Hilary Term
[2022] UKPC 5
Privy Council Appeal No 0077 of 2019

JUDGMENT

Attorney General for Bermuda (Appellant) *v* Roderick Ferguson and others (Respondents) (Bermuda)

From the Court of Appeal for Bermuda

before

Lord Reed
Lord Hodge
Lady Arden
Lord Sales
Dame Victoria Sharp

JUDGMENT GIVEN ON
14 March 2022

Heard on 3 and 4 February 2021

Appellant
Jonathan Crow QC
Tom Cross
(Instructed by Charles Russell Speechlys LLP)

Respondents
Lord Pannick QC
Rod S Attride-Stirling
Sean Dunleavy
(Instructed by Freshfields Bruckhaus Deringer LLP)

LORD HODGE AND LADY ARDEN: (with whom Lord Reed and Dame Victoria Sharp agree)

OVERVIEW OF THIS APPEAL

1. This appeal is about whether the law of Bermuda recognises same-sex marriage. Section 53 of the Domestic Partnership Act 2018 of Bermuda ("the DPA") confines marriage to a union between a man and a woman. However, both the Supreme Court and the Court of Appeal of Bermuda have held that this restriction is invalid, and so the Attorney General of Bermuda appeals to the Board. The question of invalidity turns on three matters: (1) religious purpose - is section 53 inoperative because it was enacted for a religious purpose? (2) freedom of conscience - do the respondents have a constitutional right to freedom of conscience with regard to their belief that same-sex unions should be legally recognised as marriage, and, if so, does section 53 contravene that right? and (3) creed-based discrimination - is the respondents' belief that same-sex marriage should be legally recognised a "creed" entitling the respondents to constitutional protection from discrimination on that basis, with the consequence that section 53 violates that protection? The Supreme Court of Bermuda (Chief Justice Kawaley) found for the respondents on points (2) and (3) and the Court of Appeal found for the respondents on points (1) and (2). For the reasons in this judgment, the Board considers that the respondents should not have succeeded on any of the three points and that this appeal should be allowed. A short statement of the Board's reasons will be found in the section headed "Conclusion" at the end of this judgment.

2. The first respondent is Mr Roderick Ferguson, a Bermudian who currently resides in Boston, who is gay. His complaint is that the DPA deprived him of the right to marry, offering instead a separate relationship status. The second respondent is OUTBermuda, a charity devoted to addressing the challenges faced by LGBTQ Bermudians. The third respondent is Ms Maryellen Jackson, a lesbian Bermudian. The fourth to sixth respondents are Dr Gordon Campbell, a trustee of the Wesley Methodist Church, Ms Sylvia Hayward-Harris and The Parlor Tabernacle of the Vision Church of Bermuda.

DOMESTIC PARTNERSHIP ACT 2018, SECTION 53

3. The DPA principally provides for the legal recognition of relationships between two individuals. These are domestic partnerships and may be entered into by any two persons. The DPA regulates the conditions of eligibility, and formalities, for domestic partnerships, and their termination. The preamble to the Act describes its purpose as follows and makes no reference to any religious purpose:

> "WHEREAS it is expedient to provide for the formalisation and registration of a relationship between adult couples, to be known as a domestic partnership, to clarify the law relating to marriage, and to make connected and related provision;"

4. Section 53 of the DPA provides:

> "53. Notwithstanding anything in the Human Rights Act 1981, any other provision of law or the judgment of the Supreme Court in *Godwin and DeRoche v The Registrar General and others* delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female."

5. Section 54 provides that it does not apply to same-sex marriages entered into between the date of the decision in *Godwin* and the commencement date of the DPA.

6. Section 48(1) of the DPA states that section 53 and other specified provisions of the DPA and section 15(c) of the Matrimonial Causes Act 1974, which provides that a marriage is void unless the parties are male and female, are to take effect notwithstanding anything to the contrary in the Human Rights Act 1981 of Bermuda ("the HRA"). The protections of the Human Rights Act are therefore not available in support of same-sex marriage.

THE CONSTITUTION OF BERMUDA

7. The Legislature of Bermuda can make laws subject to the Constitution of Bermuda ("the Constitution" or the "Bermudian Constitution"). This is set out in Schedule 2 to the Bermuda Constitution Order 1968 ("the Constitution Order") enacted by the United Kingdom. So, the Constitution derives its legal attributes from UK legislation, and that is a signal that the Constitution of Bermuda is not like that of a fully independent state. A very special feature of the Bermudian constitutional position is that it is multi-layered. The UK Parliament may have retained powers in relation to the Constitution of Bermuda. The UK is as a matter of international law responsible for its international affairs as the Board explains below.

8. The Constitution sets out the main political institutions of Bermuda. The Legislature consists of a Senate, whose members are appointed by the Governor, and the House of Assembly ("the Assembly"), which is an elected body. Subject to the

Constitution, the Legislature has power to make laws for the peace, order and good government of Bermuda (section 34 of the Constitution). In addition, Bermuda has a ministerial system of government with an executive, and this is the principal body for making policy. The Legislature may determine its own privileges (see section 46 of the Constitution) but there is no information about any privilege attaching to the proceedings of the Legislature. As to the role of religion under the Constitution, there is no preamble to the Constitution and thus no statement about religion. The Constitution does not, however, provide that laws must not be passed for a religious purpose.

9. Chapter 1 of the Constitution sets out fundamental rights and freedoms. The Constitution does not confer any right to marry. Relevant to this appeal are sections 8 and 12, which (among other matters) guarantee freedom of conscience and protection from particular forms of discrimination, including creed-based discrimination, respectively. Under section 8(5), a law may interfere with constitutional rights where reasonably justified on the specified grounds. The presence of sections 8(1) and 12 indicate that Bermuda is a society in which different views may be held on religious matters and matters of conscience, and that difference must be respected. Sections 8 and 12 provide:

> "**Protection of freedom of conscience**
>
> 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.

Protection from discrimination on the grounds of race, etc

12(1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

APPLICATION OF THE CONVENTION AND THE INTERPRETATION OF CONSTITUTIONAL RIGHTS

10. In this section the Board explains why the European Convention on Human Rights ("the Convention") applies to Bermuda as a matter of international law and is relevant to the interpretation of its constitutional rights.

11. The UK signed the Convention in 1950 and by a declaration dated 23 October 1953 the UK government declared that the Convention should extend to certain territories, including Bermuda, for whose international relations they were (and are) responsible. By a declaration dated 12 September 1967 pursuant to article 63 (now article 56) of the ECHR, and in light of the UK being responsible for the international relations of Bermuda, the UK declared that the European Commission and now the European Court of Human Rights ("the Strasbourg Court") had "competence … to receive petitions … by any person claiming, in relation to any act or decision occurring or any facts or events arising on or after [12 September 1967], to be the victim of a violation of the rights set forth in the [Convention] as extended to that territory" for an initial period. This declaration has been renewed for successive periods and on 22 November 2010 it was renewed on a permanent basis. The Convention does not, however, form part of the domestic law of Bermuda and so the courts cannot give effect to Convention rights. A Bermudian may apply to the Strasbourg Court because he claims that there has been a violation of a Convention right even though it is not set out in the Constitution. In addition, in accordance with an established canon of construction (*Matadeen v Pointu* [1999] 1 AC 98, 114 per Lord Hoffmann), the courts of Bermuda will interpret any ambiguous enactment in a manner which is consistent with the international obligations of the United Kingdom in relation to Bermuda if that is one of the meanings open to them.

12. It is well-established that the usual approach of the Board to the interpretation of constitutional rights is that laid down in the landmark case of *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 ("*Fisher*") which concerns the Bermudian Constitution. The Board adopts a "generous" approach. In that case, the Board held that Chapter 1 of the Constitution had been influenced by the Convention, which in turn had been influenced by the United Nations' Universal Declaration of Human Rights of 1948, and that:

> "These antecedents, and the form of Chapter 1 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." (p 328)

13. The Convention is relevant to the interpretation of the Constitution because the ECHR's text was one of the "antecedents" to the text of the Constitution. That cannot be said of other international human rights instruments except the Universal Declaration of Human Rights. This was clearly the view of the Board in *Fisher*. Lord Wilberforce, giving the opinion of the Board, explained:

> "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 SI 1968/182). It can be seen that this instrument has certain special characteristics.
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> 1. It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality.
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> 2. Chapter 1 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 1 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 1. 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'." (pp 328-329)

14. Manifestly, therefore, the intention of the Constitution was that the way in which Convention rights were understood under the case law of the Strasbourg Court should be a particularly relevant consideration in the interpretation of those of the rights conferred by the Constitution that could be traced back to the Convention.

15. Nonetheless, the Constitution must be interpreted subject to special provisions applying in Bermuda and in the context of Bermuda's history and heritage. Compliance with the Convention is an obligation on the international plane and does not make the Convention part of the domestic law of Bermuda. The Convention therefore is relevant to the interpretation of the Constitution as an international human rights instrument which (i) is binding on the United Kingdom in relation to Bermuda on the international plane and (ii) has inspired those provisions of the Constitution which have been derived from it. The degree of persuasive force of authorities on the Convention depends on the text of the relevant provision and its place in the general scheme of the Convention and the Constitution: *Williams v The Supervisory Authority* [2020] UKPC 15, para 73 per Lord Sales.

16. The Bermudian Constitution must be interpreted having regard to its historical origins. In his judgment, Lord Sales refers to the Colonial Constitutional Note 23 (CO 1032/283). This confirms that in the 1950s and 1960s the UK was keen to ensure that its colonies which were about to become independent and those which were moving towards internal self-government adopted constitutions which protected fundamental rights, particularly where there were minorities. The UK appears to have adopted this policy separately from its decision to extend the application of the Convention to such territories. But, while the UK intended to negotiate the inclusion of fundamental rights if it could do so, it could not insist on fundamental rights being part of any new constitution. Prior to independence the UK could itself have ensured compliance with Convention rights but that would not have been possible after independence or after a country became internally self-governing, subject in the latter case to the possibility of primary legislation by the UK Parliament. The policy of the UK was to negotiate with representatives of each country for rights which corresponded with Convention rights. This led to the development of distinct constitutions for different countries. The discussion in Chapter 9 of the work to which Lord Sales refers, namely Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford, 2007) confirms this point. The fact that constitutions were individually negotiated and vary reinforces the view of the Board that its task is to interpret the Constitution of Bermuda according to its own special combination of provisions and in the light of the conditions in Bermuda and its history. Some provisions from the Convention found their way into the Bermudian Constitution, but others did not.

17. In view of the "antecedents" discussed in *Fisher*, which, as explained, include the Convention, and in the light of the application of the Convention at the international level (which may have implications for Bermuda in its domestic affairs) the starting point (subject, as explained above, to any countervailing arguments) is that the rights conferred by the Constitution which merely echo Convention rights should be read and applied in accordance with the jurisprudence relating to the Convention.

Such an approach is consistent with the advice of the Board in the Gibraltarian case of *Rodriguez v Minister of Housing of the Government of Gibraltar, The Housing Allocation Committee* [2009] UKPC 52; [2010] UKHRR 144, in which Lady Hale, giving the judgment of the Board, stated (para 11) that provisions in the Gibraltarian Constitution which were equivalent to provisions in the Convention should, if possible, be interpreted as giving no less protection than their equivalents in the Convention.

18. A case in point is section 8(1), already set out above. Article 9 of the ECHR guarantees freedom of religion and conscience in these terms:

> "**Article 9**
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

19. The Board cannot discern any indication of any legislative intention that section 8 should confer any greater right in any relevant respect to freedom of religion or conscience than that conferred by article 9.

20. Article 12 of the Convention guarantees the right to marry in these terms:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

21. The Constitution does not confer any right to same-sex marriage; nor does the Convention. The only right in the Convention to marriage is to heterosexual marriage,

and, as the Board explains in paras 45 to 50 of its judgment in *Day v The Governor of the Cayman Islands* [2022] UKPC 6, the right to marry under article 12 of the Convention, to which the constitutional right in that case corresponds, is *lex specialis*. The Board holds that the Constitution of the Cayman Islands has to be read as a consistent whole and in the light of jurisprudence on the Convention. The Board goes on to hold that the Convention does not guarantee any right to a legally recognised same-sex marriage because that is exhaustively dealt with in article 12 of the Convention, and by implication is excluded by the right to heterosexual marriage contained in that article. Under the Convention as interpreted by the Strasbourg Court, there is a right to a legally recognised union which is not marriage, and the Legislature has passed the DPA which gives same-sex couples in Bermuda the right to enter a domestic partnership, and this gives them all the rights that married couples have. However, this institution is not called marriage. The respondents in this case attach considerable importance to that term and seek in these proceedings to have that name used also for the legally recognised unions which same-sex couples may enter.

THE HUMAN RIGHTS ACT 1981 OF BERMUDA

22. Strikingly the HRA is not part of the Bermudian Constitution but it is clearly an important document so far as fundamental rights are concerned.

23. The HRA enlarges the right to freedom from discrimination conferred by section 12 of the Constitution by adding, among others, sex as a protected characteristic (section 2), and also by extending the prohibition against discrimination to other fields, including the provision of goods, facilities and services (section 5), and employment (section 6). Section 29 of the HRA gives the Supreme Court of Bermuda power to declare any provision of law to be inoperative to the extent that it authorises or requires the doing of anything prohibited by the HRA unless such provision expressly declares that it operates notwithstanding the HRA. Similarly, section 30B(1) of the HRA provides:

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

24. In 2013, the Legislature added sexual orientation to the prohibited grounds of discrimination in section 2(2)(a)(ii) of the HRA. That extension, however, is not relevant on this appeal because the Legislature, in exercise of its constitutional law-making powers, provided in section 53 of the DPA that the HRA be disapplied in its entirety to that provision. The sole question in these appeals therefore is whether section 53 of the DPA is in conformity with the Constitution.

BRIEF ACCOUNT OF THE POLITICAL BACKGROUND TO SECTION 53 OF THE DPA

25. Same-sex marriage is highly controversial in Bermuda. In October 2015, the group Preserve Marriage Bermuda ("PMB") started an online petition advocating that "marriage in Bermuda should remain defined and upheld as a special union ordained by God between a man and a woman". PMB's opposition to same-sex marriage is based on religious grounds.

26. On 23 June 2016 the people of Bermuda were asked to express their views on whether same-sex marriage or another form of same-sex union should be legally recognised. The referendum was not valid because the turnout was too low, but the results provide the Board with a useful indication of the view of Bermudians. A majority voted against both same-sex marriage and legal recognition of same-sex union of a different kind.

27. As a result of the referendum, the then government, formed by the One Bermuda Alliance party, withdrew its draft Civil Union Bill. After it was withdrawn, Mr Wayne Furbert, a member of the Assembly who appears to have supported the PMB, presented a Private Members' Bill designed to withdraw same-sex marriage from the HRA and containing a provision which became section 53 of the DPA. Mr Furbert's Bill was passed by the Assembly but not by the Senate which meant that Mr Furbert could re-introduce his bill after 12 months and, based on this history, if it were passed by the Assembly (because the Senate would not be able to block it for a second time) it would become law.

28. In May 2016, the Registrar General refused to issue a gay couple with a marriage licence because the Marriage Act 1944 and the Matrimonial Causes Act 1974 did not countenance same-sex marriage. In *Godwin & DeRoche v Registrar General* [2017] SC (BDA) 36 Civ (5 May 2017) ("*Godwin*"), the Supreme Court of Bermuda (Charles-Etta Simmons PJ) held that restricting the definition of marriage to a man and a woman contravened the HRA. Several same-sex couples subsequently married (and the legal recognition of their unions is not affected by section 53 of the DPA). The Attorney General did not appeal this decision.

29. A general election was held in July 2017. The Progressive Labour Party ("the PLP") came to power. In its election manifesto, the PLP stated that "the issue of same sex marriage remains a matter of conscience for our members. We accept that same sex couples should have similar legal benefits as heterosexual couples, save for marriage, and will introduce legislation to achieve this aim." The PLP introduced the Domestic Partnership Bill. There was extensive public consultation on the Bill. It was in due course passed. During its passage through the Assembly, the Minister with responsibility for securing the passage of the Bill, The Hon Walton Brown, told the Assembly that:

> "I know there are people on both sides of the camp who are very upset because no one is getting all that they wish. Some will see this as a retrograde step, others will see it as a modicum of salvation, but it is compromised legislation designed to put us in a space where we can accommodate a variety of interests. And it is my hope, Mr Speaker, that we can make progress as time unfolds so that the space we are in today is not the space we are going to be in five years from now." (Hansard, 8 December 2017, p 883, right hand column)

30. In due course the Bill was passed. The Governor's Assent to the Act was given on 7 February 2018 and the DPA came into effect in June 2018. The DPA introduced civil unions in the form of domestic partnerships and section 53, which has been called the revocation provision, prohibited future same-sex marriages.

