated in the manner explained in *Richardson-v-Raynor (Police Sergeant)* [2011] Bda LR 52:

> *"13. The more pro-applicant approach to the burden of proof contended for here, again without the benefit of full argument on the point, has been implicitly followed in at least one subsequent application for relief under section 15 of the Constitution and is also now supported by modern Privy Council authority. In a case concerning section 8 and freedom of conscience, Attride-Stirling-v-Attorney General [1995] Bda LR 6; [1995] 1 LRC 234, it was essentially common ground that once an interference with the fundamental right protected by subsection (1) was established, it was for the Crown to show that the interference fell within a permitted (local or national) public interest exception. In the present case therefore, it being equally admitted that the prosecution of the Applicant for criminal libel prima facie interferes with his freedom of expression rights, the question is whether the evidence relied upon by the Respondent demonstrates that the interference is "reasonably required" within section 9(2). In any event, in a recent case upon which Mr. Attridge for the Applicant relied, the Judicial Committee of the Privy Council regarded it to be uncontroversial that it was for the respondent to show that any prima facie interference with an applicant's freedom of expression rights was reasonably required and, if such requirement was made out, it was for the applicant to show that the interference was not reasonably justified in a democratic society.*

In Worme-v- Commissioner of Police [2004] UKPC 8, the Judicial Committee stated:

> '41.*It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under section 10(1) of the Constitution. It is therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, then the burden shifts to the appellants to show, in terms of the last limb of section 10(2), that the provisions are not reasonably justifiable in a democratic society. See Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd [2001] 1 WLR 1123, 1132 per Lord Cooke of Thorndon.* "

65. It will usually be comparatively straightforward for the applicant to establish a case to answer on breach of his fundamental rights (here it was unconvincingly argued that section 9 was not engaged by the Decision at all, a point to which I will return below). Where constitutional relief is sought, the main battle almost invariably takes the form of assessing whether or not the interference complained of is reasonably required in one or other of permitted public interest grounds. How difficult it is for the State to discharge this onus of proof will always depend very largely on the facts of the particular case. It will rarely be easy to demonstrate that an interference which is reasonably required in the public interest is nevertheless not reasonably justifiable in a democratic society and therefore constitutionally impermissible. For an applicant to establish this limb will ordinarily require proof that the scope of the Executive action or legislation complained of goes beyond the demonstrable limits of internationally accepted democratic practice.

66. What has this Court previously held "*reasonably required*" means in the context of provisions such as section 9(2) of the Constitution? In the *Richardson* case, I held:

> "*71... This Court is bound to approach the question of whether the provisions of section 214(1) of the Criminal Code impermissibly interfere with freedom of expression applying the following test applied by the Judicial Committee of the Privy Council in Worme and another-v-The Commissioner of Police [2004] UKPC 8:*
>
> > *'[40] In de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80 the Board adopted the analysis of Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64, 75*

> *for determining whether a limitation on freedom of expression is arbitrary or excessive:*
>
> *'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'"*
>
> *72. This is a more nuanced approach to justifying incursions with fundamental rights than the European Court of Human Rights' requirement that the State should demonstrate a 'pressing social need' for the interference in question..."* [Emphasis added]

67. In the present case where the constitutional validity of section 31(5) itself is not in issue, the critical question which appears to arise for determination in relation to section 9(2)(a) of the Constitution is the following as regards the 1st-2nd Respondents. Was placing the 1st Applicant on the stop list "*no more than...necessary*" having regard to the relative importance of freedom of expression and the gravity of the public interest concerns relied upon to justify the Decision?

68. Mr Johnston reminded the Court of the following observations I made in *Centre for Justice-v-Attorney-General* [2016] SC (Bda) 72 Civ (11 July 2016):

> "*80...The fundamental right of freedom of expression (and the related right of freedom of conscience) requires courts to adopt a restrained rather an activist approach to finding potentially offensive expressions of opinions to be unlawful.*"

69. That statement remains valid in terms of general principle. The present application invites the Court to find that the Minister exercised statutory powers in a way which excessively interfered with freedom of expression. In considering whether the Decision was constitutionally valid, this Court should not adopt an overly generous view of what forms of public speech qualify for sanction under section 31(5) of BIPA so as to authorize what could amount (in the present case) to a form of State censorship.

The Applicants' submissions

70. The essence of Mr Johnston's submissions on what type of speech could be sanctioned under section 31(5) without infringing section 9 was set out in the Applicants' Skeleton Argument as follows:

> "*40. Section 9 is the Bermudian equivalent to article 10 of the European Convention on Human Right ("the Convention"). Its*

terms are broadly similar. Therefore, it is appropriate to look to Convention jurisprudence to determine the reach of section 9 of the Constitution. When this is done it is clear all forms of expression are protected, even hate speech: see Ergin v Turkey (2008) 47 ERR 36; and Gündüz v Turkey (2005) 41 EHRR 5. Put simply, even speech that shocks and disturbs, or is intemperate is protected by the Constitution. This seemed to be accepted...in...Centre for Justice v Attorney General [2016] SC (Bda) 72 Civ at §80. When possible, the court always adopts a restrictive interpretation of provisions which interfere with freedom of expression: see for example Dhooharika v Director of Public Prosecutions [2015] AC 875.

41. A related constitutional principle is that laws must have sufficient precision to avoid arbitrariness. The Kenyan case, Andare v Attorney General of Kenya [2016] eKLR, makes this point at §77 to §80.

42. Also important is the fact that the Constitution demands sufficiently strong justification for all interferences with expression, especially when the expression relates to matters in the public interest (Perinçek v Switzerland (2016) 63 EHRR 6). After all, freedom of expression has long been recognised as the cornerstone of all democracy: see, for example, Lehideux v France (2000) 30 EHRR 665....

43. When all the above principles are considered when interpreting section 31(5) of the 1956 Act, the Applicants say a number of things become obvious:

(a) Firstly the section is concerned with actions, not words. Put another way, what the section calls 'undesirable' is the conduct a foreigner engages in while in Bermuda or the conduct a foreigner engages in while in Bermuda or the conduct s/he may engage in if allowed to enter the country; and

(b) Secondly, the word 'undesirable 'must be given a meaning approaching 'against the public welfare' for the section to remain on the right side of the Constitution. On this interpretation it is not the words which make conduct 'undesirable, it is whether the person in question did something to incite violence or harm the public. That test can never be satisfied by simply uttering offensive words, More is needed; for instance, evidence that a person did, or, in the case of section 31(5)(b), will likely, incite violence. The emphasis can <u>never</u> be placed on words.

44. In this case, it is plain the Minister purported to exercise powers pursuant to section 31(5)(a) of the 1956 Act. As such he

had to point to some evidence that Kimathi incited violence while in Bermuda, or did some act which had an identifiable, negative impact on Bermuda. That evidence does not exist."

71. On the face of it, this suggested an extremely and improbably broad definition of free speech but one which, if correct, would mean the Applicants' complaints would clearly succeed.

The Minister's submissions

72. In response, the Minister advanced the following central argument:

> "*47. In the event that the Court decides that the Applicants are entitled to* [constitutional] *rights, it is submitted that hate speech, which is what we contend Kimathi's presentation represented, does not enjoy such protection-**Gunduz v Turkey** (2005) 41 E.H.H.R. 5 para 51...As the Court indicated in **Gunduz**, 'like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Art. 10 of the Convention.*"

73. Counsel indicated that she would adopt the more detailed submissions of the 3rd Respondent on this legal issue. Although those submissions were primarily directed towards justifying the HRC Complaint, Mr Doughty supported the Minister's position on the scope of hate speech in three ways. Firstly by referring to other international treaty obligations of Bermuda, secondly by seeking to clarify the true state of the ECHR position and thirdly by reference to Canadian case law on the same topic. In summary:

    (a) he referred the Court to the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), article 5 of which obliges States to legally prohibit "*all dissemination of ideas based on racial superiority or hatred, incitement to such acts against any race or group of persons of another ethnic origin*". Additionally, article 20(2) of the International Covenant on Civil and Political Rights was quoted: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*";

    (b) *Perinçek v Switzerland* (2016) 63 EHRR 6, relied upon by the Applicants for a different proposition, was (together with other cases[8]) cited as authority for the proposition that the impugned statements (denying an Armenian holocaust) were potentially validly sanctioned in pursuit of the aim of protecting the rights and freedoms of others which undermined "*the dignity of those persons and their*

[8] An important case which I will return to later was *Jersild-v-Denmark* (Application 15890/89) (1994) European Court of Human Rights.

descendants". The following paragraph of the Court's judgment was referenced by counsel. It apparently supported the proposition that unprotected hate speech might include incitements to violence but also embraced incitement to hatred and intolerance as well:

> "*206. Another factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance (see, among other authorities, Incal v. Turkey, 9 June 1998, § 50, Reports 1998-IV; Sürek (no. 1), cited above, § 62; Özgür Gündem v. Turkey, no. 23144/93, § 64, ECHR 2000-III; Gündüz v. Turkey, no. 35071/97, §§ 48 and 51, ECHR 2003-XI; Soulas and Others, cited above, §§ 39-41 and 43; Balsytė-Lideikienė, cited above, §§ 79-80; Féret, cited above, §§ 69-73 and 78; Hizb ut-Tahrir and Others, cited above, § 73; Kasymakhunov and Saybatalov, cited above, §§ 107-12; Fáber v. Hungary, no. 40721/08, §§ 52 and 56-58, 24 July 2012; and Vona, cited above, §§ 64-67). In assessing that point, the Court has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups (see Seurot v. France (dec.), no. 57383/00, 18 May 2004, Soulas and Others, cited above, §§ 40 and 43; and Le Pen, cited above, all of which concerned generalised negative statements about non-European and in particular Muslim immigrants in France; Norwood v. the United Kingdom (dec.), no. 23131/03, ECHR 2004-XI, which concerned statements linking all Muslims in the United Kingdom with the terrorist acts in the United States of America on 11 September 2001; W.P. and Others v. Poland (dec.), no. 42264/98, 2 September 2004, and Pavel Ivanov v. Russia (dec.), no. 35222/04, 20 February 2007, both of which concerned vehement anti-Semitic statements; Féret, cited above, § 71, which concerned statements portraying non-European immigrant communities in Belgium as criminally-minded; Hizb ut-Tahrir and Others, § 73, and Kasymakhunov and Saybatalov, § 107, both cited above, which concerned direct calls for violence against Jews, the State of Israel, and the West in general; and Vejdeland and Others v. Sweden, no. 1813/07, § 54, 9 February 2012, which concerned allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and AIDS).*" [Emphasis added];

(c) *R-v-Keegstra* [1990] SCR 697 (Supreme Court of Canada) was cited as authority for the proposition that hate speech did not require an incitement to violence. Keegstra (a dismissed high school teacher) was charged with contravening a criminal statute which stated that any person who "*wilfully promotes hatred against any identifiable group*" was guilty of an offence. His message, *inter alia*, was that

Jewish people "*seek to destroy Christianity*" and that they were "*inherently evil*". The majority held that this provision did not contravene the accused's freedom of expression rights. The minority held that imposing criminal sanctions for this form of hate speech went too far. Reliance was placed by Mr Doughty on Dickson CJ's description of hate speech in the following broad terms (at 764):

> "*...expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society where the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is wholly inimical to the democratic aspirations of the free expression guarantee.*"

Findings: what type of speech is unprotected by freedom of expression?

74. The principal authorities relied upon for interpreting section 9 of the Constitution dealt with article 10 of ECHR. It is important to clarify the extent to which such authorities are persuasive because they deal with overlapping legal concepts. Article 10 provides as follows:

> "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*" [Emphasis added]

75. It was suggested on behalf of the Applicants that freedom of expression was broader under section 9 than under article 10 because the words "*since it carries with it duties and responsibilities*" did not appear in the Bermudian provision. I reject this submission because those words are clearly merely declaratory and/or explanatory in nature. The words explain why the permitted limitations are being adopted. Corresponding language, somewhat differently framed, may be found in section 1 of the Bermuda Constitution, which explains (in relation to freedom of expression and other protected rights) that:

> "*...the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*" [Emphasis added]

76. If rights are conferred on the basis that they may only be exercised in a way which does not prejudice the rights and freedoms of others or the public interest, the exercise of the rights conferred necessarily carry with them duties and responsibilities as is spelt out in article 10. The substantive provisions of section 9 and article 10 are broadly the same. Mrs Sadler-Best accordingly enthusiastically embraced the following observations of this Court in *Richardson-v-Raynor (Police Sergeant)* [2011] Bda LR 52 in concluding her written submissions, where I acknowledged that free speech carried with it at least moral duties:

> "*20... It is a notorious fact that charismatic figures can through provocative statements incite acts of violence and even genocide, which is why prominent individuals in the modern era of mass communication have a moral duty to exercise considerable care when writing or talking about emotive topics such as race.*"

77. Depending on the context, the free speech rights conferred by section 9(1) of the Constitution by necessary implication carry with them corresponding duties and responsibilities which restrict the way the rights may be exercised without lawful restraint.

78. It was suggested on behalf of the 1st to 2nd Respondents that while article 10 could be invoked by foreign nationals living abroad, section 9 could not. This was because article 10 paragraph 1 included the words "*regardless of frontiers*" and section 9(1) did not. I have already implicitly rejected this argument above in concluding that that the fundamental rights and freedoms provisions of the Constitution generally can be invoked by persons outside Bermuda. The phrase "*regardless of frontiers*" in article 10 appears to be borrowed from the Universal Declaration of Human Rights (article 19) and in my judgment has no bearing on the standing issue at all. The absence of those words from section 9(1) has no further impact on the limits of free speech which falls to be determined in the present case.

79. Accordingly, ECHR article 10 cases dealing with the extent to which limits may be placed on free speech in the interests of, *inter alia* public safety, preventing disorder and crime and protecting morals and the rights of others are highly persuasive as section 9(2) contains substantially the same limitations.

80. Canadian Charter of Rights and Freedoms cases need to be read with greater care, because the structure of the Charter is such as to give the courts greater scope for determining the extent of limitations. This is because section 1 provides for an open-ended limitation of the rights protected in the following terms:

> "*1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*"

81. Section 2(b) then lists various fundamental rights (including freedom of conscience and expression) without any tailor-made limitations at all.

82. The preponderance of ECHR case law placed before the Court demonstrates that hate speech which falls short of an incitement to violence is not protected by article 10. The clearest statements include the following:

- *Jersild-v-Denmark* (Application 15890/89) (1994) European Court of Human Rights: a journalist was held to have had his free speech rights infringed by being prosecuted for broadcasting a programme about a group called 'Greenjackets', which contended that blacks and all foreign workers were "*not human being, they are animals*" (paragraph 14). The Court observed (at paragraph 35), admittedly in remarks not forming part of its actual decision: "*There can be no doubt that the remarks in respect of which the Greenjackets were convicted...were more than insulting to the targeted groups and did not enjoy the protection of Article 10*";

- *Üstün-v-Turkey* (Application no. 37685/02) (2007): the prosecution of an author was not justified because (at paragraph 32) the "*the passages highlighted by the prosecution ...do not encourage violence...**and** do not constitute hate speech*" [emphasis added];

- *Perinçek v Switzerland* (2016) 63 EHRR 6: In considering whether interference with statements was justified, the European Court of Human Rights said its case law reflected regard to various factors including "*whether the statements were made against a tense political background...whether the statements, fairly construed and seen in their immediate or wider context, could be seen as...a justification of...hatred or intolerance...In assessing that point, the Court has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups...*" (paragraphs 205-206);

- *Vejdeland-v-Sweden* (2012) ECHR 242 (cited in *Perinçek)*: the European Court of Human Rights unanimously held:

> "54. *The Court notes that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The Court agrees with the Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down paedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.*
>
> *55. Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see Féret v. Belgium, no. 15615/07, § 73, 16 July 2009). In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" (see, inter alia, Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI).*" [Emphasis added]

83. These principles articulated in the context of analysing article 10 of ECHR, upon which section 9 of the Bermudian Constitution is substantially based are highly persuasive and I find that they reflect the Bermudian law position. *R-v-Keegstra* [1990] SCR 697 illustrates a very similar approach being taken to determining the limits of free speech in relation to 'hate speech' as protected by a national constitution. That is unsurprising, because the Supreme Court of Canada expressly considered ECHR case law as well as other international jurisprudence. The judgment of Dickson CJ adds texture to that more legalistic ECHR analysis by explaining in more practical terms why 'hate speech' is a legitimate public interest concern:

> "*Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment, for example, this Court has found that words can in themselves constitute harassment (Janzen v. Platy Enterprises Ltd., 1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252). In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded (p. 214).*

In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, 'Two Concepts of Liberty', in Four Essays on Liberty (1969), 118, at p. 155). The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe 'almost anything' (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances (at p. 8):

'. . . we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter".

We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.'

It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is

outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted (see Matsuda, op. cit., at pp. 2339-40)."

84. Those observations, albeit made in different sociological context, appear to me to have general application and they find broad support in a document of which this Court may take judicial notice. The last (to my knowedge) Royal Commission to examine social and racial relations in Bermuda reported nearly 40 years ago: '*Report of the Royal Commission into the 1977 Disturbances*', July 14, 1977 (the "Pitt Report")[9]. The central theme running through the Pitt Report was a broad political consensus that Bermuda's best interests lay in effectively evolving away from a racially divided society dominated by a privileged white minority towards a more equitable 'integrated' or non-racial society. That consensus implicitly underpins the fundamental rights and freedoms protected by the Bermuda Constitution. Public disorder was identified as a risk flowing from perceptions of racial injustice. The Pitt Report (parts of which have a disturbingly current ring to them) made the following observations (at paragraph 9.19), which in my judgment reflect the sort of broad public policy concerns which should be borne in mind in Bermuda today when defining the limits of free speech in our unique social context:

> "*Many Bermudians will remember the slogan that was publicised in Britain during World War Two: 'Careless talk costs lives'. Bermudians must have the courage to enter into and persevere in a similar campaign which will remove the hostile attitudes generated by the sort of remarks which add to the problems rather than assist in resolving them. Bermuda is too small and too complicated for separation to be a viable alternative to bigotry...*"

85. In summary, I find that section 9 of the Constitution does potentially authorize the State to, depending on the circumstances of any particular case, sanction 'hate speech' without having to establish a risk of actual violence or physical harm. What qualifies as 'hate-speech' is ultimately a fact-specific question. But the central ingredient is statements which have the capacity to result in hatred for and discrimination against the targeted groups.

Findings: did the Minister interfere with the Applicants' freedom of expression rights under section 9(1) of the Constitution?

86. I have already found that the 1st Applicant's rights under section 9 were potentially engaged by the Decision, which solely based on the contents of Mr

[9] This reference to a source not referred to in argument merely adds a gloss to the analysis which is wholly immaterial to the conclusion I would in any event have reached on this issue.

Kimathi's lecture, which had the effect of preventing the 1st Applicant from returning to Bermuda, *inter alia*, to present another lecture at an event hosted by the 2nd Applicant. Preventing the 1st Applicant from returning to Bermuda to give a lecture based on objections to his initial lecture clearly interferes with his freedom of expression rights in a material way. Once the standing objection of the Minister is rejected, all further credible challenges to this *prima facie* interference finding fall away.

87. This conclusion is supported by *Cox-v-Turkey* (2012) 55 E.H.R.R. 13 (where an American academic was banned from re-entering Turkey because of expressing politically controversial views whilst employed in the country). The following passage upon which Mr Johnston relied concisely records the European Court of Human Rights' decision on this point:

> "*31. The Court considers that the ban on the applicant's re-entry is materially related to her right to freedom of expression because it disregards the fact that Article 10 rights are enshrined 'regardless of frontiers' and that no distinction can be drawn between the protected freedom of expression of nationals and that of foreigners. This principle implies that the Contracting States may only restrict information received from abroad within the confines of the justifications set out in Article 10 § 2 (Autronic AG v. Switzerland, 22 May 1990, §§ 50 and 52, Series A no. 178). The scope of Article 10 of the Convention includes the right to impart information. The applicant is precluded from re-entering on grounds of her past opinions and, as a result, is no longer able to impart information and ideas within that country. In light of the foregoing, the Court concludes that there has been an interference with the applicant's rights guaranteed by Article 10 of the Convention. The Court will thus proceed to examine whether that interference was justified under the second paragraph of that provision.*"

Findings: was the interference with the 1st Applicant's freedom of expression rights by the Decision "reasonably required" within section 9(2)(a) of the Constitution?

Introductory

88. Whether the Minister can justify the interference which has been found has two main elements to it in a case where the constitutionality of the law deployed is not itself subject to challenge. Firstly, was the aim of the interference a legitimate one, namely a permitted ground of restriction authorised by law? And, secondly, was the interference which occurred reasonably required or proportionate having regard to the nature of the governing public policy imperative which inspired the restraint and the form which the impugned expression took?

Was the Decision made in pursuit of a legitimate aim within section 9(2)(a)?

89. It is helpful at this point to revisit the reasons for the Decision, both the version officially recorded shortly after it was made and the version expanded by way evidence in these proceedings:

    (1) **The official decision**:

    "*Mr Ayo Kimathi arrived in Bermuda as a guest speaker for a forum held at the Liberty Theatre on Saturday, September 26, 2015. During this engagement, Mr Kimathi was responsible for making remarks regarding homosexuality and interracial partnership which were deemed to be offensive and propagated hatred, intolerance and discrimination...*";

    (2) **The subsequent reasons**:

    "*4. I made such decision on, inter alia, the basis that at a minimum, specifically and generally, this was inflammatory and 'hate speech' not acceptable in a democratic society; particularly in a society like Bermuda where there is a cosmopolitan mix of peoples of diverse origins and races...*

    8 My decision to place the First Applicant, Mr Ayo Kimathi, under the then prevailing circumstances and in light of the potential increased tensions in the community, was lawful, reasonable and proportionate." [Emphasis added]

90. The official reasons for the Decision clearly demonstrated a desire to protect the targeted groups and the community from the effects of "*hatred, intolerance and discrimination*". The language used closely resembles that of the various judgments which were cited in argument describing 'hate speech'. The subsequent reasons confirmed this aim and supplemented it with public order concerns based on "*prevailing circumstances*". It is inherently believable that these concerns were operative in the Minister's mind on September 28, 2015 because it is common ground that the Government was leading controversial emotive debates about same-sex marriage during the same time-frame. And these were debates which were, to some extent, divided along racial lines with Bermudians of European descent over-represented in the ranks of those openly supporting same-sex rights.

91. Section 31(5) of BIPA provided legislative authority for the Decision and it is helpful to revisit its terms. It very simply confers a discretionary power on the Minister to place a person who does not belong to Bermuda on the stop list if they have, inter alia, while in Bermuda behaved in an "undesirable manner". The jurisdictional scope of that power is found in the definition of "undesirable" in section 2 of BIPA:

> *"'undesirable person' means a person who is, or who has been, so conducting himself (whether within or outside Bermuda) as to be, or to be likely to be, prejudicial to the proper maintenance of peace, good order, good government or public morals in Bermuda; and "undesirable", in relation to the conduct of any person, shall be construed accordingly."* [Emphasis added]

92. The Applicants' counsel rightly submitted that "undesirable" had to be construed narrowly so as to give full effect to constitutional right of freedom of expression. Where freedom of expression is interfered with, the justification must be found not simply in section 31(5) but in section 9(2) as well.

93. Mr Johnston, somewhat half-heartedly, further complained that that the stop list power was so broad as to be uncertain and therefore constitutionally impermissible on its face. The Kenyan legislation which was found to be bad on this ground created a criminal offence, was less particular than section 31(5) and fell to be considered in relation to a far more specific constitutional protection of free speech: *Andare-v-Attorney-General* [2016] eKLR at paragraphs 78-82. By way of contrast, the English equivalent of our own stop list provision, which was construed in relation to article 10 in *Farrakhan,* was far broader than our own section 31(5) (as read with section 2). The ground in question was "*where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good*". It is unclear from the report of this case whether the term "public good" has a statutory definition, but no attempt was made in *R (Farrakhan)-v-Secretary of State for the Home Department* [2002] Q.B. 1391 to suggest that the statutory jurisdiction for excluding foreign nationals was so imprecise that the relevant statutory provision was incompatible with article 10 of ECHR.

94. Having rejected the complaint that the Decision was made for reasons other than those relied upon by the Minister, I am bound to find that the aim of the interference with the 1st Applicant's freedom of expression rights was to further a purpose which falls within section 9(2)(a) of the Constitution. The relevant provisions permit the State to restrict freedom of expression for the following purposes which are relevant to the Decision:

    - "*public order*";
    - "*protecting the rights... and freedom of other persons*".