THE JUDGMENT OF THE CHIEF JUSTICE

31. Following the enactment of the DPA, the respondents to this appeal launched a fresh challenge to establish that section 53 of the DPA was unconstitutional. The challenge succeeded before Chief Justice Kawaley who produced a detailed judgment dated 6 June 2018 (2018 No 34/2018:99). The Attorney General appealed that decision, but the Court of Appeal agreed with the Chief Justice's decision on other grounds, thus ruling that same-sex marriage was legal for the third time.

32. The Chief Justice found that between them the respondents hold the following beliefs:

> "The applicants through their evidence seek protection for the following main categories [of] beliefs:

(1) a religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (held by persons who would like to so marry);

(2) a non-religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (held by persons who would like to so marry);

(3) a religious or non-religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (not held by persons who would like to so marry eg friends and family or other same-sex married couples who would like to see future same-sex marriages);

(4) a religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (held by ministers of religion and/or churches who would like to conduct such marriages)." (para 79)

33. As the Board notes, that meant that section 8 of the Constitution protected several different categories of person and was not limited to the beliefs of persons who wished to enter into same-sex marriages but also extended to those who supported their marriages or the institution of same-sex marriage for the future and those who wished to officiate at ceremonies of legally recognised marriage for same-sex couples. Moreover, importantly, the beliefs all involve belief in the legal recognition of marriage.

34. On the constitutionality of religiously motivated legislation, the Chief Justice found as a matter of fact that there were several reasons for promoting the DPA. They included fulfilling an election promise, providing a comprehensive scheme for dealing with the legal position of a same-sex relationship and satisfying the demands of opponents of same-sex relationships (judgment, para 69). He held that it would be against the weight of the evidence to find that the revocation provision was enacted solely or substantially for religious purposes (para 70). Accordingly, that challenge failed.

35. On freedom of conscience, the Chief Justice cited the Board's judgment in *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13; [2017] 1 WLR 2752 ("*Laramore*"), which the Board will have to consider later in this judgment. The Chief Justice found that the respondents had a sincere belief in marriage as an institution in which same-sex couples ought to be able to participate. The Chief Justice accepted that, under the jurisprudence of the ECtHR, a person could not complain that the laws of his state did not recognise same-sex marriage: see *Schalk and Kopf v Austria* (2011) 53 EHRR 20 and *Oliari v Italy* [2017] 65 EHRR 26. The Chief Justice preferred to rely on *Laramore* rather than on the Canadian case of *Halpern v Attorney General of Canada* (2003) 65 OR (3d) 161 on the footing that the approach to fundamental rights in *Laramore* was generous. Prior to the DPA coming into force same-sex couples who believed in the institution of marriage could manifest their beliefs by participating in marriage ceremonies. The respondents did not seek to compel persons of opposing beliefs to celebrate or enter same-sex marriages. They merely sought to enforce the rights of those who share their beliefs to freely manifest them in practice. In short, the Chief Justice held that freedom of conscience rights could be relied on in relation to a failure by the state to provide legal protection for same-sex marriage and the decision of the Legislature to remove legal protections which had been granted by the law (para 91). The government did not seek to justify the interference with freedom of conscience.

36. As to section 12 of the Constitution, the Chief Justice concluded that the expression "creed" embraces all section 8(1) rights. He held that it was not open to adopt a narrow definition of the word "creed" because that would run contrary to the principle of interpretation laid down in the *Minister of Home Affairs v Fisher* (para 6 above) and treated the word as corresponding broadly with the beliefs that section 8 of the Constitution protected. He held that there was a violation of section 12 in relation to those who held a religious belief in same-sex marriage, namely the churches and priests among the respondents. Moreover, the Chief Justice was satisfied that the respondents were discriminated against because of their beliefs in same-sex marriage. Again, there was no attempt by the government to attempt to justify this violation of their rights.

THE JUDGMENT OF THE COURT OF APPEAL

37. The President of the Court of Appeal of Bermuda, Sir Scott Baker P (with whom Maurice Kay and Bell JJA agreed) dismissed the appeal, but on different grounds (Civil Appeals nos 11 and 12 of 2018). As explained below, the Court of Appeal declared that section 53 of the DPA was invalid because it was passed mainly for a religious purpose and contravened section 8 of the Constitution.

38. On religious purpose, the President held that Bermuda could not pass laws "wholly or mainly for a religious purpose", stating that this "is common ground and beyond dispute" (para 7) and that "[t]he authorities supported a principle agreed by all parties, namely that Parliament may not validly promulgate laws which are motivated by a religious purpose" (para 8). He cited a long passage from the judgment of Laws LJ in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; (2010) 29 BHRC 249; [2010] IRLR 872, including his holding at para 22 that "The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified", describing this sentence as "critical" (at para 8). The President placed heavy reliance on the decision of the Supreme Court of Canada in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (referred to below as *Big M*). He further relied on other decisions of the Supreme Court of Canada, including *Mouvement Laïque Québécois v Saguenay* [2015] 2 RCS 3, and on a passage from the decision of the Board in *Laramore*. He concluded that it was sufficient if the religious purpose was only the primary, as opposed to the sole, purpose. In determining whether the religious purpose was the primary or sole purpose it was necessary to consider the DPA as a whole. The Chief Justice had erred in failing to appreciate that section 53 could have a religious purpose even if the rest of the DPA did not (para 33). That meant that the Court of Appeal had to come to its own conclusion whether section 53 was invalidated by the religious purpose of the Legislature. The President held that although the DPA as a whole was a political compromise, introducing a comprehensive scheme for same-sex relationships in fulfilment of an electoral promise, what mattered was the underlying purpose of section 53 itself. The effect of section 53 was to reverse the decision in *Godwin* (para 42). The President concluded that on the evidence and considering the underlying reason for the provision itself, section 53 was introduced at least primarily for a religious purpose (para 40). The percentage of those voting in the referendum against same-sex marriage had been very similar to those voting against same-sex civil unions.

39. As to section 8, the President held that the Chief Justice was correct in holding that the respondents' section 8 rights under the Constitution were violated by section 53 of the DPA. Prior to the DPA, same-sex couples had the same right to marry as opposite sex couples. The purpose of section 8 is to protect the beliefs and freedom of conscience of minorities. The appellant had failed to bring forward any case to show that the breaches of section 8 were justified (para 71). The President distinguished *Halpern v Attorney General of Canada* on the basis that the complaint of the church in that case that it could not perform same-sex marriages was "a somewhat diluted version of the complaint in the present case in which legally recognised marriages were possible until removed by section 53 of the DPA". The President considered that the decision was inconsistent with the more generous approach commended by the Board in *Laramore* (para 66). The President relied on *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 as showing the comparatively low threshold required for a religious belief for the purposes of article 9 of the Convention and that article 9 protects both religious and non-religious beliefs.

40. As to section 12, the President noted that the issue turned on the meaning of "creed". He held that the Chief Justice was correct to find that section 12 should be given its broader meaning to include both religious and non-religious beliefs. However, he held that even the broader meaning refers to a set or system of beliefs, rather than a single belief. The respondents' case was based on a single belief (a belief in marriage recognised by law, in which same-sex couples ought to be entitled to participate). The President held that this point was determinative of the section 12 issue (para 75).

ANALYSIS OF THE THREE ISSUES: RELIGIOUSLY MOTIVATED LEGISLATION, FREEDOM OF CONSCIENCE AND CREED-BASED DISCRIMINATION

41. The Board addresses each of the three grounds on which the respondents have challenged the validity of section 53 of the DPA. Those grounds are:

> (i) that section 53 is invalid because it was passed primarily or mainly for a religious purpose contrary to the secular nature of the Constitution;
>
> (ii) that section 53 and related provisions of the DPA contravene section 8 of the Constitution because they hinder the enjoyment of beliefs in same-sex marriage as an institution recognised by law which are held by the respondents and others; and
>
> (iii) that section 53 contravenes section 12 of the Constitution as it affords different treatment to the respondents and others attributable to their description by creed.

(1) The constitutionality of religiously motivated legislation

42. The Court of Appeal upheld the respondents' challenge on the basis that section 53 was enacted primarily or mainly for a religious purpose contrary to the secular nature of the Constitution. As the Board explains below, in so holding, the court fell into error for two reasons. First, the Constitution does not contain a self-standing and implicit ban on the enactment of legislation for a religious purpose. Nor does the Board interpret section 8 as including such a ban by implication. Secondly, and in any event, it is not appropriate to consider section 53 by itself and to disregard its place in the DPA as a whole. The DPA was an attempt to achieve a political compromise on a socially divisive issue in Bermuda rather than an attempt to impose a religious view on the Bermudian community.

43. Section 34 of the Constitution empowers the Legislature, "subject to the provisions of this Constitution" to make laws "for the peace, order and good government of Bermuda". This provision gives the Legislature plenary law-making authority subject to the other provisions of the Constitution. As Lord Hoffmann explained in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] AC 453, para 50, the words "peace, order and good government" are not words of limitation but have been treated as apt to confer plenary law-making authority.

44. One must therefore look to the terms of the Constitution, both its express provisions and any provisions that arise by implication, for a limitation on the power of the legislature, and in particular for a principle that would nullify a legislative provision enacted by the Legislature on the ground that it had been enacted for a religious purpose.

45. There is no such provision in the Constitution. There is no formal declaration that the Constitution is a secular constitution which bars legislation for a religious purpose. An examination of the structure of Chapter 1 of the Constitution reveals that there is no scope for a self-standing principle which bars legislation enacted for a religious purpose. Section 1, as the Board has said, declares certain fundamental rights and freedoms and explains that the later provisions of Chapter 1 of the Constitution set out the protections of and limitations on such rights and freedoms. The reader of the Constitution is therefore directed to those later provisions to see if any such bar is implicit in the relevant section of the Constitution. In this case, the relevant section is section 8, which protects freedom of conscience. As the Board discusses more fully when addressing the second ground of challenge to the DPA, section 8(1) is a prohibition against hindering or interfering with a person's enjoyment of his or her freedom of conscience. The focus in that section is on the result or effect of a law, administrative act or legislative measure. The concept of interference with freedom of conscience is given a broad interpretation. See, for example, *Sanatan Dharma Maha Sabha of Trinidad and Tobago v Attorney General of Trinidad and Tobago* (Privy Council Appeal No 53 of 2008) in which a measure which named the highest award for meritorious service or gallantry as "the Trinity Cross of the Order of Trinity" was held to be discriminatory and to contravene, among other provisions of the Constitution of the Republic of Trinidad and Tobago, the protection of freedom of conscience and belief. This contravention, which was conceded by the government, arose because some people of faiths other than Christianity may have felt unable or at least reluctant to accept the award on religious grounds. But, so long as the effect of a law or measure is not a hindrance of, or interference with, the enjoyment of freedom of conscience, the purpose of those who promoted the law or measure is of no consequence. Were it otherwise, a measure which did not interfere with a person's enjoyment of freedom of conscience in any way could be impugned solely because of the motive attributed to

the various members of the Legislature in enacting the legislation. It is not possible to read into section 8 such a bar by implication from anything stated in that section or from the structure of Chapter 1 of the Constitution.

46. So to hold is not to depart from the principles, which the Board has repeatedly stated, (i) that constitutions are living instruments and constitutional provisions are to be given a generous interpretation to allow them to develop through usage and convention, rather than a narrow and technical construction: *Edwards v Attorney General for Canada* [1939] AC 124, 136; *Matadeen v Pointu* (above) 108, and (ii) that individuals are to be given the full measure of the fundamental rights and freedoms which a constitution confers: *Minister of Home Affairs (Bermuda) v Fisher* (above), 328. Thus, the protections given to the fundamental rights stated in section 1 of the Constitution, such as those contained in section 8, must not be given a narrow legalistic construction. But the generous interpretation to give full effect to the fundamental rights and freedoms contained in a constitution, which the Board and courts adopt, must be derived from the language used in the Constitution. In *Matadeen v Pointu* (above), 108 the Board stated:

> "the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma* 1995 (4) BCLR 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'"

See also *Boyce v R* [2004] UKPC 32; [2005] 1 AC 400, para 59 per Lord Hoffmann. In respectful disagreement with the Court of Appeal, the Board cannot find any basis in the language used in the Constitution for a general principle which would nullify legislation enacted for a religious purpose.

47. It is necessary to examine the case law which has been cited in support of a contrary view. First, reliance has been placed on the judgment of Laws LJ in *MacFarlane* (above). The judgment addressed an application by an employee to appeal to the Court of Appeal of England and Wales against a decision of the Employment Appeal Tribunal ("the EAT") which was concerned with unfair dismissal and discrimination on the ground of religious belief. The EAT upheld the decision of the Employment Tribunal that the dismissal of a person employed as a relationship counsellor, who had agreed to comply with his employer's equal opportunities policy but later refused on religious grounds to counsel same-sex couples on sexual matters, was justified as the employer's aim to provide a full range of counselling services to all sections of the community, regardless of sexual orientation, was a legitimate aim

which the employer was entitled to pursue. In the course of his judgment, and in response to a suggestion by Lord Carey of Clifton, a former Archbishop of Canterbury, in a witness statement in support of the application, that the panel hearing such appeals should comprise people with proven sensitivity and understanding of religious issues and the Christian faith, Laws LJ stated (paras 21-22):

> "[T]he conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good by objective grounds, but to give effect to the force of subjective opinion. … The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified."

He continued (para 23):

> "So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime."

48. It is unnecessary for the Board to decide whether these statements are an accurate description of the common law of England and Wales informed by article 9 of the Convention and the Human Rights Act 1998. The state's duty of neutrality, which the Strasbourg Court has held to be implicit in article 9 of the Convention, relates to the duty of impartiality in *ensuring the exercise* of various religions, faiths and beliefs. In any event, Laws LJ's words do not support an interpretation of the Bermudian Constitution that would treat as implicit a provision that invalidates legislation enacted for a religious purpose.

49. The Canadian cases to which reference has been made also provide no assistance in the interpretation of the Constitution. The first, which is a decision of the Supreme Court of Canada, is *Big M*. This case involved the interpretation of the Canadian Charter of Rights and Freedoms and in particular the fundamental freedom of conscience and religion in section 2 of the Charter interpreted in the light of section 27 of the Charter which provides:

> "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

The case concerned trading on a Sunday, contrary to section 4 of the Lord's Day Act 1906, which was a federal statute. The majority judgment, delivered by Dickson J, concluded that it was sufficient to breach an individual's fundamental freedom of religion and conscience that the original purpose of a statute was to impose a particular religious practice, in that case Christian sabbatical observance, and that the court would need to consider the effect of the legislation only if the law had passed the purpose test. The power to compel observance in this way was not compatible with section 27 of the Charter. The minority judgment delivered by Wilson J held that the correct approach to the Charter was to focus on the effect of the impugned legislation and ask whether it had the effect of violating an entrenched right; the purpose of the legislation was relevant to a question whether a limitation on a citizen's rights could be justified.

50. The Canadian Charter is structured differently from the Bermudian Constitution and the latter has no provision like section 27 of the Charter. The Charter contains the statement of the right to freedom of conscience and religion in section 2 but has no equivalent to section 8 of the Constitution which spells out the protection afforded to the right and the limitations imposed on its enjoyment. Thus, in Bermuda, in contrast to the interpretation of the Canadian Charter, the analysis of the protection given to freedom of conscience and religion in Bermuda turns on the interpretation of section 8 of the Constitution. Under that section coercion by a government of an individual to affirm a specific religious belief (expressly or by implication) or to take part in a specific religious practice against his or her will, or otherwise interfere with his or her enjoyment of freedom of conscience, would infringe the protection which it conferred. But legislation which had a religious purpose but did not have such an effect would not so infringe section 8 because there would be no interference with an individual in his or her enjoyment of freedom of conscience.