95. The initially recorded decision only explicitly referenced attacks on homosexual and interracial marriage although the offending remarks in fact had a further reach which was explained in the Minister's Affidavit. The Decision was in terms based on the aim of preventing the propagation of "*hatred, intolerance and discrimination*" and quite obviously fell within the ambit of protecting the rights of members of the target groups more broadly understood. The 1st Applicant's remarks, summarised in paragraph 7 above targeted primarily people of European descent and homosexuals, with particular contempt being directed towards homosexuals of African descent, but secondarily targeted people of Arabian,

Asian and mixed-race descent and interracial couples as well. The passing swipes the 1st Applicant made against 'feminists' fell on the margins of promoting hatred towards and discrimination against women looked at in isolation from the other remarks, but added a further layer to the 'discrimination' analysis.

96. In my judgment it required very little analysis to entitle the Minister to conclude that encouraging Bermudians of African descent to regard Europeans, Arabs and Asians as their enemies, encouraging African Bermudians to pursue a separatist economic and social agenda (which included shunning African Bermudian homosexuals altogether) amounted to 'hate speech'. It is a notorious fact that Bermuda was at the time in a deep recession which was laying bare longstanding disparities of wealth between traditionally privileged Bermudians of European descent and traditionally disadvantaged Bermudians of African descent. Expatriate workers played (and continue to play) an important role in Bermuda's economy at multiple levels and included persons of European and Asian descent while key actual and potential sources of investment in the international business sector included the United States (a predominantly European country), Asia and the Middle East. More broadly still, it is a notorious fact that tensions were also increasingly apparent between those benefitting from international business and globalisation, on the one hand, and those marginalised by it on the other. At the time when the controversial lecture took place, proceedings brought by the Government in respect of irregular strike action were before the Court.

97. The Minister's concisely expressed judgment that "*this was inflammatory and 'hate speech' not acceptable in a democratic society; particularly in a society like Bermuda where there is a cosmopolitan mix of peoples of diverse origins and races*" was, in all the circumstances, a conclusion he was entitled to reach. Statistical data[10] put before the Court on behalf of the Minister merely confirmed the obvious: at least the main racial groups targeted by the 1st Applicant (White 31%, Asian 4%) are indeed minorities in the resident population, as are (it is surely a notorious fact) homosexuals. The Black resident population is 54% although it is generally understood to be in the region of 70% of the voting population. This data confirms a considerable diversity generally as well as the minority status on the part of the target groups which creates an inherent vulnerability to the somewhat intangible effects of hate speech. The State is not expected in cases such as this to produce expert evidence about the harmful effects of what is said to amount to 'hate speech' speech. In *Saskatchewan Human Rights Commission-v-Whatcott* [2013] 1 SCR 467, the Supreme Court of Canada responded to academic criticism that its earlier decisions had been too deferential to the Executive as regards proof of harm in the following way:

> "*[132] This Court has addressed such criticism in a number of situations involving the applicability of s. 1 and has adopted a "reasonable apprehension of harm" approach. This approach recognizes that a precise causal link for certain societal harms ought not to be required. A court is entitled to use common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms.*"

[10] 2010 Census.

98. The targeted persons have the right to be protected from discrimination on a wide variety of grounds under either the Constitution or the HRA or under both. Upholding the human rights of others clearly falls within the scope of "good government" for the purposes of excluding a foreign national on the grounds of past or future anticipated undesirable conduct under section 31(5). The explicit primary aim of the Decision as originally recorded was to stifle hate speech with a view to (implicitly) protecting the rights and freedoms of others. The Minister's evidence confirms this was the main objective by using the term "hate speech" for the first time and, also, by making reference to the diversity of Bermuda's population. However he adds a further gloss to the analysis by making reference for the first time to "social tensions" which he may well have considered to be self-evident when the Decision was memorialised on October 2, 2015.

99. Somewhat inconsistently with the Minister's own evidence, it was asserted at the end of the '*Submissions on behalf of the First and Second Respondents*' that: "*The Minister after careful consideration determined that placing Kimathi on the stop list was in the interest of maintaining public order.*" The Minister's evidence did not clearly rely on protecting the interests of public order as the main aim of the Decision at all. That would have required far more specificity. Rather, the Minister raises the tense background as contextual factor to justify the proportionality of placing the 1st Applicant on the stop list. The Minister's evidence overall (the Decision, his press statements and his Affidavit filed herein) clearly indicates that his main aim was to promote the interests of "good government" by demonstrating a strong response to statements which appeared likely to promote hatred towards and discrimination against one or more minority groups in Bermuda. As a matter of common sense, community tensions were merely indicative of ill-defined public order threats. Tensions were more clearly grounds for concerns that the effects of 'hate speech' were more likely to have a negative impact. In my judgment, it was not necessary for the Minister to wait for more concrete evidence of harm before taking pre-emptive action As the Supreme Court of Canada observed in *Saskatchewan Human Rights Commission-v-Whatcott* [2013] 1 SCR 467 (Rothstein J) rejecting the proposition that clear proof of harm was required to justify taking legal steps to curtail hate speech:

> "*[131] Such an approach, however, ignores the particularly insidious nature of hate speech. The end goal of hate speech is to shift the environment from one where harm against vulnerable groups is not tolerated to one where hate speech has created a place where this is either accepted or a blind eye is turned.*"

100. It was effectively common ground that if the impugned statements amounted to 'hate speech' and hate speech did not require proof of incitement to actual violence, then the Applicants were not entitled to protection under section 9(2)(a). This assumed the Court would be applying the ECHR case law on art 10 of ECHR, with further support from the Supreme Court of Canada in *Keegstra* and other cases. It was implicitly conceded, or all but formally conceded, that

preventing hate speech was a legitimate public policy aim capable of justifying proportionate interference with free speech rights under the Bermudian Constitution. This limb of the case was most clearly supported by *Perinçek v Switzerland* (2016) 63 EHRR 6 where the European Court of Human Rights found that there was insufficient evidence to justify the State relying upon public order but that:

> "*156... In these circumstances, the Court can agree that the interference was also intended to protect the dignity of those persons and thus the dignity of their descendants.*
>
> *157. The interference with the applicant's right to freedom of expression can thus be regarded as having been intended 'for the protection of the ... rights of others'.*"

Was the Decision a "reasonably required" or proportionate response?

101. The Applicants may fairly be viewed as having placed all of their eggs in other baskets so that it was difficult to advance a convincing case that the Decision was a disproportionate one after the bottoms in those other baskets all fell away. It was first contended that the Minister had no jurisdiction to make the Decision at all. The Applicants next elected to defend the impugned statements on the grounds that they did not constitute 'hate speech', insisting that the 1st Applicant should be permitted to return to Bermuda to make similar remarks. With this central plank removed from their case, it was difficult to effectively argue that the Minister's actions were a disproportionate response. The Applicants' position, in light of the findings that this Court has reached on the central 'hate speech' issue (namely that it was open to the Minister to treat the relevant statements made by the 1st Applicant as 'hate speech'), helps to make the Minister's case for him on the final constitutional issue. This was not a case where the criminal law was being used in circumstances where no incitement to violence had taken place which would have required a more than usually restrictive approach to the margin of appreciation generally accorded to the State, as illustrated by *Gerger-v-Turkey,[*1999] ECHR 46 at paragraph 48.

102. The Applicants were in no position to complain that the Decision was procedurally defective because the Minister acted precipitously and unfairly, failing to give the 1st Applicant an opportunity to be heard or to give an undertaking not to make the anticipated discriminatory statements as occurred in the *Farrakhan* case[11]. It is self-evident that the undertaking Minister Farrakhan commendably gave to the Secretary of State in that case would not have been replicated in the present case because the 1st Applicant, supported by the 2nd Applicant and perhaps understandably influenced by the more liberal US free speech position, considered that his objectionable statements fell within the

[11] The role of the Court in deciding whether fundamental rights have been infringed does not require regard to be had to the decision-making process although this process may be relevant to the weight to be given to the judgment made by the relevant public body: *R (Core Issues Trust)-v-Transport for London* [2013] PTSR 1161 at paragraphs 119-120.

boundaries of protected free speech. There is no precedent for a judicial finding that a State could not lawfully exclude a non-national who had propagated hate speech in the course of one visit and wished to return for a 'repeat act'. Authorities placed before the Court by Mr Johnston only supported the contrary position. For example:

- *Cox-v-Turkey* (2012) 55 E.H.R.R. 13 at 355: excluding the applicant was not "*a sufficient and relevant justification* [because] *the applicant has not been shown to have been engaged in any activities which could clearly be seen as harmful to the State*" [emphasis added];

- *Gündüz v Turkey* (2005) 41 EHRR 5: the statements for which the applicant journalist, a national, was prosecuted were held not to constitute hate speech. His conviction was accordingly held to be an unjustified interference with his freedom of expression rights;

- *R (on the application of Naik)-v-Secretary of State for the Home Department* [2011] EWCA Civ 1546: the English Court of Appeal upheld the Secretary of State's decision to refuse the applicant entry in the interests of the "public good". The interference with his freedom of expression rights was justified in part because, albeit in the national security context, the applicant failed to provide a "specific repudiation" of views he contended had been taken out of context (paragraph 74);

103. The Minister may be said to have acted somewhat rashly in making the Decision at the speed and without the sort of consultative processes that he should ordinarily have undertaken. I also accept entirely other options were reasonably open to him. Another Minister might have left the matter to be dealt with by the HRC. Yet another might have been content to make a vigorous rebuttal of the 1st Applicant's most objectionable views, feeling assured that a presentation which might be viewed as closer to histrionics than history in Bermuda's black majority context would be unlikely, in the long term, to gain traction here. The option chosen by the Minister in my judgment fell well within the range of reasonable responses which were available. Bearing in mind the obvious importance to Bermuda's economy of being viewed as a jurisdiction which is friendly to a diverse range of foreign investors and foreign workers and a legal jurisdiction which respects the rule of law, it was in my judgment quite proportionate for the Minister to have opted for a decisive and unambiguous response to the offending extremist remarks.

104. Mrs Sadler-Best sought to mitigate the failure to obtain legal advice by reference to the fact that the Minister happens to be a lawyer and that, although he acted instinctively, he effectively 'made the right call'. It is undeniable that the Minister's instinctive judgment has been vindicated by this Court's present analysis of what potentially amounts to 'hate speech' and the ultimate decision that he was entitled to form the view that the most extreme remarks fell outside the boundary of protected freedom of expression. He cannot now be criticised for failing to give the 1st Applicant an opportunity to 'recant' because of the position the 1st Applicant adopted in the present proceedings. Both Applicants have

insisted to the last that the line between acceptable and unacceptable speech was not crossed.

105. In all the circumstances of the present case, I see no justification for finding that placing the 1st Applicant on the stop list was a disproportionate response to the unfiltered message of hate which, coming in a cultural history lecture series, could not fairly be said to form part of an ongoing political debate. The conclusion might well have been more nicely balanced if the remarks had been made in the context of a balanced debate in which the controversial message was one of many on the same broad topic. This Court cannot second-guess the Minister's judgment about the social tensions which existed at the time and/or the risks that the targeted groups would potentially face unspecified forms of discrimination. The Minister acted under a statutory power which enabled him to make the Decision in the interests of "*peace, good order, good government*", in line with section 6(2)(a) of the Constitution (public order, protecting the rights and freedoms of others). What those interests require mean in practice is a judgment which Parliament has vested in the Minister, not the courts subject to the ability of this Court to ensure that the power is not deployed in an irrational or disproportionate manner which is inconsistent the fundamental values of the Constitution.

106. There was at least some suspicion on the Minister's part that the 1st Applicant deployed a sleight of hand by entering Bermuda under the respectable cloak of a history lecture and launched his hateful separatist message by stealth. The Minister did not formally adopt this concern in his Affidavit, perhaps because he tacitly conceded that the Internet searches he conducted after the lecture could have been carried out before the 1st Applicant was given permission to enter Bermuda. But the '*Royal Gazette*' reported on September 29, 2015 that the Minister made the following remarks on or about September 28 when the Decision was made:

> "*The application for Mr Kimathi was solely for the purpose of speaking in relation to the event as advertised, called 'African History and Culture Come Alive. It is very clear therefore, based on the title of the proposed lecture, that Mr Kimathi ventured far off the subject matter.*"

107. This complaint was not pursued in the present proceedings and this aspect of the Minister's initial reported response is mentioned here for a limited purpose. It serves to highlight the important point, upon which Mrs Sadler-Best placed emphasis, that in the sphere of immigration the Minister should be given a generous margin of appreciation to make policy judgments: *R (Farrakhan)-v-Secretary of State for the Home Department* [2002] Q.B. 1391 (at paragraph 54). Mr Johnston relied upon authorities suggesting that even in the immigration context interference with freedom of expression calls for careful scrutiny: *Cox-v-Turkey* (2012) 55 E.H.R.R. 13 at paragraph 39. But the facts in that case suggest such scrutiny is only likely in practice to dilute the degree of deference the Judiciary accords the Executive where the foreign national has previously been in the country and participated in public debate in a manner which does <u>not</u> harm the

host State. The courts should ordinarily show some deference to the judgment of the Minister that a person with no working or family ties to Bermuda should be placed on the stop list.