51. Lord Pannick QC, who appears for the respondents, submits that the Board in its decision in *Laramore* has recognised and upheld the view of the majority of the Supreme Court of Canada in *Big M* that constitutional validity could be determined by reference to the purpose of the legislation rather than its effect. The Board is not persuaded that that is so. *Laramore* concerned a claim by an individual, who had converted to the Islamic faith, that the requirement that he, as a member of the Royal Bahamas Defence Force, must be present at, and take off his cap during the conduct of, Christian prayers at ceremonial parades and morning and evening colours hindered his right to enjoy freedom of conscience under article 22(1) of the Constitution of the Bahamas. That provision was in the same terms as section 8(1) of the Bermudian

Constitution. The Board, in an opinion delivered by Lord Mance, stated (para 7) that the two main points which arose in the appeal were first whether Mr Laramore had been "hindered in the enjoyment of his freedom of conscience" within article 22(1), and secondly, if he had, whether there was any justification for this. The Board concluded that Mr Laramore had been hindered in his enjoyment of his freedom of conscience. On the facts that Board was satisfied that Mr Laramore was hindered in the enjoyment of his right to freedom of conscience in relation to parades (other than for national events) (para 22):

> "The Board has no doubt that Mr Laramore was 'hindered in the enjoyment of his freedom of conscience' in the present case. His conscience told him that he should not be taking part in the prayers which were part of regular colours parades. He made this point after he had converted to the Muslim religion in 1993, and he pursued it after the 2006 Memorandum reversed the dispensation introduced in 1993. The effect of the 2006 Memorandum was that he was no longer able to enjoy or give effect to his freedom of conscience by falling out during prayers."

In the same paragraph the Board referred with approval to Sir Michael Barnett CJ's apt quotation from the majority judgment in *Big M* in which Dickson J stated:

> "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."

The Board went on to say that the first two sentences of the quotation were in point and did not otherwise comment on the reasoning of Dickson J in *Big M*. In rejecting the defendants' argument that article 22 of the Bahamian constitution gave a more limited protection than article 9 of the Convention and the Canadian Charter, Lord Mance stated that each involved a promise that the freedom would be protected, and not interfered with by, the state: para 11 of the Board's opinion. It is clear, therefore, that

in *Laramore* the Board focused on interference by the state with a person's freedom of conscience; in other words, article 22 of the Bahamian Constitution addressed the effect of the state's action rather than its purpose.

52. The Board is also not able to accept Lord Pannick's submission that the Board approved the reasoning in *Big M* in its opinion in *Reyes v R* [2002] UKPC 11; [2002] 1 AC 235. Lord Bingham of Cornhill in delivering the opinion of the Board in *Reyes* referred in para 26 to the valuable guidance given on the task of constitutional interpretation by a number of cases, including *Big M* at p 331. The passage in *Big M* to which he referred was one in which Dickson J held that both purpose and effect, which were clearly linked, were relevant in determining constitutionality, but Lord Bingham's summary of the principles derived from the cited authorities made no reference to purpose as a sufficient ground on its own of constitutional invalidity. He stated:

> "the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed of a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see *Trop v Dulles* 356 US 86, 101. In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in *S v Makwanyane* 1995 (3) SA 391, 431, para 88 …"

The Board's opinion in *Reyes v R* did not rely on any argument that the purpose of the impugned provision of the Criminal Code of Belize gave rise to constitutional invalidity.

53. In *Mouvement Laïque Québécois v Saguenay* (above), the Supreme Court of Canada held that the evolving concept of freedom of conscience and religion obliged the state to be neutral in matters of belief, including religion: paras 64, 71-81 of the judgment delivered by Gascon J. As a result, a byelaw passed by a local council that required prayers to be said before its meetings was constitutionally invalid because it was passed for a religious purpose. The fact that attendance at the prayers was not

compulsory did not save the byelaw. The judgment of the Supreme Court of Canada that the state was under a constitutional duty of neutrality which could invalidate legislation passed for a religious purpose was based on an assessment of the evolution of Canadian society: para 72.

54. The judgment in *Saguenay* does not provide a template for other common law jurisdictions, including Bermuda, in which society has developed differently. The family of democratic states which have constitutions which protect the rights of minorities and individuals, including the enjoyment of freedom of conscience and religion, have been subject to different social developments and the Board in interpreting their constitutions has no authority to attempt to homogenise such different societies by reference to social developments in other societies. The Board's task is to give full effect to the constitutional protections conferred on members of the societies which accept its jurisdiction. As in *Laramore*, it does so by requiring the state to give full effect to the protection of freedom of conscience in the relevant constitution. In *Laramore* and in this case that task involves the Board determining the validity of a legislative measure by reference to its effect on an individual or minority rather than its purpose. That does not mean that in constitutions with provisions similar to section 8 of the Constitution, the state may not also have positive duties to protect freedom of conscience. The Board recognised in *Laramore* that the guarantee of freedom of conscience is not confined to obliging the state to refrain from interference with a person's holding of beliefs and his or her manifestation of such beliefs but is likely by implication to involve positive duties. But such duties are not to be equated with a principle that legislation enacted for a religious purpose is invalid.

55. In a series of judgments relating to article 9 of the Convention, which is the closest comparator to section 8 of the Constitution, the Strasbourg Court has repeatedly ruled that that article imposes on a contracting state a duty of neutrality which prevents the state from assessing the legitimacy of religious beliefs or the ways in which those beliefs are expressed. See, for example, *Bayatyan v Armenia* (2012) 54 EHRR 15, para 120 and *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81. In *Lautsi v Italy* (2012) 54 EHRR 3, para 60, the Grand Chamber described the duty of neutrality and impartiality in these terms:

> "it should be pointed out that states have responsibility for *ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs*. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs." (Emphasis added)

In its assessment of whether a state has complied with its obligations under article 9 of the Convention the Strasbourg Court has looked to the effect of a measure or action of the state. It asks itself whether there has been an interference with a person's enjoyment of freedom of conscience and whether that interference is justified by the considerations in article 9(2). The Board has not been referred to any case in which the Strasbourg Court has held that the enactment of a law for a religious purpose amounted to a breach of article 9 of the Convention. This jurisprudence on article 9 of the Convention, a provision that was influential in the drafting of section 8 of the Constitution, gives no support to a constitutional challenge under section 8 based on a religious purpose principle. Different considerations may arise in the context of a claim of unjustified discrimination when article 9 of the Convention is read with article 14 of the Convention. But, as the parties acknowledge, in Bermuda discrimination on the ground of sexual orientation is not prohibited by the Constitution. The Attorney General therefore succeeds on this ground of appeal.

56. In any event, the Court of Appeal was wrong to conclude that "Introducing a comprehensive scheme for same-sex relationships has nothing whatever to do with section 53" (judgment, para 42). The DPA as a whole represented a compromise between different opinions in Bermuda as well as fulfilling an electoral promise. OUTBermuda nobly accepted that the proposals for domestic partnerships were a compromise and considered that the compromise was in the best interests of Bermuda (see letter of 17 November 2017). Section 53 cannot be viewed in isolation from the rest of the DPA in the absence of evidence showing that it was gratuitously added on to the compromise without any demand for it. The right approach is to treat the DPA as a set of connected provisions which all had the same purpose, namely that of ending the dispute in Bermudian society over same-sex marriage.

57. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223, the Supreme Court of the United Kingdom discussed the nature of compromises reached in Parliament and discouraged courts from unpicking them or requiring them to be capable of being rationalised:

> "167. Two other aspects of Parliamentary proceedings are important in this context. First, the will of Parliament finds expression solely in the legislation which it enacts. Parliament does not give reasons for enacting legislation: it simply votes on a motion to approve a proposed legislative text. There is no corporate statement of reasons, and the individual members of Parliament do not give their reasons for voting in a particular way. As Lord Hobhouse stated in *Wilson*, para 143, '[i]t is not part of the duty of any Member of Parliament

to provide or state definitively in Parliament the justification for legislation which the legislature is content to pass'.

168. Secondly, the decisions which Parliament takes are not necessarily capable of being rationalised in any event. In the first place, Parliament does not operate only, or even primarily, as a debating chamber. It is also a forum for gathering evidence, and for extra-cameral discussion, negotiation and compromise. Furthermore, the way in which members of Parliament vote will usually, but by no means always, reflect party policy, and may be influenced by the discipline imposed by the party whips.

169. It follows that Parliamentary methods of resolving disputes are very different from judicial methods, aimed at the production of decisions arrived at by an independent and transparent process of reasoning. That is by no means a criticism of Parliament. Its methods reflect the nature of its task: the management of political disagreements within our society so as to arrive, through negotiation and compromise, and the use of the party political power obtained at democratic elections, at decisions whose legitimacy is accepted not because of the quality or transparency of the reasoning involved, but because of the democratic credentials of those by whom the decisions are taken.

170. A number of consequences follow from this. One is that a ministerial statement of compatibility, made in accordance with section 19 of the Human Rights Act, cannot be ascribed to Parliament. As Lord Hope explained in *Anderson v Scottish Ministers* [2003] 2 AC 602, para 7, it is no more than a statement of opinion by the relevant minister.

171. A more far-reaching consequence is that the courts have to be careful not to undermine Parliament's performance of its functions by requiring it, or encouraging it, to conform to a judicial model of rationality. That model is not suitable for resolving differences of political opinion. An insistence on transparent and rational analysis would be liable to make the process of resolving political differences

> through negotiation, compromise and the exercise of democratic power more difficult and less likely to succeed."

58. Thus, section 53 cannot be divorced from the rest of the DPA. In the opinion of the Board, the DPA was certainly not passed for a religious purpose. It was passed to bring about a democratic solution to a divisive debate in Bermuda over same-sex marriage and to do so in a way which accommodated the position of both sides to the debate. Section 53 cannot be considered in isolation. It is an important feature of section 53 that it was enacted as part of an overall package designed to bring an end to a dispute between different groups in Bermudian society, and to give effect to an election promise.

59. The Court of Appeal came to the wrong conclusion on this point and the conclusion of the Chief Justice is to be preferred. Accordingly, even if there had been a prohibition on legislation with a religious purpose, the Attorney General would have been entitled to succeed for this reason also.

(2) Section 8 of the Constitution: hindering the enjoyment of freedom of conscience

60. The Board accepts the sincerity of the respondents' beliefs. The question, however, is whether such beliefs qualify for protection under section 8 of the Constitution, and, if so, whether section 53 interferes with those beliefs.

61. In discussing this second ground of appeal, it is important to recall, as Mr Jonathan Crow QC emphasises in his submissions on behalf of the Attorney General, that the respondents cannot establish a case of unlawful discrimination on the ground of sexual orientation because there is no provision within the Constitution prohibiting such discrimination and because the DPA contains an express provision disapplying the protections of the Human Rights Act in relation to same-sex marriage. In many jurisdictions, the prohibition of such discrimination has been a powerful weapon to protect minorities, such as gay people, who have been stigmatised and victimised in the past, against majoritarian bias and oppression. But that provision is not part of the Bermudian Constitution. The respondents' constitutional challenge therefore is that section 53 and related provisions of the DPA contravened section 8 of the Constitution because they hindered the enjoyment of beliefs in same-sex marriage as an institution recognised by law.

62. Subject to the justifications set out in section 8(5), section 8(1) of the Constitution prohibits the state from hindering a person's enjoyment of freedom of

conscience. This protection covers not only the person's private thoughts and beliefs but also his or her manifestation and propagation of such thoughts or beliefs. The Board in *Laramore* (para 11) rejected an argument that the concept of hindrance should be construed narrowly and expressed doubt that there was a difference of substance between a provision that conferred an outright guarantee of freedom of conscience and religion, subject to necessary or justifiable limitations, and provisions that prohibited a person being "hindered in the enjoyment of his freedom of conscience". Both forms of provision involved a promise that the freedom would be protected, and not interfered with, by the state. The Board continued:

> "Such positive duties as the state may have to confer or guarantee freedom of conscience are more visible in article 9 of the Convention and articles 1 and 2 of the [Canadian] Charter, but it seems to the Board likely that similar duties would be held to arise implicitly under article 22 of the Constitution."

There is therefore no basis for taking a narrow view of the concept of "hindrance".

63. Mr Crow does not seek so to argue. Instead he focuses on the nature of the beliefs which are in issue and argues (i) that the respondents' beliefs are not protected by section 8 of the Constitution, (ii) that, in any event, the DPA does not interfere with a person's holding or manifestation or propagation of those beliefs, and (iii) that the protection of the enjoyment of freedom of conscience in section 8 does not confer a right on an individual to insist that the state make available the same legal status to the relationship of same-sex couples as is available to heterosexual couples by giving legal recognition to same-sex marriage. He submits, first, that section 8 does not protect political beliefs as to what the law should provide and, secondly, that in any event the DPA does not interfere with a person's ability to hold and manifest or propagate that belief.

64. For the reasons set out below, the Board agrees with Mr Crow that section 8 of the Constitution does not impose on the state an obligation to give legal recognition to same-sex marriage. In the Board's view, and drawing on analogous jurisprudence of the Strasbourg Court, there are two alternative ways of analysing the matter, both of which lead to the same result. The first is that a belief in same-sex marriage as an institution which should be recognised in law is a belief within the scope of section 8 but that the state does not interfere with that belief if it does not give legal recognition to same-sex marriage. The second, also drawn from the jurisprudence of the Strasbourg Court, is that the belief that same-sex marriage should be given legal recognition is not the type of belief that section 8 protects because it is inconsistent

with the absence of any protection in the Constitution against discrimination on the ground of sexual orientation and the ability of the legislature expressly to disapply the operation of the HRA.

65. In the context of this appeal three principal questions arise in an analysis of section 8 of the Constitution. They are, first, do the beliefs which the respondents profess fall within the scope of the protection conferred by section 8? Secondly, what is meant by the enjoyment of freedom of conscience? Thirdly, what is the scope of the protection conferred, whether negatively, in prohibiting interference with such enjoyment or positively, in providing protection in another form? The Board analyses these questions addressing the first approach before turning to the second approach.

66. Turning to the first question on the first approach, the language of section 8(1) is not restrictive. The subsection states that freedom of conscience "includes" freedom of thought and of religion and freedom to change one's religion or belief. "Includes" is not a word of restriction. The Board was referred to only one case from Bermuda which touches on this question. In *Attride-Stirling v Attorney General* (Civil Appeal No 19 of 1994) in a judgment dated 30 March 1995 the Court of Appeal for Bermuda held that a conscientious objection to military service in any capacity (and not just in the capacity of a combatant) was within the scope of section 8.

67. Guidance on the scope of the protection of beliefs and thought can be found in jurisprudence on the analogous article 9(1) of the Convention which the Board has set out in para 19 above. Not every belief falls within the scope of article 9 but the requirements for protection are not onerous. In *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, para 36, which was a case concerning article 2 of Protocol No 1 of the Convention, the Strasbourg Court laid down three requirements for a religious or philosophical conviction, which it likened to a belief protected by article 9. Those requirements were (i) that the conviction or belief must attain a certain level of cogency, seriousness, cohesion and importance, (ii) that the conviction or belief must relate to a weighty and substantial aspect of human life and behaviour, and (iii) that it must be worthy of respect in a democratic society and not be incompatible with human dignity. To meet the third requirement the belief must respect the rule of law, human rights and democracy: *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1, para 93. See also the article 9 case of *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81. In *R (Williamson) v Secretary of State for Education and Employment* (above), which was a case concerning article 9 of the Convention, the House of Lords, in para 23 of the speech of Lord Nicholls of Birkenhead, set out essentially the same criteria. The requirements for protection under article 9 are therefore modest and the article gives protection to a wide range of thoughts and beliefs. In Dingemans and others, *The Protections for Religious Rights: Law and Practice*, (Oxford, 2013), para 3.19, Sir James Dingemans and his fellow authors helpfully list beliefs, other than

mainstream religious beliefs, which the Strasbourg Court has held to fall within article 9 of the Convention; they are "pacifism, atheism, veganism, political ideologies such as communism, the Salvation Army, pro-life, secularism, and conscientious objection."

68. Several of the respondents provided evidence in this case by affirmation or affidavit. Maryellen Jackson, a teacher, in her evidence spoke of her belief in monogamous marriage by which a loving relationship is recognised by society as a fundamental spiritual belief. Sylvia-Hayward-Harris, who is a marriage-officiant in a Pentecostal Church which emphasises the inclusivity of God's love and upholds marriage between two consenting adults regardless of sexual orientation, spoke of the ability to officiate at same-sex marriages as an important part of her religious beliefs. Dr Gordon Campbell of the Wesley Methodist Church of Bermuda, which allows congregations to choose to appoint gay ministers and to celebrate the marriage of same-sex couples, spoke of the importance in his church of welcoming all people to the full life of the Christian community, including marriage.