108. As I observed in the course of argument, the Minister's Decision might have been subject to more critical scrutiny if the 1st Applicant had been admitted to the country to participate in the same-sex marriage debate and then been 'punished' for expressing political views with which the Government disagreed. While the documentation in support of the Decision falls short of what might be desired, in my judgment the Minister's response was clearly proportionate in all the circumstances. The case law under ECHR shows a high degree of protection for political speech and a reluctance to lightly permit governments to use State power to stifle criticism of their own governance activities. Here the 1st Applicant entered Bermuda for the purposes of a cultural lecture. He cannot now complain, if his real aim was to participate in the then ongoing same-sex marriage debate, that the Minister's real purpose in making the Decision was to stifle debate in relation to an ongoing political issue.

109. One final aspect of the proportionality analysis which often arises for consideration is whether the form of interference which occurred was reasonably required or not. A criminal prosecution would very arguably have been a disproportionate response in relation to speech which did not incite actual violence. As the European court of Human Rights opined in :*Gerger-v-Turkey[*1999] ECHR 46 at paragraph 48

> "*48. The Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, Reports 1996-V, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, Reports 1998-IV, p. 1567, § 54). Finally, where such remarks constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.*" [Emphasis added]

110. Mrs Sadler-Best in analysing the impact of the decision rightly pointed out that excluding the 1st Applicant did not prevent Bermudian residents from accessing his views by means other than his appearing in person. This was a consideration which was taken into account in the proportionality analysis carried out by the English Court of Appeal in the *Farrakhan* case:

> "*77. The other factor of great relevance to the test of proportionality is the very limited extent to which the right of freedom of expression of Mr Farrakhan was restricted. The reality is that it was a particular forum which was denied to him rather than the freedom to express his views. Furthermore, no restriction was placed on his disseminating information or opinions within the United Kingdom by any means of communication other than his presence within the country. In making this observation we do not ignore the fact that freedom of expression extends to receiving as well as imparting views and information and that those within this country were not able to receive these from Mr Farrakhan face to face.*"

111. The Applicants could not plausibly suggest that, assuming the offending remarks constituted 'hate speech' as it has been found the Minister was entitled to find they did, the Decision was liable to be set aside on the grounds that it was a perverse one. It cannot be seriously suggested that the Decision was one which no reasonable minister, properly directing himself, could properly reach. That does not mean that no reasonable minister might equally have taken some other course; other options have been alluded to above. How far individual free speech should be permitted to undermine the rights and freedoms (and dignity) of others is a matter of judgment. Ironically, bearing in mind the Applicants' advocacy of African traditional values, placing the interests of the group ahead of the individual is widely viewed as a classically African inclination. In my judgment, the Minister was well within the margin of appreciation that the Constitution allows to the Executive branch of Government in such matters to decide, admittedly on largely intuitive grounds, that Bermuda's social balance was too delicate to allow the 1st Applicant's individual free speech rights to be privileged over the rights of the targeted groups and the community as a whole.

112. To conclude, the case against the Decision largely stood or fell on whether or not the Applicants could on legal grounds invalidate the Minister's finding that the 1st Applicant propagated 'hate speech'. That legal challenge has been decisively rejected.

Summary: constitutional validity of the Decision under section 9 of the Constitution

113. For the above reasons the application for a declaration that the Decision contravened the 1st and/or the 2nd Applicant's rights of freedom of expression under section 9 of the Constitution is refused. Although the Decision did interfere with the 1st Applicant's freedom of expression rights, the interference which occurred was reasonably required for a valid legally prescribed public interest aim and, accordingly, legally justified.

Findings: did the Minister interfere with the Applicants' freedom of conscience rights under section 8(1) of the Constitution?

114. Section 8 of the Constitution provides so far as is material as follows:

> "*8(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance...*
>
> *(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required—*
>
> *(a) in the interests of defence, public safety, public order, public morality or public health; or*
>
> *(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited interference of persons professing any other religion or belief,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*"

115. The right of freedom of conscience is broadly protected by section 8(1), as is freedom of expression under section 9(1) of the Constitution. Interference with freedom of conscience can be justified on substantially the same grounds, including those relied upon by the Minister in relation to freedom of expression. The critical question is whether, taking into account a starting assumption that the beliefs set out in paragraph 67 of the '*Applicants' Skeleton Argument*' are entitled to protection, whether it is permissible to publically manifest those beliefs in a way which likely to cause the various minority groups to be subjected to hatred or discrimination. Mr Johnston distilled those beliefs into seven somewhat sanitised propositions broadly asserting the benefit to persons of African descent adhering to traditional African cultural practices and resisting efforts to impose European cultural practices (such as homosexuality) on them. Thus formulated the beliefs might be controversial and offensive to some but difficult to fairly construe as 'hate speech'.

116. The Bermuda Constitution and the HRA prohibit discrimination on the grounds of, *inter alia*, race and sexual orientation. Accordingly, associating one entire racial group as being morally reprehensible and engaged in attacks amounting to genocide on another racial group, advocating what amounted to a black-led form of segregation and suggesting that persons of African descent should shun homosexuals, even their own children, crossed the line having regard to the pluralist nature of Bermuda's modern constitutional mission. As I observed in the course of the hearing with reference to one of the Afrocentric texts placed before the Court in an apparent attempt to legitimize the Applicants' beliefs, that text[12] reflected views on the outer margins of mainstream history. By any objective measure, the 1st Applicant's racial separatist agenda reflects an extremist position, albeit forming part of at least one strand of a recognised (American) Afrocentric popular academic tradition. In a robust but reasoned critique of the various strands of that tradition, British academic Stephen Howe observed two decades ago:

> "*...it is striking and important that what Americans call Afrocentrism is not especially popular among continental or non-diasporic African intellectuals. It is perhaps more clearly recognised by them than it is by some in in Europe and North America that Afrocentrism in the contemporary, narrow US sense is largely a deviation or degeneration from the wider tradition of the politics of liberation: perhaps more an index of frustration than of progress....Much Afrocentric and related writing slips from ethnocentrism and neo-conservatism into full-blown racism, sexism and homophobia...the general tendency of modern scholarship in all fields and almost all parts of the world since 1945 has been to question-if not flatly deny-the reality or relevance of the concept of race.*"[13]

117. Mr Kimathi's controversial views deserve respect as arising out of a wider body of views which have been in circulation for many years. The merits or validity of the Applicants' beliefs are, of course, a wholly irrelevant consideration to the crucial issue at hand. Was the Minister justified in finding, as I have found that he was, that some of the statements made by the 1st Applicant in the meeting in question, taking into account the way he made them, amounted to 'hate speech'? No authority was cited for the proposition that freedom of conscience rights override the State's power to prevent threats flowing from 'hate speech' to public order and/or to the rights and freedoms of others. The ability to manifest your beliefs in public is clearly subject to public interest restraints. These findings are naturally based on the Bermudian context. Most of the justification for the 1st Applicant's extreme view that 'Africans' worldwide are facing risks akin to genocide and that separatism was necessary for 'the race' to 'survive', it must be noted, were clearly based on an analysis of American data (e.g. relating to prison conditions) which had no obvious relevance here. It must

[12] Chancellor Williams, '*The Destruction of Black Civilisation*', Third Edition (Third World Press: Chicago, 1987) pages 310-311.

[13] Afrocentrism: Mythical pasts and Imagined Homes'(Verso: London/New York, 1998), pages 2, 275.

be acknowledged that some Bermudians may feel that Mr Kimathi's commentary on historic attacks on 'masculine' black males still has resonance and relevance today.

118. The application for a declaration mirroring that sought for a breach of freedom of expression rights could not possibly be stronger in relation to an alleged interference with freedom of conscience rights as regards the 1st Applicant. His application for a declaration that his section 8 rights have been infringed must be rejected for the same reasons as his section 9 application has been refused.

119. The 2nd Applicant's position is, in substance, little different. The Decision does not in any meaningful way interfere with his beliefs at all save that it prevents him from bringing the 1st Applicant back to Bermuda to manifest the shared beliefs here. There can be no constitutional right to publically manifest (through guest lecturers from overseas or otherwise) beliefs amounting to 'hate speech' which undermine the rights and freedoms of others and/or public order. On the other hand, the Decision in no way undermines the overarching belief espoused by the 2nd Applicant that African culture and history receives insufficient attention in Bermuda, bearing in mind that the majority of our population is of African or mixed descent. This head of relief is also refused as regards the 2nd Applicant as well.

Findings: are the Applicants entitled to an Order of certiorari quashing the Executive Officer's decisions?

Procedural invalidity: introductory

120. The Applicants' submission on this limb of their application against the EO's decisions was formulated in the following manner:

> "*Section 15 of the 1981 Act governs investigations by the HRC. It is a mandatory requirement that before the Executive Officer conducts a formal investigation of any complaint, terms of reference must be drawn up and provided to the accused person: see section 15(4) of the 1981 [Act]. This position finds parallels in two cases: R v Commissioner for Racial Equality, ex parte Hillingdon LBC [1982] AC 779; In Re Prestige Group plc [1984] 1 WLR 335.This requirement cannot be waived because it is an essential component of fairness in this context.*"

121. In their Grounds it is contended that the case against the Applicants was frivolous and this would have been revealed had terms of reference been prepared as required. This is the narrow dimension of the invalidity point. The broader dimension was that the Complaint on its merits ought not to have been referred to the Tribunal at all. Favouring the HRC's position on same-sex marriage and discriminating against the Applicants for the contrary political views expressed by the 1st Applicant, the EO's investigation was completed and the Complaint

referred to the Tribunal without properly analysing the merits of the case in its wider constitutional context.

122. Mr Doughty's primary response was that leave to seek the relief sought should have been refused because the Applicants had alternative remedies under, *inter alia*, section 20(6) of the HRA ("*The Tribunal may dismiss a complaint at any stage of the proceedings*"). However, he alternatively submitted that the terms of reference argument lacked substance and should be rejected on its merits. The EO's counsel was also bound to concede that the position of the 2nd Applicant was somewhat different to that of the 1st Applicant because a case was only coherently set out against the 1st Applicant.

123. I propose to consider the merits of the Applicants' case before considering whether, in relation to any complaint which is potentially made out, relief should be refused on the grounds that there is a more appropriate alternative remedy.

Procedural invalidity: the terms of reference point

124. Section 15 of the HRA provides as follows:

> "*15 (1) Subject to the following provisions of this Part where—*
>
> *(a) any person complains to the Executive Officer upon grounds which appear to be genuine that he has suffered unlawful discrimination by reason of any alleged contravention of this Act; or*
>
> *(b) the Executive Officer has reasonable grounds for believing that any person has contravened any provision of this Act,*
>
> *the Executive Officer shall have power to investigate, and it shall be the duty of the Executive Officer as soon as is reasonably possible to investigate and—*
>
> *(c) endeavour to settle the causes of the complaint; or*
>
> *(d) endeavour to cause the contravention to cease, as the case may be.*
>
> *(2)The Executive Officer shall, before commencing an investigation under subsection (1), comply with the requirements of subsections (3), (4) and (5).*
>
> *(3) The Executive Officer shall give notice in writing of the complaint or belief, as the case may be, to the person or organization against whom the complaint was made or in relation to whom the belief arose, and the notice shall state that the Executive Officer intends to investigate the complaint or the belief.*

(4)Where pursuant to subsection (3) the Executive Officer gives notice to any person or organization that he believes that that person or organization has contravened any provision of the Act, the notice shall specify the grounds for that belief.

(5)The Executive Officer shall determine the terms of reference for any investigation carried out pursuant to this section.

(6)Where the terms of reference of the investigation relate to the activities of persons named in them or to the activities of any employer or organization under Part II of this Act, the Executive Officer shall offer such person, employer or organization so named an opportunity of making oral or written representations with regard to it (or both oral and written representations if it thinks fit); and a person, employer or organization so named who avails himself of an opportunity under this subsection of making oral or written representations may be represented—

(a) by a barrister and attorney; or

(b) by some other person of his choice, not being a person to whom the Executive Officer objects on the ground that he is unsuitable.

(7)The Executive Officer may, if he thinks fit-

(a) from time to time revise the terms of reference of an investigation; or

(b) unless a person affected by a complaint objects, consolidate two or more complaints;

and, when the Executive Officer exercises a power that he has under this subsection, subsections (1) to (5) shall have effect in relation to the case mutatis mutandis.