69. On the first approach, the belief that society should recognise the relationship of long-term commitment of a same-sex couple through the institution of marriage and that a separate form of civil union distinct from marriage has the potential to stigmatise and exclude such couples from the mainstream of social or religious life has, in the light of changes in social attitudes internationally in the last 60 years, unquestionably attained a seriousness, cohesion and importance to meet the first of the *Campbell and Cosans* criteria. For similar reasons, the belief meets the second and third requirements as changing attitudes have increased the significance given to an individual person's autonomy and the respect to be accorded to people's intimate relationships.

70. The Chief Justice in para 79 of his judgment, in a passage which the Court of Appeal approved, analysed under various headings the nature of the beliefs in issue: see para 32 above. In essence, the beliefs of the respondents, whether religious or non-religious in nature, and whether held by those who wish to enter into a same-sex marriage, who support same-sex marriage, or who wish to officiate in the celebration of same-sex marriages, amount to and have in common a belief in *marriage as an institution recognised by law* in which same-sex couples ought to be able to participate.

71. Such a belief involves a belief in how society should be organised and is a call to the government and the Legislature to give recognition in civil law to same-sex marriage. It may readily be characterised as a political belief, but, contrary to Mr Crow's submission, that does not of itself exclude a belief from the protection of section 8. Having regard to the wide range of beliefs that are protected by the

analogous article 9 of the Convention, there appears to the Board to be a powerful argument that the respondents' beliefs come within the protection conferred by section 8 of the Constitution and that, as discussed below, the central questions are the scope of the manifestation of a belief in a "practice" and the protection of that practice.

72. The second question is the nature of the enjoyment of freedom of conscience which section 8 protects. It has two elements. The first element is the internal element, which is a person's ability to think as he or she pleases and to adhere to a set of religious beliefs or to have none. It includes the ability to change one's religion or one's beliefs. The second element is an external element which involves the ability to manifest and propagate one's religion or belief "in worship, teaching, practice and observance".

73. The third question is the nature of the protection given by section 8(1) to the enjoyment of freedom of conscience. On its face the subsection gives a negative protection in the sense that it prohibits the state from hindering the enjoyment of freedom of conscience. As the Board has said when discussing the Board's opinion in *Laramore*, the concept of hindrance is not to be given a narrow meaning but is to be equated with an interference. Further, as the Board recognised in *Laramore* (para 11) in relation to the equivalent provision in the Bahamas, the subsection may impose positive duties by implication to confer or guarantee freedom of conscience.

74. The nature of the enjoyment of freedom of conscience and the nature of the protection in the circumstances of this appeal can be analysed together. On the first approach, the central issues under this ground of appeal are whether the state has interfered with the respondents' enjoyment of freedom of conscience by legislating to exclude the recognition in civil law of same-sex marriage and whether there falls to be implied into section 8(1) a positive duty to give such recognition in order to protect their enjoyment of freedom of conscience. For the reasons set out below, the Board is persuaded that Mr Crow is correct in his submission that the state has not so interfered, and that the Constitution does not impose a positive duty on the state to give such recognition. He submits that section 8(1) does not confer upon anyone a legal entitlement to demand recognition of same-sex marriages by the civil law. In other words, the subsection does not impose on the state an obligation to give legal recognition to same-sex marriages in response to a demand for such recognition by people who thereby manifest a conscientiously held belief that such a legal right should exist. The Board's reasons for this conclusion are as follows.

75. First, neither the government nor the Legislature has interfered in any way with the conscientiously held internal belief of any of the respondents that the law of

Bermuda should give recognition to same-sex marriage. They remain free to hold such beliefs.

76. Secondly, neither the government nor the Legislature has interfered in any way with the respondents' ability to manifest and propagate such a belief. The respondents are free to argue forcefully in favour of such recognition, marshalling, among others, the arguments contained in their affidavits or affirmations and those advanced by Lord Sales in his dissenting opinion.

77. Thirdly, the DPA does not prevent a church or other religious body from carrying out a marriage ceremony for a same-sex couple and giving recognition to such a marriage as a matter of religious practice within their faith community. Similarly, the legislation does not prevent people from celebrating a same-sex union in a secular ceremony of a similar nature. No restriction is placed on the worship, teaching, practice and observance of the respondents which manifests their belief in the validity of same-sex marriage. The protection of a "practice" does not extend to a requirement that the state give legal recognition to a marriage celebrated in accordance with that practice. This view is consistent with the judgment of the Court of Appeal for Ontario in *Halpern v Attorney General of Canada and others* (above), paras 52–57, and with the judgment of the Strasbourg Court in *Pretty v United Kingdom*.

78. This is because, fourthly, the protection, if any, which section 8(1) gives to a conscientiously held belief as to what the civil law should be does not, at least as a general rule, extend to imposing a positive obligation on the state to make the law comply with that belief, subject only to the invocation by the state of an exception under section 8(5). The protection of a belief in the right to life does not compel the state to ban all forms of abortion unless an exception in section 8(5) can be invoked, just as the protection of a belief in communism does not require the state to adopt a particular form of government. The protection of a belief in pacifism does not require the state to legislate for or adopt a pacifist policy unless it can make out a case under section 8(5) for the defence of the realm. Further, on many social and ethical issues governments are faced with competing beliefs and thoughts which are conscientiously held. Examples include controversies on fundamental issues such as the right to life as against assisted dying, and the right to life as against abortion. Many people conscientiously hold views on other important issues, which arguably might fall within the scope of the protection conferred by section 8. Such beliefs might involve an ethical stance against poverty which includes a belief as to the level of a minimum wage which a state should mandate or the level of benefits which the state ought to pay to a family with children to avoid destitution. A requirement that a state "protect" such beliefs does not involve the state having to give effect to them unless it can pray in aid the limited exceptions in section 8(5).

79. In making those comparisons, the Board does not seek to diminish or understate the importance of marriage as a fundamental social institution or the value of social recognition of committed and loving relationships. There is, however, no principled basis for concluding that beliefs as to marriage can be distinguished from other conscientiously held beliefs in relation to very weighty issues concerning human life and behaviour, especially those involving questions of life and death.

80. A further difficulty with the interpretation of section 8 which the respondents advocate is that those who conscientiously believe that same-sex marriage should not be given legal recognition would also have a right which must be recognised in the same way under section 8. That would place the state in an impossible position in performing its obligations to respect constitutional rights.

81. The second approach, which the Board mentioned in para 65 above, is that the belief that the law should recognise same-sex marriages is not protected by section 8 of the Constitution. Support for this analysis can be found in the judgment of the Strasbourg Court in in *Pretty v United Kingdom* (2002) 35 EHRR 1. In that case a woman suffering from motor neurone disease wished her husband to be able to assist her to commit suicide to avoid the distressing and undignified final stages of the disease which would end her life. Assisting suicide is an offence in the United Kingdom. The Director of Public Prosecutions refused to grant her husband an immunity from prosecution if he assisted her to commit suicide. Mrs Pretty challenged that decision under articles 2, 3, 8, 9 and 14 of the Convention. The Strasbourg Court held unanimously that there had been no violation of any of those articles and pointed out the incoherence which would arise if the Convention which recognised the right to life as a central provision were to recognise a form of a right to die. In relation to the challenge under article 9 the court stated (para 82):

> "The Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by article 9(1) of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph. As found by the Commission [a reference to *Arrowsmith v United Kingdom* (Application No 7050/77 dated 12 October 1978, para 71)], the term 'practice' as employed in article 9(1) does not cover every act which is motivated or influenced by a religion or belief. To the extent that the applicant's views reflect her commitment to the principle of

> personal autonomy, her claim is a restatement of the complaint raised under article 8 of the Convention."

82. On this approach the legal recognition of same sex marriage is not simply an expression of thought, conscience or religion and section 8 cannot be interpreted as requiring the state to give such legal recognition because it is inconsistent with the absence of any protection in the Constitution against discrimination on the ground of sexual orientation and the ability of the legislature expressly to disapply the operation of the HRA. Such an interpretation would distort the balance of the Constitution by restricting the powers which it has conferred on the legislature. On this approach section 9 ("protection of freedom of expression") protects the freedom to hold opinions and to receive and impart ideas and information about same-sex marriage without interference. Section 8 provides protection against interference to persons who wish to take part in religious or non-religious ceremonies of same-sex marriage and those who officiate at such ceremonies as a manifestation of a belief but does not impose any obligation on the state to give legal recognition to such marriages.

83. In the Board's view there is nothing else in the Convention jurisprudence which supports the contention that a contracting state must give legal recognition to same-sex-marriage. The Strasbourg Court has repeatedly rejected arguments that article 9 of the Convention requires a contracting state to give legal recognition to a marriage contracted in a form which the law did not recognise. The DPA therefore involves no breach by the United Kingdom of obligations on the international plane arising from adherence to the Convention.

84. In *X v Germany* (Application No 6167/73), an admissibility decision dated 18 December 1974, the European Commission on Human Rights rejected as inadmissible a man's complaint that the German authorities had refused to register his marriage which had been constituted by a religious ritual that involved his reading a verse from the Old Testament followed by sexual intercourse. The Commission's reasoning was that marriage was not considered "simply as a form of expression of thought, conscience or religion but is governed by the specific provision of article 12" of the Convention. Article 12 of the Convention provides:

> "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."

85. In *Khan v United Kingdom* (Application No 11579/85), an admissibility decision dated 7 July 1986, a Muslim man entered into an Islamic marriage ceremony with a 14-

year-old girl and was convicted under the Sexual Offences Act 1956 for having had sexual intercourse with a girl under the age of 16. The European Commission on Human Rights held his complaint that the Act prevented him from manifesting his religion through his marriage under Islamic law to be inadmissible. The Commission stated that the term "practice" in article 9(1) of the Convention did not cover every act that may be motivated or influenced by a religion or belief. It repeated what it had said in *X v Germany* that marriage could not be considered simply as a form of expression of thought, but was governed specifically by article 12.

86. The Strasbourg Court in *Parry v United Kingdom* (Application No 42971/05), an admissibility decision dated 28 November 2006, held that a challenge to provisions in the Gender Recognition Act 2004 under article 9 and other articles of the Convention was inadmissible. A married couple sought to argue that the requirement in the Act that their marriage be annulled before the husband, who had undergone gender reassignment surgery, could receive formal recognition of her acquired gender interfered with their strongly held religious beliefs. The Court stated:

> "The Court notes, firstly, as regards article 9, that the provisions do not purport to regulate marriage in any religious sense and that it depends on each particular religion the extent to which they permit same-sex unions. The manner in which the State chooses to grant its own formal legal recognition to relationships does not, in the circumstances of this case, engage its responsibility under this provision."

This important statement as to the scope of article 9 of the Convention, which is wholly consistent with the Commission's rulings in *X* and *Khan*, makes clear that article 9 of the Convention does not require a contracting state to give formal legal recognition to committed relationships. The statement followed a discussion in which the court rejected a complaint under article 12 of the Convention. The court acknowledged that this article secured the fundamental right of a man and woman to marry and to establish a family and that it enshrined the traditional concept of marriage as being between a man and a woman. The court continued:

> "While it is true that there are a number of contracting states which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the contracting states in the Convention in 1950."

87. It is clear from this decision that there is nothing in the Convention that points to a wider interpretation of section 8 of the Constitution to achieve consistency with article 9 of the Convention as an antecedent of section 8. As discussed below, it is open to the state under the Convention to give legal recognition to same-sex unions without giving recognition to same-sex marriage. To interpret the Constitution as conferring a right to legal recognition of same-sex marriage by virtue of the protection of the enjoyment of freedom of conscience of those who believe in such legal recognition would be to deprive the state of a choice which is available to the Bermudian legislature on the international plane. The Attorney General succeeds on this ground of appeal.

88. For that reason, the Board does not need to address the question of justification which the Attorney General asks to be allowed to advance although it was not argued in the courts below. Had it been necessary to consider that application, the Board would have been inclined to refuse it as the Board does not have the benefit of the views of the courts in Bermuda on that matter.

89. Before turning to the cross-appeal on section 12 of the Constitution, the Board addresses briefly the judgment of Lord Sales who has in part reached a different conclusion. The Board agrees with the view that marriage is an institution with profound religious, ethical and cultural significance. It recognises also the historical background of the stigmatisation, denigration and victimisation of gay people which has motivated a drive to right a wrong through the recognition by society of a relationship of love and commitment between gay people. There is no doubt that the provision of domestic partnerships for same-sex couples and the restriction of marriage to couples of different sexes may create among gay people and those who support their aspirations a sense of exclusion and stigma. This is because many people may, as some of the respondents do, view a domestic partnership as inferior to the institution of marriage, notwithstanding that the civil rights conferred on the parties to a domestic partnership are substantially the same as those who are parties to a marriage. There is force in the policy argument in favour of the recognition of same-sex marriage on the ground that it would accommodate diversity within society.

90. Where the Board respectfully differs from Lord Sales is that it cannot agree that international instruments and other countries' constitutions may be used to read into the Constitution a right to the legal recognition of same-sex marriage. In the Board's view the right to freedom of conscience in section 8 of the Constitution and the absence of an equivalent to article 12 of the Convention, which establishes a right to heterosexual marriage, do not provide a platform for the use of those instruments and constitutions in the way in which Lord Sales argues. The Board fully accepts the need to interpret in a generous way the rights contained in the Constitution. That task, as the Board has said, is informed by the jurisprudence on analogous provisions in the

Convention. The Constitution does not provide such a right either expressly or by implication.

91. The Convention is of particular relevance in relation to the Constitution because, as explained above, the Convention was influential in its drafting and may therefore assist the court in finding the meaning of the text of the Constitution more than other international instruments. Thus, in *Minister of Home Affairs v Fisher* (above), the Board was assisted in interpreting the term "child" in a section 11(5) of the Constitution, which protects the freedom of movement of, among others, a person's family, to include an illegitimate child by referring to the protections given to family life in article 8 of the Convention and similar international instruments. But the Bermudian Constitution has no provision for the protection of private and family life, or for the protection of marriage, or which prohibits the discriminatory application of rights on the ground of a person's sexual orientation, such as are found in the Convention in articles 8, 12 and 14 and in some other national constitutions. In *Matadeen v Pointu* (above) the Board rejected the use of international instruments to curtail the powers that a constitution conferred on a legislature in a circumstance in which the Mauritian constitution entrenched the protection of an individual against discrimination only on a limited number of grounds. In the present case, the absence of a sufficient connection between the relevant terms of the Bermudian Constitution and the terms of the international instruments and foreign constitutions undermines any reliance on those instruments and constitutions as a basis for reading into section 8 of the Constitution a protection which it does not provide, ie the protection of the right to marry.

92. Further, as the Board has stated, the jurisprudence of the Strasbourg Court does not assist the respondents. First, it is clear that article 9 of the Convention, which is analogous to section 8 of the Constitution, has been held not to cover the recognition by the state of the institution of marriage and the Board sees no basis for saying that, because the Bermudian Constitution has no equivalent to article 12 of the Convention which protects the right of opposite-sex couples to marry, one should extend the scope of section 8 to require the state to recognise same-sex marriage. Secondly, the Strasbourg Court has recognised the obligation on a contracting state to provide a specific legal framework for the recognition and protection of same-sex unions by reference to the article 8 obligation to ensure respect for private and family life but has consistently held that the Convention does not oblige a contracting state to grant same-sex couples access to marriage: *Schalk and Kopf v Austria* (above), paras 58-59, 62-63, 101, 115; *Oliari v Italy* (above), paras 164, 167, 174, 185, and 190-193. The DPA is therefore consistent with the United Kingdom's international obligations under the Convention.

93. The Inter-American Court of Human Rights is concerned with the interpretation and enforcement of the American Convention on Human Rights to which neither Bermuda nor the United Kingdom are parties. The US Supreme Court in *Obergefell v Hodges* (2015) 576 US 644 and the South African Constitutional Court in *Minister of Home Affairs v Fourie* (2006) 1 SA 524 applied specific provisions in their country's constitutions which have no analogue in the Bermudian Constitution to the question of the recognition of same-sex marriage. While it is legitimate to have regard as a matter of comparative law to the judgments of constitutional courts and international tribunals on questions of fundamental rights in order to assist the interpretation of analogous provisions concerning fundamental rights in another constitution, the provisions considered in those cases are not analogous. Further, the Attorney General is correct in stating that there is as yet no international consensus on the way in which committed same-sex relationships should be recognised in law. In these circumstances, the reasoning in those cases does not inform the proper interpretation of section 8 of the Bermudian Constitution.

94. The Board therefore respectfully disagrees with Lord Sales' opinion which in its view is not sufficiently moored to the wording of the Constitution, however generously interpreted.

(3) The cross-appeal: section 12 of the Constitution

95. The respondents appeal against the rejection by the Court of Appeal of their case under section 12 of the Constitution. The respondents contend that the revocation provision in section 53 of the DPA was unconstitutional under section 12 of the Constitution because their belief in legally recognised same-sex marriage constitutes a "creed". They further contend that section 53 of the DPA replaced a wide secular definition of marriage with a narrow religious one, held by certain creeds but not others, and thus accorded privileges and advantages to persons of certain creeds, and imposed disabilities and restrictions on persons of other creeds.

96. The Court of Appeal in paras 73-75 of its judgment rejected the respondents' arguments on the ground that section 12 applies to discrimination against a person on the ground of his or her system of beliefs, whether religious or secular, and does not apply to a single belief. The Board is satisfied that the Court of Appeal was correct to do so.

97. Section 12(3) defines "discriminatory" as "affording different treatment to different persons attributable wholly or mainly to their respective *descriptions by … creed*" (emphasis added). There are two reasons why the respondents cannot bring

themselves within the protection of section 12. The first is the reason given by the Court of Appeal. Discrimination attributable to a person's description by creed is a reference to discrimination based on a person's system of beliefs, by which he or she is described, such adherence to a religion such as Christianity or Islam, or a secular belief system such as communism. Secondly, the exclusion of same-sex couples from the institution of marriage is attributable not to their or their supporters' description by creed but because they are of the same sex.

CONCLUSION

98. The Board will humbly advise Her Majesty that the Attorney General's appeal should be allowed and the cross-appeal by the respondents should be dismissed.

LORD SALES: (dissenting)

99. I have reached a different conclusion and would have dismissed the appeal on the basis of the second issue, which concerns the effect of section 8 of the Bermudian Constitution ("the Constitution"). This was the ground of challenge on which both the Chief Justice and the Court of Appeal considered the respondents should succeed in their claim. The issue is whether a belief in same-sex marriage is within the ambit of section 8(1) and/or whether the respondents held beliefs within the ambit of that provision.

100. Such a belief and beliefs are not simply a belief that same-sex unions should be legally recognised as marriage, as the Chief Justice made clear (see points (1) and (2) set out at para 32 above). The complaint of the respondents throughout has been that there are atheistic, agnostic and religious gay persons who hold the belief, as a matter of their personal conscience, that if they wish to be in an intimate and committed relationship with a partner they have a religious or moral obligation to enter into marriage with that partner; for those persons marriage plays "a fundamental role in their view of the world and of themselves", being "a deeply held, conscientious belief in marriage going to the core of who [they] are" (as it was put in the written submissions at first instance); and the fact that Bermudian law does not allow for the recognition of marriage between them constitutes an impermissible hindrance in the manifestation by them of such religious and conscientious beliefs, contrary to section 8(1). They complain that the Domestic Partnership Act 2018 ("the DPA"), which removed the right which formerly existed for same-sex couples to be married and have their married status recognised in law, violates the rights under section 8(1) of any gay person "who has a conscientiously held view that she should be married" (ibid). This is a complaint concerning hindrance in the manifestation of a belief regarding one's

personal religious or ethical obligations, not a political belief about how the state should act (although the former undoubtedly has implications regarding how one might think the state ought to behave).

101. Section 8 protects freedom of conscience and religion, including the right to manifest one's conscientious and religious beliefs without hindrance by the state. Marriage is an institution with profound religious, ethical and cultural significance. For that reason, it is an institution endorsed and given recognition by the state. Marriage realises fundamental human values such as intimacy, love and commitment. It also has a public dimension, as the social marker that two people have entered into a relationship of love and commitment to each other whereby society recognises, supports and honours that relationship.

102. Entering into marriage is a matter of personal religious or ethical belief, ie a matter of conscience, about how one should live one's life as regards being in an intimate and committed relationship with another person. Enjoyment of freedom of conscience is hindered, and freedom to manifest one's belief by marrying is likewise hindered, when one is denied the possibility of framing a relationship in that way in conformity with one's belief. Section 8 therefore protects those who have a belief that they should marry. I do not think that there is any basis on which it can be said that such a constitutional right does not cover same-sex couples in the same way as it covers opposite-sex couples.

103. Just as much as an opposite-sex couple, a same-sex couple may have a moral belief grounded in conscience (whether ethical or religious) that the proper form for their relationship is marriage, whereby they take a vow before God (if God features in their belief system) and society to be faithful and true to each other. Further, the major religions command that there should be no sexual intercourse outside marriage; so a believer may consider that they should not give expression to this fundamental aspect of their human nature outside such a relationship. Equally profoundly, for religious, ethical or cultural reasons a couple may believe that marriage is the definitive institution whereby to frame a relationship of commitment to each other, as the foundation for their family life together and (it may be) for their family life with children.

104. Western liberal democratic states protect the exercise of individuals' moral judgment about what constitutes the right way to conduct and frame their lives. They protect individuals' ability to form and live by their own conceptions of what is good and morally right. In the context of the Constitution, section 8 has particular salience and does most of the heavy lifting so far as this is concerned.

105. The state has a duty to be neutral between different religious and conscientious beliefs which individuals have, in order to afford them equal respect as citizens, ensure they are free to exercise their own ethical independence and so as to avoid the civic disparagement of vulnerable minorities. That is subject to certain limits which are not relevant in this case. The state hinders the exercise of freedom of conscience where it endorses the beliefs of some individuals (the beliefs of opposite-sex couples that they should marry in order to give full expression to their own moral being and to give full moral expression to their relationship) but refuses to do so in relation to the same beliefs held by other individuals (same-sex couples). By doing this, the state fails in its duty of neutrality between different conceptions of what is good and morally right and thereby denigrates the beliefs of the latter group. It fails to accord equal respect to the latter group as citizens and moral beings of equal worth to those in the former group.

106. As Justice O'Connor put it in the US Supreme Court in *Lynch v Donnelly* 465 US 668 (1984), outlining one of the main rationales for the clause in the First Amendment of the US Constitution preventing establishment of religion and protecting freedom of conscience in the form of free exercise of religion (p 688): "Endorsement [of one set of religious beliefs] sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."

107. This effect is compounded where, as here, there is a historical background of stigmatisation, denigration and victimisation of gay people. By saying to opposite-sex couples that they may marry and the state will endorse and support their relationship in that form, but saying to same-sex couples that they may not have access to the institution of marriage as recognised by the state, the state further stigmatises gay people and their relationships and may deter them from declaring and giving open expression to their commitments to each other. The state sends a message of civic exclusion and may also reinforce feelings of shame and guilt gay people might experience at being unable to live lives of integrity, in which there is congruence between their manner of living and the moral obligations to which they feel subject or the traditional cultural forms recognised in the community of which they are part. An individual's conscience may lead them to wish to participate as full members of their community in an institution such as marriage which has particular significance for that community. I agree with the submission of the respondents that the state recognises marriage as a cornerstone of society and it is demeaning to same-sex couples if they are denied by the state the same status as opposite-sex couples. Same-sex couples should be allowed to participate in ordinary moral life, as regards marriage, in the same way as opposite-sex couples, and I consider that section 8(1) protects their interest in this.

108. In my opinion, the argument for the Attorney General on the central ground of challenge in the appeal fails to give sufficient recognition to the importance of one's conscience, which is the kernel of an individual's personality, and the importance for an individual of being able to live a life in accordance with their conscience and hence which is morally whole. It also fails to take seriously the text of the Constitution as a legal instrument which, unlike the European Convention on Human Rights ("the ECHR"), contains no lex specialis provision on marriage, but which contains a general protection for freedom of conscience and the right to manifest one's conscientious beliefs by living in accordance with those beliefs (subject to a power on the part of the state to interfere with that right where that is justified for social reasons, which justification is absent in this case). And it fails to take seriously the state's duty of neutrality in relation to matters of conscience, which is the foundation of a liberal, pluralist polity.

109. This judgment is divided into the following sections:

(1) Analysis of the claims of conscience involved in this case;

(2) The constitutional provisions;

(3) The background to the Constitution;

(4) The principles governing the interpretation of an instrument like the Constitution which confers fundamental rights on individuals. I explain that the important point of distinction from certain other rights-conferring instruments such as the ECHR is that the Constitution has no lex specialis on marriage;

(5) The significance of constitutional protections for individual rights in a democracy;

(6) Comparison of the Constitution with the ECHR and other rights-instruments, including those which do not have a lex specialis on marriage. In this section I explain (i) how under the Constitution important constitutional values, including the right to respect for private and family life, are protected by section 8; (ii) that, in my view, section 8 includes a right to marry which covers (at the least) opposite-sex couples; and (iii) that there is no sound basis to exclude same-sex couples from that right to marry;

(7) Analysis of the text of section 8(1) to explain the application of freedom of conscience and religion in the context of marriage;

(8) Discussion of the right to marry under section 8(1) for opposite-sex couples and, on the same basis, for same-sex couples;

(9) Finally, I address other arguments which have been raised on the appeal: (i) religiously inspired change in the law to target gay people; (ii) absence of objective justification for the interference with rights under section 8(1); and (iii) section 12 of the Constitution.

(1) The claims of conscience

110. I think that the fundamental difference between Lord Hodge and Lady Arden, for the majority, and myself relates to our respective views regarding the nature of the claim of conscience on individuals who are gay and who wish to be able to marry a person of the same sex.

111. Clearly, as it seems to me, one may have the belief (whether religious or ethical) that all humans are equal and equally worthy of dignity and respect; loving relationships are central to our lives and our humanity; there is no lesser quality to love and the significance of a loving relationship between a same-sex couple and an opposite-sex couple; and marriage is an institution which involves both a private and a public commitment to a primary loving relationship with another which it is good and right to enter into. Some hold the religious view that God wishes opposite-sex partners in a loving relationship to enter into marriage, as the highest form of such relationships and a way of bringing God's grace into their lives. Equally, some hold the religious view that God wishes same-sex partners in a loving relationship to enter into marriage for the same reasons: see, eg, the ongoing debates in Anglicanism on this topic and the recent policy in favour of same-sex marriage adopted by the Methodist Conference in 2021 on the basis of the report by its Marriage and Relationships Task Group, "God in Love Unites Us", which states at paras 4.3.19-4.3.20:

> "The purposes, qualities and practices of marriage relationships that we have identified in this report as enabling those relationships to flourish can be applied to same-sex committed loving relationships as well as to mixed-sex relationships. Consequently, we believe that, in awe and humility, the Methodist Church needs to recognise that it is being called by God to take the next steps in the

> development of its understanding of relationships and marriage. Those steps include enabling people of the same sex to commit themselves to each other in Christian marriage services. There is a strong case that, if marriage is what the Methodist Church says it is, and is as wonderful as it says it is, this Church cannot remain true to the God of justice and love by continuing to deny it to those same-sex couples who desire it so deeply."

112. Conscientious beliefs about the importance of marriage as the vessel for a committed loving relationship are held by the respondents and those they represent. Maryellen Jackson, the third respondent, who wishes to enter into marriage with her same-sex partner, says: "I grew up in Bermuda, where marriage is the norm … I cherish the concept of monogamous marriage, and this forms an important part of my belief system. Although my beliefs are not founded on any particular religious position, they are founded on my cultural beliefs and my deeply held personal beliefs, including in particular my belief in the institution of marriage … marriage has deep meaning for me"; she is not a member of a church, so the only option for her for marriage would be a civil marriage; civil partnership has no cultural or spiritual significance for her, but is "a cheap imitation of marriage"; she concludes, "I want a relationship whose significance can be recognized and understood not only by myself and my partner, but by other people and by society as a whole."

113. Marriage is an institution with both an internal aspect (the commitment by one person promising to another to be faithful) and a public aspect, in that the commitment is made by a public declaration, so society knows the nature of the relationship between the partners and can honour and support it. A person may have religious and ethical beliefs about both these aspects. As to the former, these may include a belief that, if one wishes to express love in a relationship with a sexual dimension, that should be done within marriage. So far as the latter is concerned, these may include beliefs as to whether a church or religious community should allow the celebration and acceptance of same-sex marriage.

114. Similarly, in my view, a person may have religious or ethical beliefs about the importance of the state allowing the celebration and acceptance of same-sex marriage. Having regard to the role of the state as a source of legitimacy and authority and as an arbiter of social standards, the belief that the state should honour and respect a primary loving relationship between a same-sex couple in the same way as it does such a relationship between an opposite-sex couple is also capable of being a matter of conscience. A person may believe, as an aspect of religious or ethical views about the value of particular relationships and what the state should do to recognise and uphold such values, that the state should show equal respect for persons in a same-sex

relationship and treat them with equal dignity as it does persons in an opposite-sex relationship. Legal recognition of marriage involves giving the endorsement of the state to the relationship, conferring on it public recognition and legitimacy.

115. The internal and the public aspects of conscientious beliefs about same-sex marriage are analogous to those about pacifism, veganism and about forms of political organisation, all of which may involve ethical beliefs about one's own personal conduct and also that of the state. However, in the context of the present case, it is the internal aspect of belief and the sense of moral obligation or moral desirability to express one's primary intimate and committed relationship by means of the institution of marriage which is most important. One may manifest one's beliefs about what the state should do by campaigning for a change in the law; but that possibility does not allow a sufficient means of expression or manifestation in relation to the internal aspect of one's beliefs, which relate to how one should live one's life now. The reason why many people believe that the state should recognise same-sex marriage in law is, I would emphasise, because of the fundamental importance of the issue for individuals by virtue of that internal aspect.

116. The analysis adopted by Lord Hodge and Lady Arden focuses on beliefs individuals may have in respect of the public aspect of marriage, regarding how the state should frame its laws from a political point of view. If conscience is understood in that limited way, it is comparatively easy to say that the state does not hinder or interfere with such beliefs in a relevant sense so long as it allows people to hold and express such beliefs without risk of punishment or sanction.

117. However, in my opinion this misses the real force of the claim of conscience in relation to same-sex marriage. This is that, from the internal perspective, individuals feel that they are personally subject to a profound religious or ethical claim upon them that they should engage in the institution of marriage to give proper moral form to the intimate relationship which they wish to have with another person. A person who is not allowed to marry most certainly is hindered in, and is in fact prevented from, being able to manifest and give expression to their conscientious beliefs (be they religious or ethical) in that respect. They cannot live their lives in accordance with their moral convictions. If your conscience says you ought to get married but you cannot do so, that is an interference with your enjoyment of your freedom of conscience. And, as it seems to me, a state which allows opposite-sex couples to give expression to their conscientious beliefs about entering into marriage by providing a facility for civil marriage and by affording legal recognition to marriages entered into according to religious rites, but which denies those things to same-sex couples who hold such beliefs, also hinders and interferes with the enjoyment of their freedom of conscience, including their ability to manifest their belief in practice and observance (as it is put in section 8 of the Constitution).

118. It follows that I do not agree with Lord Hodge and Lady Arden (para 71) that the relevant conscientious beliefs in this case are to be characterised as a "political belief" to the effect that the state should recognise same-sex marriages. Many people may hold a belief of that character, and they may do so whether they are gay or not, in a relationship or not. In my opinion, by contrast, the relevant beliefs in this case are deeply held religious or ethical convictions of individuals as to the manner in which they should live their own lives. The only way in which a person who has the religious or ethical belief that to be in an intimate committed relationship one should be married can "enjoy" that belief is by getting married when they feel they should do so.

119. For this reason, the relevant beliefs of the respondents cannot be compared to political beliefs such as communism or pacifism. Political beliefs relate to what the state should do. The beliefs of the respondents are concerned with how they themselves should live. One can live openly as a communist or a pacifist without the state adhering to that position, but one cannot live in accordance with a religious or ethical belief that one should be married if one is not allowed to marry. In modern society marriage has evolved from being a purely religious institution defined by traditional religion into an institution regarded by many as the proper way, irrespective of faith, to frame and honour an intimate committed relationship.