(8)[Repealed by 2012 : 1 s. 7]

(9) If, in the opinion of the Executive Officer, a complaint is without merit, the Executive Officer may dismiss the complaint at any stage of the proceedings after he has given the complainant an opportunity to be heard.

(10) In any case where it is made to appear to the Executive Officer that a complaint which he is investigating is also under active investigation by some other department or agency of the Government, the Executive Officer may suspend or discontinue his own investigation into that complaint.

(11) At any stage a complainant may withdraw a complaint made pursuant to subsection (1)." [Emphasis added]

125. Section 15 envisages the following steps where the EO proposes to investigate:

- Notification of receipt of a complaint and intention to investigate (ss.(3));
- Preparation of terms of reference (ss. (5));
- Forwarding of terms of reference to the subject of complaint for comment with a right to representation by a lawyer;
- Revision of terms of reference if EO sees fit;
- Dismissal of complaint at any stage after giving complainant an opportunity to be heard.

126. It is common ground that the statutory scheme was not strictly followed. Mr Johnston complained that there were no terms of reference at all while Mr Doughty countered that although the words "Terms of Reference" do not appear on the "Particulars of The Complaint" forwarded to the Applicants for their comments, the bold text italicised words in the heading of the document signed by the Complainant in substantive terms met the requirements of section 15 (5) in substantive terms. I accept the latter submission for the following reasons:

(1) it is clear that the December 15, 2015 letter from the EO inviting comments on the Particulars of The Complaint merged the administrative steps required by section 15(3) and 15(5) into one;

(2) the Applicants' responded throughout through their lawyer and no complaint was made that the terms of reference of the proposed investigation were missing or unclear;

(3) for the purposes of the Complaint, it is impossible to see why the Particulars of the Complaint read as a whole did not in substance constitute adequate terms of reference. Supported by a Statement signed by the Complainant, the document contained the following summary of the nature of the Complaint:

> "*The Complainant alleges that the Respondents, with intent to incite or promote ill will or hostility against any section of the public, used words which were threatening, abusive or insulting and were likely to promote or incite ill will or hostility against a section of the public distinguished by colour, race, ethnic or national origin in contravention of section 8A(1) of the Human Rights Act, 1981*".

127. The statute does strictly require notification to be given that a complaint has been received and may be investigated as a preliminary step before terms of reference are drawn up and forwarded to the respondent for comment. The merging of these two steps may well have become the standard practice over the years. It is unclear what good reason there is for a departure for from the statutory scheme which implicitly requires prompt notification to a potential respondent of a potential investigation. In the present case no complaint can be made that the notification stage was missed out because the 2nd Applicant deposes that the HRC Chairman was reported in the '*Royal Gazette*' as stating that the controversial remarks would be investigated by the HRC.

128. In my judgment there is no substance to the narrower limb of the procedural non-compliance point and it is impossible to imply a legislative intention that any wholly technical procedural irregularities should nullify an otherwise valid HRC complaint when no unfairness to the respondent has occurred. The principle which formed the basis of the decision in *R-v-Racial Equality, Ex p. Hillingdon L.B.C.* [1982] A.C. 779 has no relevance to the facts of the present case. The central finding of Lord Diplock (at 786E-F) was:

> "*Having regard to the wide variety of acts that are made unlawful by the Act...fairness requires that the statement in the terms of reference as to the kinds of acts which the commission believe the persons named may have done or may be done should not be expressed in any wide language than is justified by the genuine extent of the commission's belief.*"

129. The Bermudian HRA provisions do not impose comparable restrictions on the content of terms of reference and occasioned no unfairness in any event. This ground of attack on the EO's decisions fails.

Procedural invalidity: the alleged failure to consider whether the Complaint was meritorious or not

130. It is now necessary to assess whether the Applicants' prayer for an Order of certiorari quashing the EO's decisions should be granted on the no arguable case disclosed ground. For the avoidance of doubt I summarily reject the complaint that the EO invalidly decided to investigate at all.

131. The Applicants' second administrative law response to the Particulars of The Complaint (which overlapped to some extent with the same constitutional arguments relied upon in relation to the Minister's Decision) was to assert that the Complaint was on its face frivolous and the EO had failed to properly consider the merits of the Complaint. This was attributed to political discrimination against the Applicants based on the HRC's contrary and partisan position on same-sex rights. This point was only developed in concise general terms in their Grounds and Skeleton and, consistently with the approach adopted throughout in the present proceedings, no distinction was made between the position of the 1st and 2nd Applicants. The arguments advanced were largely, but not entirely, based on the

assumption that the impugned statements by Mr Kimathi fall under the protective umbrella of protected free speech and did not constitute unprotected 'hate speech'.

132. Having found above that some of the statements which form the subject of the Complaint did in fact amount to constitutionally unprotected 'hate speech', the complaint that the EO acted to stifle opposing political views (a contested potential finding which could not be made on the basis of the Affidavits alone in any event) can be summarily rejected. The EO and the HRC are charged with protecting human rights and have a statutory duty to uphold human rights and condemn those who they genuinely believe are interfering with human rights. There will frequently be difficult choices to be made when rights conflict. The present case did not present such difficulties. In general terms, the position the EO and the HRC took was clearly consistent with their statutory mandate and the fundamental rights and freedoms protected by Chapter I of the Constitution as well.

133. As regards the 1st Applicant, the contention that on "*a cursory reading of Conyers' complaint no violation of section 8A (1) of the Act may be found*" was obviously not sound. As regards the 2nd Applicant, as I observed in the course of the hearing, the position was markedly different. The relevant statutory provision reads as follows:

> "***Publication of racial material and racial incitement prohibited***
> *8A. (1) No person shall, with intent to incite or promote ill will or hostility against any section of the public distinguished by colour, race or ethnic or national origins—*
>
> *(a) publish or display before the public, or cause to be published or displayed before the public, written matter which is threatening, abusive or insulting; or*
>
> *(b) use in any public place or at any public meeting words which are threatening, abusive or insulting,*
>
> *being matter or words likely to incite or promote ill will or hostility against that section on grounds of colour, race or ethnic or national origins.*" [Emphasis added]

134. Two distinct forms of conduct are prohibited. Reversing the order which the HRA adopts, the first category of prohibited conduct is using words which are likely to and intended to incite or promote ill will or hostility based on, *inter alia*, race[14] (section 8A(1)(b)). The second category is publishing or causing to be published written matter with a similar propensity (i.e. likely to incite ill will or hostility). An arguable allegation that a breach of section 8A has occurred must necessarily particularise a breach of either section 8A(1)(a) or (b). The only

[14] After the Complaint was filed with the HRC in this case, section 8A was amended to include sexual orientation as a protected ground.

particularised breach of section 8A(1) which is set out in the Complaint is a breach of section 8A(1)(b) (paragraphs 11 and 13).

135. The essence of the Complaint set out in paragraph 1 of the Complainant's Statement is as follows:

> "*The first Respondent engaged in what I consider to be, at least in part, hate speech due to the racist remarks made during what was promoted as an African history lecture and the second Respondent did not put a stop to this aspect of the lecture as it occurred.*"

136. An arguable case sufficient to justify the reference to the Tribunal is, I find, disclosed against the 1st Applicant and is summarised in the Complaint in the following terms:

> "*7. It is for these reasons that I believe that Mr. Kimathi discriminated against me on the basis of race. The language that he used was intended to incite polarity and ill will, and, in my view, direct hostility to a specific race (whites)....*"

137. I have recently held that an HRC complaint should not be construed as strictly as a pleading and is primarily designed as a foundation for a decision to investigate and, if found broadly meritorious, to be referred for adjudication to a tribunal. In *Battiston-v-Grant* [2016] SS (Bda) 51 App (31 May 2016), I stated :

> "*39. Section 20(1) of the Act provided that: "A board of inquiry after hearing a complaint shall decide whether or not any party has contravened this Act..." In the present case, the Board not only took into account the breadth of its general statutory jurisdiction, but also noted that the Minister's reference to them was expressed in similarly broad terms. Bearing in mind that a complaint under the Act is merely designed to initiate an investigation rather than a hearing, in my judgment there can be no rational justification for equating a complaint to a pleading filed before an adjudicative body to whom a dispute has been referred for determination. The notion that a board of inquiry was compelled by Parliament to decide complaints referred solely on the grounds articulated by a complainant before his complaint has even been investigated is both absurd and wholly inconsistent with the manifest purpose of the Act as a whole.*"

138. If this is a correct view of the scheme of the Act, it would clearly be contrary to the interests of good administration for this Court to quash a decision by the EO to investigate and/or to refer to a Tribunal on 'technical' pleadings grounds. This legal policy issue was not directly addressed when the Court of Appeal reversed my decision to uphold the Tribunal's finding that discrimination on grounds of race had been proved in *Battiston-v-Grant* (unreported), Judgment dated April 21, 2017. In that case an arguable breach of the HRA was clearly disclosed on the

face of the relevant complaint. The main focus of the Court of Appeal's decision was the disjuncture or mismatch between the specific breach of the Act which was complained of before the Tribunal and found to have been proved, and the factual and legal findings which were formally made by the Tribunal. I held that the true legal and factual basis of the case (as it evolved) and the decision was obvious and that the complainant should not be denied justice on what I considered to be purely technical grounds. The Court of Appeal disagreed, with Bell JA (with whom Baker P and Clarke JA agreed) holding:

> "*30. I cannot see any basis upon which a complaint made under section 6(1)(g) of the Act, which concerns the application of a special term or condition of employment can be said to have been established by complaints which have nothing to do with terms and conditions. The findings made by the Tribunal (quite apart from the imperfectly expressed finding referred to by the Chief Justice) were not sufficient to permit the finding of discrimination which the Chief Justice made on the basis of section 6(1)(g), but which the Tribunal itself did not make. This is not a technical issue. If and insofar as the complaint was to have proceeded under section 6(1)(g) with reference to a particular term or condition of employment, then it was necessary for the position to have been made clear to Mr Battiston (and his counsel) so that he had a clear understanding of the changed nature of the case which he was being asked to meet. But that, if anything, is irrelevant, since the findings of the Tribunal were of a completely different nature to those upon which Mr Grant based his complaint.*" [Emphasis added]

139. The central finding was that it was not open to the Tribunal to find the respondent liable for a form of discrimination which was different in its particulars to the precise form of discrimination alleged in the complaint which was referred. It was "irrelevant" that a modified version of the case was not made clear to the Respondent. Clearly the Court of Appeal adopted a more pro-respondent policy view than my own of what fairness requires in the human rights context. They effectively held (in relation to the difference between the form of discrimination alleged and the form of discrimination proved) that 'if the glove does not fit, you must acquit'. Nevertheless, this decision must be understood in its proper legal context. The tribunal in *Battiston* ruled in favour of the complainant on February 9, 2012 at a time when it had no express statutory power to amend a complaint. Although the precise legal basis of the case changed in the course of the hearing, no application to formally amend the complaint was made. Section 20(5) of the Act as amended (with effect from October 26, 2012) conferred on the tribunal the express power to amend its 'terms of reference'.

140. It is now unarguably possible to amend the terms on which complaints have been referred to tribunals. So the key assumptions underpinning my remarks on the legislative scheme in paragraph 30 of the first instance judgment in *Battiston-v-Grant* [2016] SS (Bda) 51 App (31 May 2016) are not in my judgment materially undermined by the Court of Appeal's subsequent reversal of the actual decision. Nonetheless I am also bound to acknowledge the need, in this context to

avoid cantering enthusiastically along a path of pro-complainant judicial activism in a manner which may reasonably be viewed by an appellate tribunal as trampling on respondents' rights. The Court of Appeal's recent decision, I should add, in no way changes the law relevant to the present Judgment. It merely commends a slightly more rigorous approach to applying the provisions of the HRA and illustrates that the precise way in which breaches of the HRA are set out a complaint does legally matter.

141. It is necessary to remember that the EO is given the power under section 15(8) to dismiss an unmeritorious complaint. Although the discretion to grant judicial review at the pre-tribunal phase should obviously be exercised with restraint and not on overly technical grounds, the statutory scheme cannot sensibly be understood to envisage that complaints which are not even arguably meritorious on their face should be referred to a tribunal. As Mr Johnston submitted, being made a respondent to a complaint in and of itself can have a negative impact on the reputation of a respondent.

142. Against this background, one can now turn to the very different case against the 2nd Applicant. As a matter of initial impression, the Complaint does not appear to disclose an arguable case against the 2nd Applicant for breaching section 8A(1)(b) at all. Mr Doughty submitted that the following additional paragraph pleaded a *prima facie* case against the 2nd Respondent:

> "*8. Additionally, the organizer of the event should be held equally culpable. The function lasted some two hours thus affording him the opportunity, at any moment he chose, to intervene in what appears to be a sustained assault on and affront to human rights. His silence and the audience applause sent a very serious and clear message about the state of race relations in Bermuda. Aside from Mr Kimathi's own internet self-promotion, a simple search of arguably credible sources such as Ebony, The Washington Post and the Daily Mail, almost instantly illustrates an established pattern of behaviour and character in him. I believe that it was entirely reasonable to expect the organizer to have known beforehand what was reasonable to expect from Mr Kimathi and suggest that he was not chosen from a position of either innocence or blindness.*"

143. This is a very coherent "gripe" against the moral culpability of the 2nd Applicant for Mr Kimathi's offensive remarks but very far removed from a clearly articulated case for holding the organiser of an event legally responsible for intending to incite ill will through the "use" of words which are likely to have that effect. When the entire presentation is listened to, it is clear that the overwhelming majority of it was not legally objectionable and that most of the legally objectionable statements came at the end. The suggestion that the 2nd Applicant should have interrupted the "sustained assault" is not itself an obviously sustainable complaint. This passage in the Complaint also ignores the obvious point in Mr Tucker's favour, that if it was so obvious that Mr Kimathi was an unsuitable speaker he ought not to been permitted by the Minister to enter

Bermuda in the first place. Be that as it may the allegation amounts to no more than this. It is alleged that the 2nd Respondent:

(a) failed to stop the presentation; and

(b) ought to have known beforehand what the 1st Applicant was likely to say.

144. It is difficult to imagine how section 8A(1)(b) can sensibly be viewed as intending to prohibit not just the use of words which incite hostility, but also failing to prevent such words being used and/or causing such words to be used as the Complaint implies. Section 8A(1) as read with section 22(1), (c), (d) is a penal provision which may result in a conviction of a criminal offence. It must be construed narrowly so as to minimize the potential interference with freedom of expression rights as the ECHR case law considered above clearly demonstrates. Section 22(1) provides:

> *"(1) Any person who—*
>
> *(a) wilfully and unlawfully discriminates against a person contrary to any provision of Part II; or*
>
> *(b) aids, counsels or procures any other person to discriminate against a person contrary to any provision of Part II; or*
>
> *(c) wilfully infringes, or wilfully does, directly or indirectly, any thing that infringes, a right that a person has under Part II; or*
>
> *(d) wilfully contravenes any other requirement of Part II, commits an offence:*
>
> *Provided that it shall be a defence for any person charged with an offence under this subsection to prove that he acted in reliance upon a statement made to him by some other person to the effect that, by reason of any provision of this Act, it would not be unlawful for him so to act, and that it was reasonable in the circumstances for him to have relied upon the statement so made."*

145. It is noteworthy that even in the criminal context, it is only an offence to "aid", "counsel" or "procure" another person to discriminate. In a criminal prosecution for breach of section 8A(1)(d) as read with section 22(1)(c), it might be perhaps be alleged that the defendant, directly or indirectly, wilfully infringed the complainant's rights under section 8A(1). Whether such an offence would, without violating the defendant's freedom of expression rights to an impermissible extent, embrace the allegations made against the 2nd Applicant is subject to considerable doubt. The language of section 22(1)(c) appears to require positive actions rather than mere inactivity. And the governing provision (section 8A(1)(b)) cannot easily be read as embracing conduct beyond the scope of the

statutory words. What level of participation is required by a respondent in the context of a civil HRA complaint? The notion that Parliament intended this to be the subject of speculation is undermined by the fact section 8A(2) explicitly deals with incitement in the following very specific terms:

> "(2) *No person shall, with intent to incite another to commit a breach of the peace, or having reason to believe that a breach of the peace is likely to ensue, do any act calculated to incite or promote ill will or hostility against any section of the public distinguished by colour, race or ethnic or national origins.*"

146. In the specific context of employment discrimination combined with corporate responsibility, I held in *Apex Construction Management and others-v-Grant* [2015] Bda LR 37 on the trial of a preliminary issue:

> *"23. Section 6(1)(c) and (f) were relied upon by the Respondent as the ways in which he complained he was discriminated against. Construing the statute liberally with a view to giving effect to its goal of protecting human rights, it seems self-evident that:*
>
> *i. "no person shall discriminate" potentially includes not just the employer in a narrow legal sense, but includes any directors, managers, supervisors and/or general employees as well;*
>
> *ii. a person would potentially be liable for discrimination if they either:*
>
> *(a) committed the allegedly discriminatory acts,*
>
> *(b) procured other persons to commit the acts complained of, and*
>
> *(c) omitted to take remedial steps, in circumstances where the relevant person had knowledge of the*

discriminatory acts and possessed the authority to put a stop to them; and

iii. although there may be some overlap with the tortious liability test (eg examples (a) and (b) in subparagraph (ii) hereof), it is impossible to exclude the possibility of a more fluid and generous test for liability, depending on the applicable facts."

147. It was perhaps in the hope of engaging this broader theory of legal responsibility that the Complaint tacked on at the end an allegation that discrimination had occurred:

> "*13. I believe that the Respondent, Mr Ayo Kimathi, and Mr David Tucker have contravened Section 8A(1)(b) of the Human Rights Act as read with Section 2(2)(a)(i) of the Act.*"

148. Section 2(2)(a)(i) simply defines "discrimination" so the reference to section 2(2)(a)(i) is legally meaningless. Part II of the Act substantively prohibits discrimination on various grounds:

- in notices (section 3);
- in the disposal of premises (sections 4, 4A);
- in the provision of goods and services (section 5);
- in employment (section 6);
- by organizations (section 7);
- as retribution for taking part on proceedings under the HRA (section 8);
- through covenants (sections 10,11).

149. Notwithstanding the fact that the 1st Applicant's message advocated, in a very abstract and futuristic sense, discrimination in the provision of goods and services in a manner which would potentially infringe section 7 of the Act, it is impossible to see how the 1st Applicant (let alone the 2nd Applicant) can conceivably be said

to have actually discriminated against the Complainant in contravention of the HRA. No arguable case of such a breach has been disclosed (nor could be if the Complaint were to be amended).

150. This issue was not satisfactorily addressed in argument because although the Applicants had raised by way of correspondence in general terms the argument that the Complaint was frivolous on its face, the distinctive position of the 2nd Applicant was never highlighted by Mr. Johnston. Much in the same way that the Applicants' submissions assumed that the impugned statements did not amount to 'hate speech' the Respondent's submissions assumed that the Complaint was properly referred to the Tribunal because it disclosed on its face a *prima facie* case and that, in any event, alternative remedies should be pursued. When I put to Mr Doughty in the course of the hearing that it was difficult to see what case was validly asserted on the face of the Complaint against Mr Tucker under section 8A(1)(b), he was unable to do more than to refer to paragraph 8 of the Particulars of The Complaint. I expressed the provisional view that section 8A(1)(b) could not conceivably apply to the 2nd Respondent. This view was informed in part by the following considerations:

(a) the 2nd Applicant's evidence that he selected Mr Kimathi based on a recommendation from a previous lecturer who had brought to Bermuda was not challenged or contradicted by any other evidence;

(b) it was inherently believable that the 2nd Applicant, while possibly appreciating that Mr Kimathi's views might be in part controversial, had no reason to believe that the presentation would involve a potential breach of the HRA;

(c) the impact of the statements which potentially amounted to 'hate speech' was, from the event organiser's perspective, unfairly magnified by the selective reporting on the most offensive statements made. No coverage at all was given to the lecture of Professor Small, a respected expert on African history and culture. The broad aims of the lecture series seemed on their face to be deserving of commendation rather than condemnation;

(d) it could obviously suppress freedom of expression if organisers of similar events were made unduly anxious about their potential liability under the HRA for unexpected statements made by their invitees. Such anxiety could easily be created is HRA complaints were liberally allowed to be made and referred to the Tribunal under section8A(1) without any coherent case of wrongdoing having to be formulated at the outset.

151. Having reserved judgment, on April 19, 2017 I afforded counsel for the 3rd Respondent an opportunity to file supplementary submissions within seven days on the following questions:

> "*On what legal basis is it open to the Court, construing section 8A(1)(b) of the HRA in a manner which does not conflict with section 9 of the Constitution, to conclude that the Complaint dated December 17, 2015, viewed in conjunction with the evidence before the Court, discloses an arguable case that the 2nd Applicant acted in breach of section 8A(1)(b) and/or any other substantive provisions of the HRA prohibiting discrimination? How can section 8A(1)(b), a potentially penal provision, be read as prohibiting not merely using words which incite ill-will or hostility as the statute expressly provides, but also (by necessary implication) an ill-defined and potentially limitless range of participatory acts or omissions without contravening section 9 of the Constitution?*"

152. The two questions counsel was invited to address can further be distilled as follows: (1) whether the Complaint (i.e. the existing Complaint) read with the evidence before the Court disclosed a contravention of section 8A(1)(b) and/or any other provision of the Act by Mr Tucker; and (2) whether section 8A(1)(b) can be properly construed as including participatory acts or omissions as well as actually using prohibited words (taking into account section 9 of the Constitution and the fact that it is a penal provision). Mr Doughty advanced the following additional submissions which addressed these two narrow issues:

(a) there is evidence before the Court (the video) capable of supporting the already pleaded allegation of contravening section 8A(1)(b) that the 2nd Applicant herein himself used words which amounted to 'hate speech' by endorsing what the 1st Applicant had said by (a) encouraging persons present to join the Straight Black Pride Movement and (b) by using the words "*It's coming! It's an army!*" This implied "*that a violent uprising against white people would be 'coming'*". There is also evidence (namely selected slides) capable of supporting a viable (and entirely new) allegation that the 2nd Applicant violated section 8A(1)(a) by publishing hate speech. The latter submission did not help to validate any allegation made in the existing Complaint;

(b) it was conceded that section 8A(1) should be construed narrowly so as to ensure conformity with section 9(1) of the Constitution.

153. If section 81A(1)(b) must be construed narrowly as I find it should be so as to exclude an ill-defined range of participatory acts, it is firstly clear that the Complaint as drafted discloses no case against the 2nd Applicant. However secondly, the Complaint cannot be cured by amendment to plead a case that Mr Tucker himself used words amounting to 'hate speech' merely by warmly endorsing Mr Kimathi and making oblique references to "an army". Nor can merely encouraging people to join SBPM arguably amount to 'hate speech' in

terms of section 81A (b) as it was drafted at the material time. There is no credible suggestion that the 2nd Applicant himself, like the 1st Applicant, used an explicit and graphic combination of words which was arguably both intended to and likely to promote ill-will and hostility to persons on the grounds of their race.

154. The Complaint makes no legal or factual averment in relation to section 8A(1)(a) at all. The issue of adding an entirely new allegation by way of amendment before the Tribunal only properly arises if a Complaint which discloses a potentially sustainable allegation has been referred to the Tribunal in the first place. If this was not the correct legal analysis, it would effectively render the elaborate investigative regime of the Act (including the power to dismiss unmeritorious complaints conferred on the EO by section 15(6) and the power to decide not investigate frivolous complaints conferred by section 15A(1)-(2)) nugatory altogether. If the EO is empowered to refer complaints to the Tribunal even if they are invalid on their face, this would mean that she could refer a blank piece of paper with a respondent's name on it to the Tribunal and make entirely new allegations for the first time at that juncture. Parliament cannot have intended such an absurd result.

155. If section 8A(1)(a) must be construed narrowly as I find it should be to avoid infringing section 9 of the Constitution, then it is difficult to see how any such allegation as is presently proposed by the Executive Officer could be sustainable in any event. The slides which it is suggested by way of supplementary submission infringe section 8A(1)(a), assuming the 2nd Respondent can be held responsible for publishing or displaying them with the requisite intent, do not individually or collectively come close to the high bar required. They may be offensive or upsetting to some but freedom of expression a we know it would cease to exist if every offensive or upsetting image which is publically displayed were held by this Court to amount to an arguable breach of section 8A(1) of the HRA. It was a combination of the words used by Mr Kimathi and the slides, <u>but primarily his express words</u>, which I have found engaged section 8A(1)(b).