120. For the same reason the respondents' beliefs are of a different character from the beliefs of those who believe, as a matter of their own religious or ethical view, that same-sex marriage should not be given legal recognition. It does not follow that recognition of protection for the respondents' beliefs under section 8(1) would mean that the beliefs of those who oppose same-sex marriage would have to be protected in the same way (cf Lord Hodge and Lady Arden, para 80). The relevant beliefs of the respondents concern their views regarding the religious or ethical obligations to which they themselves are subject if they wish to live in an intimate and committed relationship with another person. The views of those who oppose same-sex marriage are fundamentally about how *other* people should live their lives. The respondents are hindered in the exercise of their freedom of conscience if they are not able to enter into a marriage and if they will not be recognised in law as married if they seek to do so. By contrast, those who hold the view that same-sex marriage should not be allowed are not hindered in the exercise of their freedom of conscience if same-sex marriage is permitted, because they remain free to express themselves as to how they think other people should live their lives and how they think the state should act in relation to them. Section 8(1) has different effects depending on the different nature of these very different categories of belief.

121. Lord Hodge and Lady Arden point out (para 77) that the current Bermudian legislation does not prohibit a church from carrying out a same-sex marriage ceremony. But what is important for many is that their married status should receive

recognition by the state, which represents society at large. They feel that otherwise their union is not truly a marriage in a full sense. Moreover, where the state affords recognition to marriages validly performed in accordance with one set of religious or ethical beliefs but denies it in relation to marriages performed pursuant to another set of such beliefs, it violates the duty of neutrality inherent in the right to protection of freedom of conscience. Also, of course, this feature of the legislation is not something that assists non-believers who feel that they should marry.

122. Related to this fundamental point of difference is another. Whereas Lord Hodge and Lady Arden say that the Constitution contains no protection for any right to marry (paras 9 and 91), it is my view that it does protect a right to marry as something inherent in the right in section 8 not to be hindered in the enjoyment of freedom of conscience. It seems most strange to me to say that the people of Bermuda have no constitutional protection in relation to their ability to enter into the institution of marriage. I do not think the Bermudian Legislature could introduce a law to forbid people from marrying. Some human rights instruments make special provision to protect the right to marry alongside protections for freedom of conscience and for private and family life. Where that is done, it is not because it is thought that a desire to marry is not a matter of conscience and is not an important way of giving expression to family and private life; on the contrary, it is out of an appreciation of the profound personal and moral importance of marriage that it is highlighted in that way.

123. An interesting question might arise as to compliance with section 8 if the Legislature did not prohibit marriage but instead withdrew legal recognition from all marriages, under whatever religion and whether between same-sex and opposite-sex couples. We do not have to address that question, because it is not what has happened here. In this case, the Legislature has chosen to endorse and facilitate some marriages, so that opposite-sex couples are able to act in accordance with their conscience in framing their relationship in that way, whereas same-sex couples are denied this. As it seems to me, this clearly amounts to hindering same-sex couples in the enjoyment of their freedom of conscience.

124. The implication of Lord Hodge and Lady Arden's analysis is that there is no requirement under the Constitution for the state to accord any legal recognition at all to long-term same-sex relationships. There is no provision in the Constitution other than section 8 where such a requirement could be found. Therefore, although as it happens the current legislation (the DPA) does create a legal form for such relationships, that could be removed tomorrow by the Legislature. As I explain below, that would involve a violation of individuals' rights under article 8 and article 14 of the ECHR. To interpret section 8(1) as permitting this would conflict with the established principles of constitutional interpretation reviewed at paras 135-140 below. It would also conflict with the aim of protection of vulnerable minorities which section 8 of the

Constitution is supposed to promote. In my view, on a proper interpretation of the Constitution, gay people are intended to be protected as regards the scope for legal recognition of relationships they form which are equivalent, from the human point of view in terms of love shared and life-long commitments made, to those formed by opposite-sex couples.

(2) The constitutional provisions

125. The issue that arises involves a question of interpretation of a provision, section 8, which is part of the constitutional instrument adopted in relation to Bermuda. Section 8 appears in Chapter 1 of the Constitution, entitled "Protection of Fundamental Rights and Freedoms of the Individual".

126. Unlike the constitutions of some Caribbean countries, such as that of the Cayman Islands under consideration in *Day v The Governor of the Cayman Islands* [2022] UKPC 6, the Constitution is not modelled directly on the ECHR. Unlike the ECHR, the International Covenant on Civil and Political Rights ("ICCPR") and the constitution of the Cayman Islands, the Constitution contains no provision containing an express right to marry which constitutes a lex specialis governing that topic.

127. Section 1 of the Constitution states:

> "Whereas every person in Bermuda 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, namely:
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

> 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."

128. The Constitution does not contain a provision equivalent to article 8 of the ECHR (right to respect for private and family life), but rather a more restricted right to protection of privacy of the home and other property in section 7, focused on protection against searches. However, as was made clear by the Board in *Minister of Home Affairs v Fisher* [1980] AC 319 ("*Fisher*"), article 8 of the ECHR informs the interpretation of other provisions in Chapter 1 of the Constitution.

129. Section 8 of the Constitution is the provision which is most significant for the appeal. Lord Hodge and Lady Arden have set it out at para 9.

130. The other fundamental rights in Chapter 1 are protection of the right to life (section 2), protection from inhuman treatment (section 3), protection from slavery and forced labour (section 4), protection from arbitrary arrest or detention (section 5), protection of law in relation to criminal and civil proceedings (section 6), freedom of expression (section 9), freedom of assembly and association (section 10), freedom of movement (section 11), protection from deprivation of property (section 13) and protection from discrimination as provided for in section 12, which Lord Hodge and Lady Arden set out at para 9. As can be seen, the overall structure of the Constitution and the rights set out in it are different from the ECHR. However, as explained in *Fisher* and the authorities referred to below, the rights in the Constitution are to be interpreted so far as possible to ensure that an individual's rights under the ECHR, which are applicable in Bermuda, are protected under the Constitution.

(3) The background to the Constitution

131. When the United Kingdom acceded to the ECHR in 1953 it also did so in respect of what were then called its colonies, including Bermuda, after due consultation with the local governing bodies. That posed a potential problem, in that the United Kingdom had thereby accepted responsibility under international law for breaches of ECHR rights by the local legislatures and governments of those colonies, over which it might be politically difficult for London to exercise control in view of an increasing emphasis on colonial self-government.

132. The Colonial Office (as it then was) issued a policy paper in 1962 regarding the adoption of human rights guarantees in constitutions in the then colonies which addressed this issue and proposed that constitutions should be adopted which limited local legislative and governmental powers in such a way as to minimise this problem: Colonial Constitutional Note 23, 26 September 1962, CO 1032/283, para 3; discussed in C Parkinson, *Bills of Rights and Decolonization: the Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (2007), Chapter 9. The ECHR was thus a direct inspiration for the constitutions to be adopted.

133. The problem was exacerbated when the United Kingdom accepted the right of individual petition in relation to the ECHR, as it did for itself and (after due consultation) its remaining colonies, including Bermuda, in 1966 and shortly thereafter.

134. The Bermudian Constitution was adopted in 1968 pursuant to this policy to make provision for legally binding constitutional human rights guarantees. This background is why, as recognised in *Fisher*, it should be interpreted where possible so as to provide protection for individual rights set out in the ECHR. Lord Diplock pointed out in *Hinds v The Queen* [1977] AC 195, 211 ("*Hinds*"), that "[a] written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made." As with other constitutions adopted at about this time, the full text of the ECHR rights was not copied out; instead, although inspired by the ECHR, the text of the Constitution is different in some important respects.

(4) Principles of interpretation of the Constitution

135. The proper approach to the interpretation of the Constitution was explained in the leading judgment delivered by Lord Wilberforce for the Board in *Fisher*. The case concerned whether an illegitimate child fell within the meaning of the term "child" as used in section 11 so as to have a constitutional right to live on the island, it being held that they did. Lord Wilberforce observed (pp 328-329):

> "It can be seen that this instrument [the Constitution] has certain special characteristics. 1. It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter 1 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 [ECHR]. 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 1 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 1. 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'.
>
> …
>
> A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language."

Lord Wilberforce recognised (p 330B) that the Constitution contained no term equivalent to article 8 of the ECHR, but nonetheless drew upon that provision (with its respect for family life and the family unit and its protection of illegitimate children) to inform the interpretation of section 11. He also referred to the UN Convention on the Rights of the Child and the ICCPR: "Though these instruments at the date of the Constitution had no legal force, they can certainly not be disregarded as influences upon legislative policy [ie in the drafting of the Constitution]."

136. This approach to constitutional interpretation is in line with the principles governing such interpretation articulated by the Board before and since *Fisher*. The Board described the British North America Act in relation to Canada, another constitutional instrument equivalent to the Constitution, as "a living tree capable of growth and expansion within its natural limits" and "subject to development through usage and convention": *Edwards v Attorney General for Canada* [1930] AC 124, 136.

137. The “living tree” notion has its analogue in the conception of the ECHR as a “living instrument” in the case law of the European Court of Human Rights (“the Strasbourg Court”), the interpretation of which is capable of adaptation within limits to social changes. The fact that the United Kingdom had made the ECHR applicable to Bermuda at the time the Constitution was adopted and the linkage between the Constitution and the ECHR emphasised by the Board in *Fisher* indicate that, so far as is compatible with the language used in the Constitution, its interpretation should be adjusted in line with the evolving construction of individual rights in the ECHR. See also *Williams v The Supervisory Authority* [2020] UKPC 15, para 73; as noted there, “[t]he degree of the persuasive force of authorities on the ECHR will depend on the text of the provision under review and its place in the general scheme of the ECHR and the local constitution, respectively.”

138. The Board has emphasised in many further judgments that an issue of interpretation of a constitution is just that, an exercise in the interpretation of a specific legal instrument. In the well-known judgment in *Matadeen v Pointu* [1999] 1 AC 98, concerning the interpretation of section 3 of the constitution of Mauritius, Lord Hoffmann, for the Board, addressed the subject of constitutional interpretation at p 108:

> “Their Lordships consider that this fundamental question [sc regarding the relationship between the courts and the legislature of Mauritius] is whether section 3, properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political

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

Lord Hoffmann added (p 114):

> "Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments. Again, their Lordships accept that such international conventions are a proper part of the background against which section 3 must be construed …"

This judgment is in line with the guidance in *Fisher*. As noted in that case, the ECHR has been made applicable to Bermuda. Therefore, both by reason of the guidance in *Fisher* and by reference to the approach stated here by Lord Hoffmann, the Constitution should if possible be construed so as to provide protection for the rights contained in the ECHR.

139. In *Rodriguez v Minister of Housing of the Government of Gibraltar* [2009] UKPC 52; [2010] UKHRR 144 ("*Rodriguez*"), Lady Hale for the Board explained (para 11) that although rights in the constitution of Gibraltar are drafted in different terms from those in the ECHR there is good reason for interpreting the constitution of Gibraltar as providing at least a similar level of protection as the ECHR on the ground that the United Kingdom had extended its application to Gibraltar before the constitution was adopted, "so that it would be surprising if Gibraltarians were to enjoy a lesser level of protection for their fundamental human rights under their Constitution than they do

under the ECHR." Lady Hale continued, "[h]owever, the Board is interpreting the constitution of Gibraltar, not the ECHR, so that the reasons for restraint in the interpretation of the 'convention rights' under the United Kingdom's Human Rights Act 1998 do not apply: cf *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20", and she observed that, as a result of interpretation of the constitution as a distinct legal instrument, in at least one respect the constitution went further than the ECHR. Thus, although Lord Hodge and Lady Arden are correct to point out that article 9 of the ECHR has not been interpreted as creating a right of same-sex marriage, I do not think that is an answer to the claim brought by the respondents.

140. In *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235 ("*Reyes*"), concerning the constitution of Belize, in another well-known statement Lord Bingham of Cornhill followed (para 26) the guidance in *Fisher* and *Matadeen v Pointu*:

> "When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases, *Weems v United States* (1910) 217 US 349, 373, *Trop v Dulles* (1958) 356 US 86, 100-101, *Minister of Home Affairs v Fisher* [1980] AC 319, 328, *Union of Campement Site Owners and Lessees v Government of Mauritius* [1984] MR 100, 107, *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700-701, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 331, *S v Zuma* 1995 (2) SA 642, *S v Makwanyane* 1995 (3) SA 391 and *Matadeen v Pointu* [1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and

> ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see *Trop v Dulles* 356 US 86, 101. …"

(5) Constitutional protections for individual rights in a democracy

141. Mr Crow QC for the Attorney General emphasised the provisions in the Constitution which confer legislative power on the Legislature and also referred to the result of the referendum of 23 June 2016 on same-sex marriage and same-sex civil unions. In his submission, recognition of same-sex marriage in Bermuda is a matter which must be left to the Legislature and the democratic process.

142. In my view, however, this submission does not give proper recognition to the role of individual fundamental rights in a Western constitutional democracy subject to the rule of law, like Bermuda. On a wide conception of democracy in a constitutional framework, protection for individual fundamental rights provides a guarantee of legitimacy of state action and the foundation on which democratic engagement can take place in an effective and fair way. Unpopular minorities are protected from exclusion from participation in society and from being exposed to what has been called "the tyranny of the majority". The tension between constitutional rights and democracy should not be overstated, as Lord Bingham was at pains to point out in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (the so-called *Belmarsh* case), paras 38-42, in a speech with which a majority of the nine-strong Appellate Committee agreed. Lord Bingham emphasised the importance of the role of the courts in a constitutional democracy subject to the rule of law as part of the democratic foundations of the state, broadly conceived, and at para 39 quoted this passage from the judgment of Jackson J, sitting in the US Supreme Court in *West Virginia State Board of Education v Barnette* (1943) 319 US 624, para 3, so far as concerns an entrenched constitution containing a set of fundamental individual rights (such as that which exists in Bermuda):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts ... We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this court when liberty is infringed."

See also *Hinds*, p 214 (Lord Diplock).

143. In this context, it should be added that a constitutional right to protection of freedom of conscience may be thought to be particularly important, for two reasons. First, the sad history of religious war and persecution in Europe shows how vulnerable religious minorities and outsiders may be to ill-treatment at the hands of a religious majority. Constitutional protections for freedom of conscience, such as that in the Constitution of the United States, were adopted to safeguard against this. Secondly, clashes of views based on religious belief are likely to be particularly intractable, since religious belief can make compromise difficult. If a person believes that they are bound by a command from God or some form of overriding moral injunction, they cannot compromise on that. But a willingness to negotiate and compromise is the essence of deliberation in a democracy. So it may make sense to take such matters off the table so far as concerns politics and majoritarian processes of resolution.

144. The individual fundamental rights in Bermuda's Constitution fall to be interpreted generously and in light of the "living tree" principle, as explained above. They also fall to be interpreted against the background of, and where possible with a view to giving effect to, rights contained in the ECHR which are themselves subject to evolution pursuant to the conception of the ECHR as a "living instrument".

145. It is a commonplace that in the family of Western liberal democracies in the last six decades or so there has been a profound transformation in the acceptance of gay persons and in acknowledgment of the need to respect their dignity and moral standing as full members of society. This has been as a result of long dialogue on the issue and social change across those democracies. Bermuda is a state which is firmly within that family of nations. The ECHR has applied to it since 23 October 1953. With the agreement of the Bermudian government, the right of individual petition to the Strasbourg Court was accepted in relation to Bermuda in 1967 and after a series of extensions this was made permanent pursuant to article 56(4) of the ECHR on 22 November 2010. It is a democratic, pluralist and tolerant society in the Western tradition and is not, and should not be treated as, an island frozen in time in the 1950s so far as social and constitutional values are concerned. The action of the Legislature in passing the Human Rights Act 1981 (and modifying it in 2013 to provide for protection against discrimination on grounds of sexual orientation) and the assessment of the local courts in the decisions below show that it is not. More to the point, the fundamental rights of individuals in Bermuda are not of less value than they are elsewhere.

(6) Comparison with the ECHR, the ICCPR and rights-instruments with no lex specialis on marriage

146. Both the ECHR and the ICCPR contain an express right for individuals to marry, drafted in terms which cover only opposite-sex couples: article 12 and article 23, respectively. These provisions are in line with article 16 of the Universal Declaration on Human Rights (1948) and reflect the social customs and mores of former times. As explained in detail in the Board's judgment in the *Day* case, paras 45-54, in the scheme of these instruments those provisions constitute a lex specialis in relation to the right to marry which precludes such a right being found to be inherent in other, general provisions set out in them. As regards the position under the ECHR, it is on the basis that in the scheme of the Convention article 12 is the lex specialis on the right to marry that the Strasbourg Court has rejected the submission that general rights in article 8 (right to respect for family and private life) and article 14 (right to protection against discrimination) include a right for same-sex couples to marry: *Schalk and Kopf v Austria* (2011) 53 EHRR 20, paras 63 and 101 ("*Schalk*"); *Hämäläinen v Finland* (2014) 37 BHRC 55, Grand Chamber, paras 71 and 96 ("*Hämäläinen*"); and *Oliari v Italy* (2017) 65 EHRR 26, para 193 ("*Oliari*"). The ECtHR made the point in this way in *Schalk* at para 101:

> "Insofar as the applicants appear to contend that, if not included in article 12, the right to marry might be derived from article 14 taken in conjunction with article 8, the Court is unable to share their view. It reiterates that the Convention is to be read as a whole and its articles should therefore be construed in harmony with one another. Having regard to the conclusion reached above, namely that article 12 does not impose an obligation on contracting states to grant same-sex couples access to marriage, article 14 taken in conjunction with article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."