156. For the avoidance of doubt I make no formal finding on a breach of section 8A(1)(a) of the Act as such a contravention has never formally been alleged and is not strictly before this Court. The EO still has time under section 14H(1)(c) to file for the first time a fresh complaint on that new ground, should she be advised to do so. No doubt she will be mindful of the need to ensure that the HRC effectively manages the extremely delicate and difficult task of maintaining the right balance between addressing often intangible and subtle forms of discrimination against the historically disadvantaged black Bermudian majority and sometimes more obvious discrimination against other minority groups, particularly groups which have been historically advantaged or which have only recently received legal protection against discrimination. What that balance should be is for the EO to decide and is far from a straightforward undertaking which can never be perfectly achieved.

157. In reaching my own conclusions on this part of the case, I have regarded as a subsidiary background consideration my view that the 2nd Applicant's lecture series, looked at as a whole, was quite obviously primarily motivated by a desire to mitigate the modern day effects of historic discrimination against Bermudians

of African descent. This broader picture should not be distorted by the intense scrutiny which the most offensive statements (made mainly at the culmination Mr Kimathi's remarks) has been subjected to, nor indeed the fact that Mr Tucker adopts many of his views. Another closely connected background factor is that Mr Kimathi was given permission to enter Bermuda despite being on record for expressing similarly 'extremist' views. This made it reasonable for Mr Tucker to assume that, as in America, the 1st Applicant was perfectly free to express himself without legal impediment. Ignorance of the law is, of course, no excuse. I have merely sought to avoid viewing Mr Tucker's enthusiastic endorsement of his guest's remarks (both at the end of the lecture and in his Affidavit evidence) through the unfairly distorting lens of hindsight.

Alternative remedies

158. Having found that the Complaint discloses, as against the 1st Applicant herein, a sufficient case to warrant reference to the Tribunal and rejected the procedural non-compliance complaint, and that the impugned words do indeed constitute 'hate speech', it follows that the 1st Applicant's prayer for an Order of certiorari quashing the Decision must be refused.

159. The present findings are entirely without prejudice to the 1st Applicant's right to invoke the Tribunal's jurisdiction to dismiss the Complaint on any ground under section 20(6). It would have required an exceptional case to justify this Court interfering with the processes of the Tribunal which are intended by the statutory scheme to provide a fast-track route for the resolution of human rights complaints before a specialist tribunal.

160. The same alternative remedies are theoretically available to the 2nd Applicant. However, in his case this Court has concluded that the Complaint is liable to struck out because it fails to disclose any reasonable case of breach of section 8A(1)(b) of the HRA. The submission of Mr Johnston that merely being respondent to an unmeritorious HRA complaint is inherently prejudicial accordingly has considerable force in light of this finding. Having decided in the context of a broader application for constitutional relief that the Complaint ought not to have been referred to the Tribunal at all, it would be illogical to find that seeking interim relief from the Tribunal is a more appropriate remedy which the 2nd Applicant should be left to follow.

Summary

161. The application for an Order of certiorari quashing the decision to investigate and the reference of the Complaint to the Tribunal is refused in the case of the 1st Applicant but granted (as regards the reference, but not the decision to investigate) in the 2nd Applicant's case.

Findings: are the Applicants entitled to a declaration that section 8A(1) of the HRA is inconsistent with sections 8 and/or 9 of the Constitution?

Introductory

162. The Applicants sought a declaration that section 8A(1) was on its face inconsistent with the Constitution. Such relief is not required by the 2nd Applicant in light of my acceptance in his case that no sufficient case for referral to the Tribunal was made out. It remains to consider whether the 1st Applicant should be granted the declaratory relief he seeks or left to pursue his alternative remedies before the Tribunal.

163. One broad legal test is engaged by this limb of the present case. Under traditional practice in relation to judicial review applications, the Court must ask whether relief should be refused because there is another more appropriate remedy which the applicant ought to be required to pursue. The function of judicial review is to support the proper functioning of public bodies, not to subvert them. The Court will only grant relief which deprives a tribunal subject to the Court's supervision of the ability to discharge its statutory functions if the applicant can demonstrate that, unless the Court intervenes, no valid proceeding can take place.

164. In *Richardson-v-Raynor* [2011] Bda LR 52, this Court accepted a reference from the Magistrates' Court in relation to a criminal defamation trial of a constitutional question. This was whether or not the statutory provision under which the accused had been charged was constitutionally valid. This reference took place pursuant to the following provisions of section 15 of the Constitution:

> "*(3) If in any proceedings in any court established for Bermuda other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Chapter, the court in which the question has arisen shall refer the question to the Supreme Court unless, in its opinion, the raising of the question is merely frivolous or vexatious.*"

165. Only this Court clearly has jurisdiction to determine constitutional matters by virtue of section 15 of the Constitution although the current practice of this Court is to permit such points to be raised either under freestanding applications under section 15 or in other proceedings in which constitutional points arise, such as judicial review proceedings: *Centre for Justice-v-Attorney-General* [2016] SC (Bda) 72 Civ (11 July 2016) at paragraphs 29-30. Accordingly, before considering the merits of the constitutional question, it is necessary to consider whether it is appropriate to entertain the application for constitutional relief at this stage at all.

166. Should the 1st Applicant respond to the Complaint on its merits and postpone seeking constitutional relief until the Complaint has been adjudicated to see whether he can succeed on the merits? In answering this question it is necessary to distinguish two types of constitutional challenge:

(a) an argument that section 8A(1) should be interpreted in a way which is consistent with sections 8 and/or 9 of the Constitution, and that the Complaint should be dismissed because it is unmeritorious if the relevant statutory provision is properly construed; and

(b) an argument that section 8A (1) is invalid on its face because its conflicts with sections 8 and/or 9 of the Constitution, and the Complaint should be dismissed because it fails to disclose a reasonable cause of action.

167. The first type of constitutional complaint can be adjudicated by the Tribunal because it simply raises a point of statutory interpretation which the Tribunal has jurisdiction to adjudicate. The second type of constitutional challenge cannot be adjudicated by the Tribunal, and if valid, would render nugatory all proceedings before the Tribunal because the Complaint ought not to have been referred at all. Unless obviously frivolous, a challenge which goes to the root of the jurisdiction of a tribunal to adjudicate a particular matter may properly be entertained by this Court on the grounds that there is no alternative more appropriate remedy for such a challenge. The prayer a declaration in the following terms clearly falls within the second category of constitutional challenges:

> "*12. Further or alternatively, a declaration that section 8A(1) of the 1981 Act contravenes either of sections 8(1) and/or 9(1) of the Constitution.*"

168. The complaint is that section 8A(1) is too broadly drafted and would be constitutionally valid if it prohibited only hate speech but is invalid because it prohibits more than hate speech. This submission is not obviously frivolous and should be considered on its merits. The analysis is quite abbreviated because of my rejection above the Applicants' narrow definition of the scope of 'hate speech'.

The Applicants' submissions

169. The Applicants' counsel invited the Court to have regard to Commonwealth (Canadian, South African) cases and ECHR cases:

> "*84. The latest of those* [Canadian/South African] *cases declared a provision similar to section 8A of the 1981* [Act] *unconstitutional, because its reach was too broad. The low-water mark in Whatcott was 'extreme ill will.*
>
> *85. As expressed above the ECtHR is even more exacting in its definition...of 'hate speech'...there must be the incitement to violence.*

86. ...Here the situation is plain. The provision does not require the type of conduct that can be properly described as 'hate speech'. Therefore, section 8A of the 1981 Act is unconstitutional. "

170. For the reasons fully set out above, I have already rejected the submission that the European Court of Human Rights decisions on article 10 of ECHR define 'hate speech' so narrowly as to require an incitement to violence. Only the other authorities relied upon by Mr Johnston require consideration here:

(a) *R-v- Keegstra* [1990] 3 RCS 167 (at page 715) involved a statutory provision which did not require an incitement to violence and which was held (by the majority) to be valid on its face (the minority held the imposition of criminal sanctions was not reasonably required);

(b) *R-v-Zundel* [1992] 2 RCS 731 (at 746) concerned a provision which does not resemble section 8A(1) in any way which was held to be unconstitutional;

(c) Saskatchewan Human Rights Commission-v-Whatcott [2013] 1 SCR 467 (at 109-110) concerned a statutory provision which was comparable to section 8A(1) a part of which was held to be invalid because it was too broad;

(d) *AfriForum-v- Malema* [2011] ZAEQC 2 (at paragraphs [26], [37]) concern broad prohibitions on hate speech which were <u>not</u> held to be unconstitutional. Moreover the Constitution of South Africa (section 16(2), cited at paragraph [20]) explicitly provides that freedom of expression does not extend to "*advocacy of hatred which is based on race, ethnicity, gender or religion, and that constitutes an incitement to cause harm*".

171. In summary, it was submitted that section 8A(1) was drafted to probably to constitute an interference with free speech which was "reasonably required".

<u>The 3rd Respondents' Submissions</u>

172. Mr Doughty submitted that section 8A was:

"*7.3.2.2 ...on its face, a justifiable exception to the guarantee of 'freedom of conscience' in that it is reasonably required to protect 'public morality' or alternatively 'for the purpose of protecting the rights and freedoms of others'...*"

173. He made the important point that the dissenting judgment of McLachlin J (as she then was) in *Keegstra* did not assist the Applicants in the present case because the dissent was based on an objection to the proportionality of imposing criminal sanctions on 'hate speech'. McLachlin J observed (at 861):

> "*Other remedies are perhaps more appropriate and more effective. Discrimination on grounds of race and religion is worthy of suppression. Human rights legislation, focussing on reparation rather than punishment, has had considerable success in discouraging such conduct.*"

174. As far as *Whatcott* is concerned, the EO's counsel pointed out that:

(a) the broad prohibition on statements likely to interfere with the enjoyment, on the basis of a prohibited ground, of other persons' legal rights was not even challenged; and

(b) only the most general aspects of the impugned statutory provision (bracketed below) were struck down:

> "*...that exposes or tends to expose to hatred* [*, ridicules, belittles, or otherwise affronts the dignity of*] *any person or class of persons on a prohibited ground.*"

Section 8A(1)(b) construed in light of the case law

175. Section 8A (1) of the HRA provided at the material time[15] as follows:

> "*(1) No person shall, with intent to incite or promote ill will or hostility against any section of the public distinguished by colour, race or ethnic or national origins—*
>
> *(a) publish or display before the public, or cause to be published or displayed before the public, written matter which is threatening, abusive or insulting; or*
>
> *(b) use in any public place or at any public meeting words which are threatening, abusive or insulting.*

[15] The current version of the section (which was amended with effect from June 22, 2016) defines the prohibited grounds more broadly and includes in subsections (1) and (2) "*colour, disability, ethnic or national origins, family status, marital status, place of origin, race, or religion or beliefs or political opinions, sex or sexual orientation*".

being matter or words likely to incite or promote ill will or hostility against that section on grounds of colour, race or ethnic or national origins." [Emphasis added]

176. The Complaint which has been referred to the Tribunal in the present case alleges a contravention of the above provision which requires the proof of three elements:

(1) an intention to incite or promote ill will or hostility against a protected group (colour, race and ethnicity all potentially apply);
(2) the use of words at a public meeting which are threatening, abusive or insulting;

(3) being words which are likely to incite hostility or ill will towards members of a protected group.

177. It is implicitly conceded that statements which amount to 'hate speech' as defined by the European Court of Human Rights can validly be prohibited by Parliament through a provision broadly similar to section 8A(1). This Court has now found that some of the statements made by the 1st Applicant potentially meet that threshold and that it was properly open to the Minister to find (for immigration purposes) that the 1st Applicant had propagated 'hate speech'. This Court has made no formal finding that the statements in question actually did constitute hate speech, an issue which was not placed before this Court for determination.

178. Accordingly, even if the terms of the statute were found to be overly broad, it does not necessarily follow the 1st Applicant has sufficient standing to seek declaratory relief in the form pleaded in his Notice of Application. He would only obviously be prejudiced to the extent that reliance was sought to be placed by the Complainant on statements which did not amount to 'hate speech'. In addition, it is important for the Court to distinguish the level of scrutiny which the interaction between criminal proceedings and fundamental rights attract and the lower level of scrutiny which a less intrusive civil proceeding necessarily attracts. The cases relied upon by the Applicant will be considered in this light.

179. *R-v- Keegstra* [1990] 3 RCS 167 (at page 715) concerned a provision in the Criminal Code which was to some extent expressed in more narrow terms:

"*319...*

(2)Every one who, by communicating statements other than in private conversation, wilfully promotes hatred is guilty...[of an offence]".

180. The majority held that this provision was constitutional and McLachlin J explicitly affirmed that a non-criminal human rights prohibition expressed in similar terms would have been permissible. It is true that the word "hatred" is narrower than "ill will or hostility", but this case provides no real insights on how

a provision such as section 8A(1) should be construed in the context of applying human rights legislation in a civil as opposed to a criminal context.

181. *Saskatchewan Human Rights Commission-v-Whatcott* [2013] 1 SCR 467 is of much more relevance to the present case. It involved a human rights complaint filed in connection with an alleged breach of the following provision of the Saskatchewan Human Rights Code, which broadly corresponds to section 8A(1)(a):

> *"**14.** (1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:*
>
> *(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or*
>
> *(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.*
>
> *(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject."* [Emphasis added]

182. The underlined words in the above extract were held to interfere to a disproportionate extent with freedom of expression. This was the unanimous decision of the Supreme Court of Canada in which McLachlin CJ concurred. The Court expressly held that only words likely to cause hatred or contempt could reasonably be restrained by the legislature and that hurtful and offensive words were not caught. Rothstein J crucially opined as follows:

> *"[85] The wording of s. 14(1)(b) of the Code has been criticized for prohibiting not only publications with representations exposing the target group to "hatred", but any representation which "ridicules, belittles or otherwise affronts the dignity of" any person or class of persons on the basis of a prohibited ground. The words "ridicules", "belittles" or "affronts the dignity of" are said to lower the threshold of the test to capture "hurt feelings" and "affronts to dignity" that are not tied to the objective of eliminating discrimination. To the extent that they do, they are said to infringe freedom of expression in ways not rationally connected to the legislative objectives.*

[86] In actual fact, the additional words in s. 14(1)(b) have not explicitly been used to lower its threshold below what was set in Taylor. Even before this Court's decision in Taylor, the Saskatchewan Court of Appeal narrowly applied the wording in s. 14(1)(b): Human Rights Commission (Sask.) v. Engineering Students' Society, University of Saskatchewan (1989), 1989 CanLII 286 (SK CA), 72 Sask. R. 161; see also L. McNamara, "Negotiating the Contours of Unlawful Hate Speech: Regulation Under Provincial Human Rights Laws in Canada" (2005), 38 U.B.C. L. Rev. 1, at p. 57.

[87] Since the decision in Taylor, the Saskatchewan Court of Appeal has interpreted s. 14(1)(b) of the Code, including the words "ridicules, belittles or otherwise affronts the dignity of", to prohibit only those publications involving unusually strong and deep-felt emotions of detestation, calumny and vilification: see Bell, at para. 31; Owens, at para. 53; and Whatcott (C.A.), at paras. 53-55.

[88] Although the expansive words 'ridicules, belittles or otherwise affronts the dignity of' have essentially been ignored when applying s. 14(1)(b), it is a matter of concern to some interveners that "the legislation has never been amended, and no declaration has ever been made to read down the impugned law" (Christian Legal Fellowship factum, at para. 22), and that the express wording of the provision contributes to its chilling effect: Canadian Journalists for Free Expression factum, at para. 5.

[89] In my view, expression that "ridicules, belittles or otherwise affronts the dignity of" does not rise to the level of ardent and extreme feelings that were found essential to the constitutionality of s. 13(1) of the CHRA in Taylor. Those words are not synonymous with "hatred" or "contempt". Rather, they refer to expression which is derogatory and insensitive, such as representations criticizing or making fun of protected groups on the basis of their commonly shared characteristics and practices, or on stereotypes. As Richards J.A. observed in Owens, at para. 53:

> *Much speech which is self-evidently constitutionally protected involves some measure of ridicule, belittlement or an affront to dignity grounded in characteristics like race, religion and so forth. I have in mind, by way of general illustration, the editorial cartoon which satirizes people from a particular country, the magazine piece which criticizes the social policy agenda of a religious group and so forth. Freedom of speech in a healthy and robust democracy must make space for that kind of discourse . . . .*

[90] I agree. Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, for the reasons discussed above, offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred.

[91] There may be circumstances where expression that "ridicules" members of a protected group goes beyond humour or satire and risks exposing the person to detestation and vilification on the basis of a prohibited ground of discrimination. In such circumstances, however, the risk results from the intensity of the ridicule reaching a level where the target becomes exposed to hatred. While ridicule, taken to the extreme, can conceivably lead to exposure to hatred, in my view, "ridicule" in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address.

[92] Thus, in order to be rationally connected to the legislative objective of eliminating discrimination and the other societal harms of hate speech, s. 14(1)(b) must only prohibit expression that is likely to cause those effects through exposure to hatred. I find that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be justified under s. 1 of the Charter and, consequently, they are constitutionally invalid.

[93] It remains to determine whether the words "ridicules, belittles or otherwise affronts the dignity of" can be severed from s. 14(1)(b) of the Code, or whether their removal would transform the provision into something which was clearly outside the intention of the legislature. It is significant that in the course of oral argument before this Court, the Attorney General for Saskatchewan endorsed the manner in which the words "ridicules, belittles or otherwise affronts the dignity of" were read out in Bell. I accept his view that the offending words can be severed without contravening the legislative intent.

[94] Given my determination that these words are unconstitutional, it is time to formally strike out those words from s. 14(1)(b) of the Code. The provision would therefore read:

> *(b) that exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground."*
> [Emphasis added]

183. Carefully read, this decision draws a clear distinction between the constitutionally permissible legislative goal of prohibiting expression likely to expose protected groups to "*hatred*", and the constitutionally impermissible "*chilling" effect*" on free speech that prohibiting statements which are "*derogatory and insensitive*" would potentially have. In my judgment, the offending statutory words in *Whatcott, "ridicules, belittles or otherwise affronts the dignity of*", have an entirely different character to the critical impugned words in section 8A (1), "*promote ill will or hostility*". The former words clearly embraced statements which were merely offensive or abusive. The latter words, linked with the prohibition on using "*words which are threatening, abusive or insulting*", clearly require more than simply statements which are insulting and abusive. To be caught by section 8A (1) (b), the offending words must be both intended to and likely to promote "*ill will or hostility"* as well. This suggests, in the context of a provision found a human rights statute primarily concerned with prohibiting discrimination, being a provision which must be read so as to avoid unreasonably infringing freedom of expression, the following requirement. To be caught by the section, the statements in question must be both intended to and be likely to promote either hatred of or discrimination against protected groups.

184. To put it another way, the natural and ordinary meaning of the words "ill will or hostility", which have an infinite variety of shades of general meaning dependent on context, must be intended to have a more grave and serious legal meaning in the particular legislative context of section 8A(1) in Part II of the HRA. Interestingly, the only easily identifiable other statutory use of the phrase "ill will or hostility" my own researches have revealed is in the Sedition Act of Trinidad and Tobago[16]. Such an interpretative approach is consistent with that commended by the Applicants when construing section 31(5) of BIPA. Construing ordinary legislation in such a manner, so far as the language reasonably permits, as to conform to potentially inconsistent provisions of the Constitution is the way in which courts routinely apply an important common law rule of statutory construction: the presumption that Parliament did not intend to legislate in a way which interferes with constitutional rights. Under Bermuda's written Constitution, the governing rule of interpretation finds expression in the Constitution itself which confers a power to legislate subject to the condition that the laws comply with the Constitution (section 34).

185. *Saskatchewan Human Rights Commission-v-Whatcott* [2013] 1 SCR 467 provides very strong support for interpreting section 8A(1) as being constitutionally compliant rather unconstitutional, and neither this case nor any of the other authorities relied upon by the Applicants supports the contrary position. I accordingly find that the only conduct which is prohibited by section 8A(1) is expression which amounts to 'hate speech', in other words, statements intended to and likely to promote hatred towards or discrimination against groups protected by the provision. That case also illustrates that the courts will so far as possible seek to construe legislation in such a way as to make it constitutionally compliant until an appropriate case arises for striking legislation down.

[16] *Suratt et al-v-A-G for Trinidad and Tobago* [2007] UKPC 55 at paragraph 34.

186. The present case is not an appropriate one to consider granting the declaration the Applicants seek in any event because they are not sufficiently prejudiced by it. The 1st Applicant is not sufficiently prejudiced because the section is not being invoked against him in relation to statements falling short of 'hate speech'. It must be acknowledged that the position might be otherwise had this Court not been required to entertain his present constitutional challenge. The 2nd Applicant is not sufficiently interested to seek such relief because the referral of the Complaint to the Tribunal in his case has been set aside.

Summary

187. As at least some of the statements made by the 1st Applicant arguably contravene section 8A(1)(b), he is neither entitled to a declaration that the provision is wholly unconstitutional nor a more limited declaration that the prosecution of the Complaint would infringe his constitutional rights in any event.

Conclusion

188. The application against the 1st and 2nd Respondents to quash the Minister's September 28, 2015 decision to place the 1st Applicant on the stop list under section 31(5) of BIPA is refused. The Minister had legal authority to make the Decision and was entitled to find that the conditions for excluding the 1st Applicant were met because some of the statements the 1st Applicant made at the public lecture amounted to 'hate speech' and were not protected by the guarantees for freedom of expression under section 9 of the Constitution. The offending statements asserted, *inter alia*, that (a) persons of European descent were enemies of persons of African descent with perverted sexual practices and were engaged in a campaign that amounted to genocide against persons of African descent, (b) persons of African descent should, to protect themselves from this attack, pursue a racially separatist agenda both economically and socially, shunning interracial relationships, and (c) persons of African descent were entitled to be homophobic, should condemn black parents who accept the alternative sexual orientation of their children and should generally shun homosexuals who were "freaks".

189. The Minister's Decision was upheld on the basis that he was entitled to find that the impugned remarks were likely to promote hatred towards and discrimination against various minority groups in Bermuda on the grounds of their race and/or sexual orientation. The constitutional rights of the Applicants under sections 8 (freedom of conscience) and 9 (freedom of expression) were not interfered with in a constitutionally impermissible manner in all the circumstances of the stop list decision. It is clear in light of the arguments and was common ground that free speech under Bermuda constitutional law is far narrower than it is under United States constitutional law.

190. The application by the 1st Applicant to quash the decision by the Executive Officer of the HRC to investigate the Complaint about his remarks and to refer the Complaint to the Tribunal for adjudication is refused. The Complaint does on its face disclose an arguable case that section 8A(1)(b) of the HRA was contravened by him. The central allegation in the Complaint is that his remarks amounted to 'hate speech' which is unlawful and not protected free speech under Bermudian law.

191. However, the 1st Applicant is apparently both an American national and resident, and, it seems likely that the position regarding the legality of his most offensive statements is different under US law. It is far from clear how in practical terms the Complaint can be fairly pursued against a foreign national who has been placed on the stop list by the Minister, or indeed whether the HRA complaint regime is designed to deal with such a case. Ordinarily a civil human rights complaint would be a proportionate State action by way of response to 'hate speech. But if the Complaint is proved and a further 'penalty' is imposed on the 1st Applicant in addition to his being placed on the stop list, would the cumulative response still be a proportionate one? The present Judgment does not deal with these issues which were, understandably, not addressed in argument and are not ripe for adjudication by this Court. For now, at least, those are matters for the Tribunal and the parties to consider.

192. The application by the 2nd Applicant to quash the decision by the Executive Officer of the HRC to investigate the Complaint about Mr Kimathi's remarks is refused but the application to quash the decision to refer the Complaint against the 2nd Applicant to the Tribunal is granted because it does not disclose a potentially valid case that he (Mr Tucker) contravened section 8A(1)(b) or any other provision of the Act. Mr Tucker's lecture series had the primary aim of addressing historic prejudice faced by Bermudians of African descent. His general support for Mr Kimathi at the end of the controversial lecture came nowhere near to supporting the allegation that that the 2nd Applicant himself "used" words which amounted to 'hate speech'. Freedom of expression would potentially be stifled if the bar for holding the hosts of guest lectures liable for their controversial remarks were set too low. Moreover, in the present case even assuming the 2nd Applicant anticipated Mr Kimathi's most outrageous remarks, it seemed likely that Mr Tucker assumed that Mr Kimathi was legally free to say in Bermuda what he was able to say (and had said) in America. Only this decision has established that freedom of expression is narrower in Bermuda than it is in the United States.

193. The application for a declaration that section 8A(1) of the HRA is unconstitutional is refused. Adopting a narrow interpretation designed to give maximum effect to constitutionally protected freedom of expression and conscience rights, the section may be read as only prohibiting 'hate speech' and not merely abusive, insulting or offensive remarks.

194. I will hear counsel as to costs and indicate in that regard that my provisional view is that this is a case to which the principles applicable to applications for constitutional relief potentially apply. These principles are most authoritatively set out in a most valuable recent Court of Appeal judgment, *Minister of Home Affairs and Attorney-General-v-Barbosa* [2017] CA (Bda) Civ (30 March, 2017).

Dated this 28th day of April, 2017

IAN RC KAWALEY