By the same reasoning, no right of marriage for same-sex couples can be derived under the ECHR from article 9 (freedom of thought, conscience and religion), whether taken by itself or together with article 14: *Parry v United Kingdom* (Application No 42971/05), admissibility decision, 28 November 2006.

147. By contrast, the Constitution contains no lex specialis on marriage, so this reasoning is not applicable.

148. However, it is clear from article 12 that the ECHR includes a right to marry for *some* people, so following the reasoning in *Fisher, Matadeen v Pointu* and *Rodriguez* a place should be found within the scheme of the Constitution for this to be covered by one of the rights set out in that instrument, if possible. Just as article 8 of the ECHR was held in *Fisher* to inform the interpretation of section 11 of the Constitution, it is readily possible to interpret section 8 of the Constitution as including coverage of the right to marry contained in article 12 of the ECHR (and also as contained in article 23 of the ICCPR), as I seek to explain below. If *anyone* is to have a fundamental right to marry under the Constitution, it has to be found in section 8. Indeed, in my view, even without these provisions of the ECHR and the ICCPR in the background, section 8 is properly to be interpreted as including a right to marry in at least some cases, particularly in light of the historic importance of marriage as a central institution of society with profound religious and moral significance for individuals which it is to be expected was intended should be reflected and find protection in the Constitution.

149. The question then becomes whether the right to marry contained within section 8 can in modern society be restricted to opposite-sex couples where the Constitution contains no lex specialis on the subject and there are no words of limitation in section 8 itself to restrict it in that way. In my opinion, it is not possible to read section 8 as so limited.

150. In addition, in my view, once one puts aside the lex specialis point, article 8 of the ECHR provides further support for the interpretation of section 8 as including now a right of marriage for same-sex couples. This derives from the development in the interpretation of article 8 in *Schalk*, in which at paras 90-95 the Strasbourg Court held for the first time that a cohabiting same-sex couple living in a stable partnership fell within the concept of "family life" and were entitled to protection under that limb of article 8 of the ECHR. At para 99 the Strasbourg Court said: "the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."

151. This interpretation of the concept of "family life" in article 8 was affirmed by the Grand Chamber of the Strasbourg Court in *Vallianatos v Greece* (2014) 59 EHRR 12, para 73 ("*Vallianatos*"). It held that the protection of the "family life" limb of article 8 did not depend upon cohabitation, but arose when the couple in question were in a stable relationship. At para 78 it reiterated para 99 of *Schalk* (quoted above). In *Vallianatos* the Grand Chamber found a violation of article 14 in conjunction with article 8 in relation to the introduction of a regime for legal recognition of civil unions (as an alternative to marriage) from which same-sex couples were excluded. Thus where the lex specialis provision in article 12 has no application, the ECHR requires the

state to provide the same institutional means of recognition for same-sex couples as it provides for opposite-sex couples.

152. In *Oliari*, in which judgment was given in 2015, the Strasbourg Court went further and held that Italy had a positive obligation under article 8 of the ECHR to provide a regime for legal recognition of same-sex partnerships. The applicants in that case were in committed, stable same-sex relationships who wished to marry, but Italian law did not allow for this. Their claims for a right to marry under the ECHR were rejected on the basis of the lex specialis reasoning set out above, but the ECtHR held that there had been a violation of article 8 by reason of the fact that there was no provision in Italian law which enabled them to enter instead into a civil partnership recognised in law. At para 165, citing *Schalk* and *Vallianatos*, the Court said:

> "The court reiterates that it has already held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship. It follows that the court has already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship."

At para 174 the court observed (omitting footnotes):

> "… the court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection - in the form of core rights relevant to a couple in a stable and committed relationship - without unnecessary hindrance. Further, the court has already held that such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce. This recognition would further bring a sense of legitimacy to same-sex couples."

See also *Orlandi v Italy* (Application Nos 26431/12, 26742/12, 44057/12 and 60088/12), judgment of 14 December 2017, para 192, in which the Strasbourg Court noted that according to the reasoning in *Schalk* there was no right of marriage for same-sex couples under the ECHR but, citing para 165 of *Oliari*, stated "[n]evertheless, the Court has acknowledged that same-sex couples are in need of legal recognition and protection of their relationship".

153. The qualifying words in para 174 of *Oliari* ("in the absence of marriage") are significant. Under modern circumstances, save for the lex specialis point regarding opposite-sex marriage in the specific context of the ECHR, one could not say that the state could justify restricting legal recognition for the relationships of same-sex couples to civil partnerships (as distinct from marriage), which do not have the same religious, ethical or cultural status in the eyes of many. The fact that rights-instruments like the ECHR and the ICCPR confer an express right of marriage (albeit one drafted in light of circumstances and customs prevailing at the time they were adopted) was in recognition of the particular importance of marriage for individuals as an expression of the values by which they may wish to live in their private life and in their family life. That importance is in no way diminished in modern society, in which the value of gay people being able to express themselves and choose to live in conformity with religious, ethical and cultural norms in their private and family lives is now accepted.

154. The Strasbourg Court has recognised that homosexuals constitute a minority which historically has been particularly subject to stigmatisation and discrimination and therefore requires "particularly weighty and convincing reasons" under article 14 of the ECHR to justify differential treatment applied to them, and differences based solely on sexual orientation are not regarded as acceptable: *Vallianatos*, para 77. Thus gay people are regarded as a group particularly requiring protection by means of fundamental rights against discrimination in society.

155. Further, the Strasbourg Court has emphasised in its case law concerning treatment of gay people that the hallmarks of a democracy include pluralism, tolerance and broadmindedness: see eg *Dudgeon v United Kingdom* (1981) 4 EHRR 149, para 53; *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, para 87; *Berkman v Russia* (2021) 73 EHRR 3, paras 45-46. This again indicates that there are particularly strong grounds for removing issues of sexual orientation from the vicissitudes of political, majoritarian decision-making.

156. Marriage is an institution which has by long tradition been the means by which persons in or wishing to enter into a stable and committed personal relationship, particularly a relationship with a sexual dimension in which they commit themselves to be faithful to the other, can undertake a formal commitment to their partner, can do

so publicly and can have that commitment recognised and given legitimacy by society and the state. On the basis of these themes in the Strasbourg case law, I consider that there is strong reason to think that, but for the lex specialis analysis set out above, the Strasbourg Court would hold that there is a right to marry under article 8 of the ECHR as an aspect of affording respect for private and family life and that in modern circumstances that right extends to same-sex couples. There is also strong reason to think that, but for that lex specialis analysis, where the institution of marriage is made available for opposite-sex couples (as it invariably is) the Strasbourg Court would also hold that it would be a violation of article 14 for it not to be made available for same-sex couples.

157. As it was explained in argument in *Oliari* (para 116):

> "The lack of legal recognition of [the applicants' committed and stable same-sex relationship], besides causing legal and practical problems, also prevented the applicants from having a ritualised public ceremony through which they could, under the protection of the law, solemnly undertake the relevant duties towards each other. They considered that such ceremonies brought social legitimacy and acceptance, and particularly in the case of homosexuals, they went to show that they also have the right to live freely and to live their relationships on an equal basis, both in private and in public. They noted that the absence of such recognition brought about in them a sense of belonging to an inferior class of persons, despite their needs in the sphere of love being the same."

158. Put shortly, if one starts with the basic position (as established since 2009 in *Schalk*, *Vallianotos*, *Oliari* and *Orlandi*) that same-sex couples have the same capacity as opposite-sex couples to form committed and stable partnerships which constitute family life and that gay people have an equal right to respect for their private and family life then - absent the lex specialis feature of the ECHR presented by article 12 - one could not conclude that it would be acceptable to deny same-sex couples the right to marry and expect them to make do with civil partnership instead. These principles are now deeply embedded as fundamental values in Western liberal states. By reason of the traditional position of marriage in society, its significance for those with a religious outlook on life and the status given to it through recognition by the state, in the eyes of many people (including, of course, many gay people) civil partnership is not regarded as having equivalent status or legitimacy; for these people civil partnership is a second-best and inferior alternative. In my opinion, given those premises, it is difficult to see a regime under which opposite-sex couples are entitled to marry and

have their marriage recognised by the state, but same-sex couples are not, as anything other than the continuation of the stigmatisation of gay people in society through the denial of equal legitimisation of the stable and committed relationships they form in the same way, and having the same profound personal significance, as opposite-sex couples.

159. This has, indeed, been the conclusion of a range of courts which have considered, in circumstances where the rights-instrument in question does not include a limited lex specialis on marriage, whether same-sex couples should in modern society now be taken to have a fundamental right to marry which is equivalent to the right opposite-sex couples enjoy. Four prominent examples may be mentioned. They are indicative of how constitutional protections for gay people and their relationships have developed in modern conditions in states with constitutional and political cultures similar to that of Bermuda.

160. First, it is notable that this was the conclusion of the Northern Ireland Court of Appeal in *In re Close's Application for Judicial Review* [2020] NICA 20, in a judgment which overlooked the lex specialis analysis stemming from article 12 of the ECHR (see the review of the case in *Day* paras 51-52), and instead analysed the claim for recognition of a right for same-sex couples to marry simply in terms of the values protected by article 8 and article 14 of the ECHR. In the view of the court, denial of equal access to the institution of marriage for same-sex couples could not be justified.

161. The Inter-American Court of Human Rights reached the same conclusion in its advisory opinion, *Gender Identity and Equality and Non-discrimination of same-sex couples (Advisory Opinion OC-24/17),* issued on 24 November 2017, regarding the effect of the American Convention on Human Rights. That Convention does not contain a lex specialis in relation to the right to marry, which instead is governed by article 11(2) (which is broadly equivalent to article 8 of the ECHR) and article 24 (which, in providing for equal protection of the law and non-discrimination, is broadly equivalent to section 1 of the Constitution and article 14 of the ECHR). The court noted that the Convention is "a living instrument", like the ECHR; agreed with the Strasbourg Court that a committed same-sex relationship should now be accepted as constituting family life; and said (para 224, omitting references):

> "224. … in the court's opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage, except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that

> basis, there would be marriage for those who, according to the stereotype of heteronormativity, were considered 'normal', while another institution with identical effects but with another name would exist for those considered 'abnormal' according to this stereotype. Consequently, the court deems inadmissible the existence of two types of formal unions to legally constitute the heterosexual and homosexual cohabiting community, because this would create a distinction based on an individual's sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention."

162. In *Obergefell v Hodges* 576 US 644 (2015) ("*Obergefell*") the US Supreme Court held that the US Constitution protects the right of same-sex couples to marry. The US Constitution does not include a lex specialis on the right to marry. Instead, the court held that the fundamental liberties protected by the due process clause of the Fourteenth Amendment and the equal protection clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs, and include a right to marry. The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy and spirituality, and this is true for all persons, whatever their sexual orientation (p 2599). The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals involved, and same-sex couples have the same right as opposite-sex couples to enjoy intimate association (pp 2599-2600). As Kennedy J, for the court, observed (pp 2601-2602), despite the importance given to marriage by states:

> "Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning. The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central

> meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."

163. In *Minister of Home Affairs v Fourie* (2006) 1 SA 524 ("*Fourie*") the Constitutional Court of South Africa held that there was a constitutional right of marriage for same-sex couples under section 9(1) of the South African Constitution ("Everyone is equal before the law and has the right to equal protection and benefit of the law") and section 9(3) (which prohibits unfair discrimination on the grounds, among others, of sexual orientation). This is a rights-instrument which does not have a lex specialis conferring a right of marriage, but instead enshrines general values of human dignity, equality and freedom: para 47 per Sachs J, in giving the plurality judgment. The absence of recognition of same-sex marriage at common law and under statute was held to violate the constitution. As Sachs J said (paras 71-72):

> "71. … It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.
>
> 72. It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. … given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way."

164. The values identified as underpinning the South African Constitution are closely aligned with those which underpin the Bermudian Constitution. Sachs J observed (para 78) that, by being denied access to the institution of marriage, same-sex couples were

denied equal protection and were subjected to unfair discrimination: "[b]y both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples", and this continued to be the case. He dismissed the submission by the state that it would be sufficient to meet the problem if an alternative institution, different from marriage, were made available for same-sex couples: paras 83-113.

165. These authorities demonstrate a uniformity of approach in interpreting rights instruments containing individual rights similar to those in the Constitution in a context where, like the Constitution, there is no lex specialis in relation to a right of marriage. The absence of such a lex specialis does not mean that there is no protected right of marriage; on the contrary, it means that protection for a right of marriage is found to be inherent in other individual rights of general application and that this protection cannot be confined to opposite-sex couples.

166. Moreover, as noted above, if the rights of gay people - or indeed any people - under article 8 of the ECHR to be accorded legal recognition of their long-term relationships are to be reflected in the Constitution, the coverage of those rights has to be found in section 8. If those rights are covered by section 8, there is no textual warrant in the Constitution for not extending the protection to include same-sex marriage. One cannot read into the Constitution a lex specialis which is not there. So the choice in interpreting the Constitution is between a right of protection for same-sex relationships (which covers the rights which have been established to exist in the ECHR and also extends to same-sex marriage) or none. It is difficult to identify any half-way house. In my opinion, analysis of the text of the Constitution leads to the conclusion that the relationships of gay people are afforded protection rather than that they have no protection whatever.

167. Also, it is clear that individual rights under article 9 of the ECHR fall to be covered by section 8 of the Constitution. Relevant points to emerge from the case law on article 9 are discussed below. That case law supports the view that a belief that persons of the same sex who wish to be in a committed relationship with each other should be able to have access to the institution of marriage is, for many people, a matter of conscientious and in some cases religious belief.

(7) Section 8 of the Constitution: freedom of conscience and religion in the context of marriage

168. I now turn to consider the text of section 8 of the Constitution. The first point to note is that the structure of that provision gives no grounds for reading the rights set out in section 8(1) in a narrow way; quite the contrary. In a pluralistic society religious and ethical views differ widely and may be in conflict at many points. However, section 8(5) makes provision to allow for interference with the rights in section 8(1) where the public interest requires this on various grounds, in a manner similar to article 8(2) of the ECHR. Therefore, there is good reason to follow the guidance in *Fisher* and the other authorities set out above and read the rights set out in section 8(1) in a generous way. The values underlying the Constitution should be given due weight when it falls to be interpreted in the light of significant changes in social attitudes. The people of Bermuda, including perhaps most importantly those least able to protect themselves, should have the full measure of protection which section 8(1) is intended to provide.

169. Three questions arise under section 8(1): (i) what qualifies as "freedom of conscience" so as to fall within the scope of the provision? (ii) what qualifies as "enjoyment of … freedom of conscience"? and (iii) what constitutes "hindering" a person in the enjoyment of his or her freedom of conscience? In this section I address these in turn in the context of marriage.

(i) "Freedom of conscience"

170. "Freedom of conscience" in section 8(1) includes "freedom of thought and of religion". According to ordinary meaning, it is a concept of wide ambit. It includes ethical and religious beliefs as to how one should live, ie according to one's conscience. So, for example, this provision would prohibit punishing someone for adherence to veganism when that is based on their conscientious beliefs about how to treat animals.

171. The width of this ordinary meaning interpretation of section 8(1) is borne out by authority and is reinforced by (a) the Western constitutional traditions in which Bermuda participates of respect for the individual and their ability to follow their conscience, (b) the absence of a precise definition and the width of the non-inclusive guidance in the latter part of section 8(1) ("the said freedom *includes* …"), (c) the existence in section 8(5) of a wide power to justify interferences with the right, and (d) the generous interpretation to be given to fundamental rights in accordance with the guidance in *Fisher* and *Reyes*.

172. The text of section 8(1) is derived from and closely aligned with article 9(1) of the ECHR and (as explained in *Fisher, Matadeen v Pointu* and *Rodriguez*) should be interpreted to ensure that it provides coverage of rights which is at least as good. The case law on article 9(1) of the ECHR confirms that the engagement of the right to freedom of conscience has a relatively low threshold: *Arrowsmith v United Kingdom* (Application No 7050/77), European Commission of Human Rights, report of 12 October 1978, para 69 (pacifism, defined as the commitment to the philosophy of securing political and other objectives without resort to the threat or use of force against another human being in any circumstances, falls within the ambit of the right to freedom of thought and conscience); *Bayatyan v Armenia* (2012) 54 EHRR 15, para 110 (conscientious objection to military service); and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246, paras 23-24 (Lord Nicholls) and 55 (Lord Walker), in relation to belief in the ethical value of corporal punishment of children in the course of education. Dingemans et al, *The Protections for Religious Rights: Law and Practice* (2013), para 3.19, lists in addition cases which have held that article 9(1) covers atheism, veganism, political ideologies such as communism, the Salvation Army, pro-life beliefs and secularism.

173. For a belief to qualify for protection under article 9(1) it must "attain a certain level of cogency, seriousness, cohesion and importance"; relate to a "weighty and substantial aspect of human life and behaviour"; and it "must also be worthy of respect in a democratic society and not be incompatible with human dignity": *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, para 36. Article 9 protects views "that attain a certain level of cogency, seriousness, cohesion and importance": *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81 ("*Eweida*").

174. Most relevantly, the Strasbourg Court has held that a conscientious or religious objection to same-sex marriage falls within the concept of freedom of conscience in article 9(1): *Eweida*, paras 102-103 and 107-108. Conversely, a belief that same-sex couples should marry (ie participate in the institution of marriage as the best way to give expression to their commitment to each other in a relationship), and thus should have the right to marry, is a matter of conscience for many people. I do not think there is any doubt that such beliefs meet the test in paras 172-173 above.

175. As set out at paras 110-122 above, individuals in same-sex relationships may have conscientious beliefs, religious or ethical in nature, regarding the moral desirability of entering into marriage. These fall within the scope of the protection afforded by section 8(1).

(ii) "enjoyment of … freedom of conscience"

176. The concept of "enjoyment" is wider than simply being allowed to entertain certain thoughts in one's own head - such as, "it would be a good thing if same-sex couples could enter into marriages" - without being punished. Section 8(1) says that freedom of conscience includes freedom of thought but also "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". Thus, section 8(1) confers a right on a person to live in accordance with their religious or conscience-based beliefs in a practical way to some degree.

177. In *Eweida* the Strasbourg Court summarised the general principles governing the application of article 9 of the ECHR at paras 79-84. At para 79 it explained that freedom of thought, conscience and religion is one of the foundations of a democratic society; that in its religious dimension "it is one of the most vital elements that go to make up the identity of believers and their conception of life", and that it is also precious for atheists and others; and pointed out that "[t]he pluralism indissociable from a democratic society … depends on it". At para 80 it emphasised the importance of individuals being able to manifest their beliefs ("[b]earing witness in words and deed is bound up with the existence of religious convictions"), while also drawing attention to the possibility of restrictions on this provided they are properly justified under article 9(2). At para 82 it referred to the state's duty of neutrality as between different beliefs, which I discuss below.

178. The Court said (para 82), "[i]n order to count as a 'manifestation' within the meaning of article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form." The court held (paras 89 and 97) that wearing a cross visibly at work as a witness to their Christian faith constituted a manifestation of the religious belief of two of the applicants. The refusal of the fourth applicant to provide psycho-sexual counselling to same-sex couples in the course of his employment also constituted a manifestation of religion and belief for the purposes of article 9(1): para 108. In *Arrowsmith v United Kingdom*, above, report of 12 October 1978, the Human Rights Commission observed (para 71) that "public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief." That paragraph was cited with approval by the Strasbourg Court in *Pretty v United Kingdom* (2002) 35 EHRR 1, para 82.

179. According to these standards, entry into marriage clearly constitutes a manifestation of belief in the religious, ethical or cultural value of that institution. That

is true for opposite-sex couples. In my view, there is no doubt that same-sex couples likewise manifest their belief in the value of marriage within a committed same-sex relationship (including also by demonstrating that belief to others) by entering into marriage and then living in such a relationship, when they are able to. In both cases, the parties to a marriage "manifest" their "religion or belief in … practice and observance", within the language of section 8(1), which follows article 9(1) of the ECHR.

180. Under article 9(1) of the ECHR the state has a "duty of neutrality and impartiality [which] is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed" (*Eweida*, para 81) and has a positive obligation to secure the rights of individuals under article 9 (*Eweida*, para 84). Where a state recognises some marriages in law but not others, issues of interference (or, in the language of section 8(1) of the Constitution, hindrance) arise: see below. That is the case both where a same-sex couple go through a religious ceremony of marriage but the state does not give legal recognition to their marriage (although it recognises such a marriage between an opposite-sex couple) and also where a same-sex couple would wish to marry without going through a religious ceremony but are denied the opportunity of doing so by reason of the non-recognition by the state of same-sex marriage (although it provides legal recognition for the marriage of opposite-sex couples in that situation). In the latter case there is a desire to manifest a belief in the value of marriage by marrying according to law and having the marriage recognised by the state which is sufficient to bring the case within the scope of section 8(1) for the purposes of proceeding to the third stage of the inquiry.

181. Individuals who are gay and who have such beliefs may wish to manifest their belief that their loving relationship has equal value with that between an opposite-sex couple and their belief, like them, that it should be expressed by way of marriage by in fact entering into such a relationship and then actually living together in the same way and with the same social recognition and support for their relationship as an opposite-sex couple. Individuals with this belief may also wish to propagate it, ie persuade others of its truth, by the "teaching" involved in the practical demonstration that they are of equal worth and dignity as opposite-sex couples and are equally capable of manifesting love and commitment to their partners through marriage and by the "practice" or "observance" of showing that they can live together in marriage in the fullest sense in the same way as an opposite-sex couple. They may wish to educate society by their example, both as a guide as to how same-sex couples should conduct themselves and to persuade others that same-sex committed relationships have the same worth as opposite-sex relationships.

(iii) "hindering" a person in the enjoyment of freedom of conscience

182. In my view, the refusal by the state to allow or to recognise same-sex marriage is a "hindrance" in the enjoyment by the respondents of freedom of conscience for two reasons: (1) it is straightforwardly an interference with their ability to act in accordance with their conscience, in the sense explained in *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13; [2017] 1 WLR 2752 ("*Laramore*"): paras 183-185 below; and (2) the state hinders the enjoyment of freedom of conscience in circumstances where it fails to comply with its duty of neutrality: paras 186-195 below.

183. *Laramore* was concerned with article 22 of the Constitution of the Bahamas, which is in the same terms as section 8 of the Constitution of Bermuda. The claimant, who was a Moslem member of the Defence Force, complained that his rights under article 22 were violated by a requirement that he attend Christian prayers during parades and remove his cap during those prayers as a gesture of respect towards Christianity and by being disciplined when he declined to do so. His complaint was upheld by the local courts and by the Board. The Board treated case law on the right to freedom of conscience and religion in article 2(a) of the Canadian Charter of Rights and Freedoms ("the Canadian Charter") and on article 9(2) of the ECHR and the concept of interference with rights under that provision as relevant aids to interpreting article 22.

184. Lord Mance, giving the opinion of the Board, held (para 11) that the notion of a person being "hindered in the enjoyment of his freedom of conscience" was to be equated with the concept of interference with rights in relation to article 9 of the ECHR and article 2(a) of the Canadian Charter and with a failure to act in compliance with any positive duties to be derived from article 22 equivalent to those derived from those provisions. The Board held (para 12) that article 22(1) covers both "the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public". At para 14 Lord Mance addressed the issue of hindrance in the enjoyment of freedom of conscience, saying:

> "Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment, but it arises only once the nature of the individual's particular beliefs has been identified. … beliefs feed into action (or inaction) … In *Freedom of Religion under the European*

> *Convention on Human Rights* (OUP, 2001), p 75, Carolyn Evans quotes in this connection a statement by HA Freeman, 'A Remonstrance for Conscience' (1958) 106 Pa L Rev 806, 826 that 'great religion is not merely a matter of belief; it is a way of life; it is action'. She adds (pp 75-76) that: 'Forcing a person to act in a way which is against the teachings of his or her religion or belief … is not irrelevant to the core of many people's religion or belief.' A requirement to take part in a certain activity may be incompatible with a particular person's conscience, however much his or her internal beliefs are otherwise unaffected and unchallenged."

185. Lord Mance rejected the suggestion that the test of hindrance is whether someone is required to do something which their religious belief forbids, which would put the barrier too high. Rather, "[w]hat is required is 'hindrance', which is not the same as prevention: see eg *Olivier v Buttigieg* [1967] 1 AC 115, 135E …"; see also the discussion of *Olivier v Buttigieg* at para 17. The Board found (paras 22-25) that the claimant was hindered in the enjoyment of his freedom of conscience by being prevented from having the option to fall out from parades during Christian prayers.

186. As noted in *Laramore*, the concept of hindrance under a provision like section 8(1) of the Constitution is aligned with the concept of interference with the right of freedom of conscience protected by in article 9 of the ECHR and section 2(a) of the Canadian Charter. In both cases, the relevant case law has made it clear that protection for individual freedom of conscience requires an attitude of neutrality on the part of the state between different sincerely held fundamental beliefs, and that interference with the right of freedom of conscience may occur where the state fails to comply with its duty of neutrality between different conscientious or religious beliefs. An equivalent duty of neutrality arises under section 8(1) of the Constitution for the same reasons, and is reinforced by the preamble in section 1 of the Constitution, which emphasises that "every person in Bermuda is entitled to the fundamental rights and freedoms of the individual", including "freedom of conscience". This is similar to the way in which in *Obergefell* fundamental rights under the due process clause were taken to be informed by the equal protection clause.

187. As to article 9 of the ECHR, the Grand Chamber of the Strasbourg Court summarised the position in *Lautsi v Italy* (2012) 54 EHRR 3, para 60: article 9 "guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on contracting states a 'duty of neutrality and impartiality'. In that connection, it should be pointed out that states have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs". As the Court stated in *Eweida*, para 81, citing relevant case law:

"the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed"; see also the same formulation in *Bayatyan v Armenia* (2012) 54 EHRR 15, para 120.

188. The jurisprudence of the Canadian Supreme Court regarding section 2(a) of the Canadian Charter is to similar effect. The obligation of the state to respect everyone's freedom of conscience and religion has as its corollary that the state must remain neutral in matters involving this freedom: see, in particular, *Mouvement Laïque Québécois v City of Saguenay* [2015] 2 RCS 3, para 1 per Gascon J for the plurality of the court, and see paras 71-76 for further discussion of the duty of neutrality. If the state favours one religion or set of conscientious beliefs at the expense of others, it "imports disparate impact destructive of the religious freedom of the collectivity": *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, p 337 ("*Big M Mart*") per Dickson J; *Mouvement Laïque Québécois*, para 64 per Gascon J. Religious or conscientious belief is an important part of a person's identity, and if the state treats one such form of belief differently and less respectfully with regard to its value, it fails to treat its adherents as being of equal worth as citizens in a democracy: *Mouvement Laïque Québécois*, paras 73-74. In *Big M Mart* legislation which compelled everyone to observe Sunday as a day of rest whatever their religion or conscientious beliefs was found to infringe the right of freedom of conscience in section 2(a) of the Charter. In *Mouvement Laïque Québécois* a requirement that Christian prayers be held at the start of every meeting of the city council was found to infringe the right of an atheist councillor who objected to this on grounds of conscience.

189. In a well-known passage in his leading judgment in *Big M Mart* Dickson J said this about the right of freedom of religion in the Canadian Charter (pp 336-337):

> "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon section 15 of the Charter [the non-discrimination provision]. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

190. These observations are equally apposite in the context of section 8(1) of the Constitution. As explained in this passage and as emerges from the other authorities referred to above, the duty of neutrality is inherent in section 8(1) and is distinct from the non-discrimination provision in section 12 of the Constitution. Section 12 does not detract from the duty of neutrality inherent in section 8(1).

191. That a constitutional right to free exercise of religion carries with it a requirement of neutrality on the part of the state has been affirmed by the US Supreme Court in relation to the First Amendment of the US Constitution. There is a "governmental obligation of neutrality in the face of religious differences": *Sherbert v Verner* 374 US 398 (1963), 409 per Brennan J for the court. See also, eg, *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 138 S Ct 1719 (2018), striking down action by the Commission penalising a baker who refused because of religious objections to make a cake to celebrate a same-sex marriage, on the grounds that the Commission did not consider his objections "with the neutrality that the Free Exercise Clause requires" (p 1731 per Kennedy J for the court). In my view, a similar approach is applicable in the context of the freedom of conscience provision in section 8(1) of the Bermudian Constitution.

192. An individual who is gay and who believes in a moral obligation to marry or at least in the moral desirability of marrying to give expression to their stable and committed relationship with another would clearly be hindered in the exercise of their freedom of conscience, in violation of section 8(1) of the Constitution, if they were

punished for holding those beliefs or for holding the concomitant belief that the state acts immorally if it fails to make provision to allow them to do so. Similarly, an opposite-sex couple who went through a marriage ceremony reflecting such beliefs and were punished for that would thereby be hindered in manifesting those beliefs, and hence in the exercise of their freedom of conscience contrary to section 8(1). The same would be true if the state punished an opposite-sex couple for entering into marriage to reflect their own equivalent beliefs about its moral importance. What, then, about a decision by the state to fail to allow a same-sex couple to marry under the auspices of the state or to refuse to recognise a marriage they have entered into, by contrast with the facility it provides for and the recognition it in fact gives to marriage between opposite-sex couples?

193. Transposing the equivalent duty of neutrality to section 8(1) of the Constitution, it would be compatible with that duty for the state to choose not to recognise and give legitimacy to any marriages entered into according to any religious or conscientious belief system, but instead to use a purely neutral conception available equally to all, say civil partnership. (There might be other difficulties associated with such a step: see para 123 above). But if instead the state chooses to recognise and give legitimacy to marriages entered into by opposite-sex couples, reflecting more traditional belief systems, in my view it is not open to it under section 8(1) of the Constitution to refuse to recognise and give legitimacy to marriages entered into by same-sex couples.

194. If the state did so, then in the public sphere it would fail to treat them and their beliefs as of equal value and deserving of equal respect, and would thereby subject them to being treated as second-class or inferior citizens; and in the sphere of their private lives, it would disable them from being able to live with integrity, giving full expression to their religious and ethical beliefs in their own lives. In my view, both these features would constitute hindrance in the enjoyment of their freedom of conscience, contrary to section 8(1).

195. As I have already mentioned, this effect is compounded by the historic background of stigmatisation and denigration of gay people. By failing to give recognition to marriage between same-sex couples, the state perpetuates and aggravates the denigration to which they are subject. This impact on same-sex couples who marry or who wish to marry also hinders them in the enjoyment of their freedom of conscience, contrary to section 8(1).

(8) A right to marry under section 8 of the Constitution for opposite-sex couples and for same-sex couples

196. Although my analysis in the preceding section is sufficient to explain why a right to same-sex marriage is protected by section 8(1), this conclusion is strengthened when one considers the issue of the protection of marriage under the Constitution more broadly. In my view, a right to marry is implicit in the Constitution as an aspect of the set of rights protected by section 8(1). The state could not legislate to refuse to recognise a marriage entered into according to established norms as a manifestation of personal belief in the importance of the institution. That view is reinforced by the fact that the Constitution falls to be interpreted in the light of the social and constitutional traditions which it was enacted to protect, and the common law has always recognised marriage as a particularly important institution and relationship and has always recognised a right to marry (cf *Hinds*, p 212, where Lord Diplock points out that the new constitutions introduced in the 1960s were intended to be rooted in the common law tradition and evolutionary rather than revolutionary).

197. Suppose two members of a religious minority in Bermuda (eg Roman Catholics) in an opposite-sex relationship wish to marry. In my view, their right to do so and to have their marriage recognised and treated as effective by the state would be protected by section 8(1). For Roman Catholics, marriage is a sacrament in which the couple participate in divine grace and celebrate their relationship with God; and it is the proper form for a committed relationship within which to express love for each other, especially when this has a sexual dimension. So being able to marry is a matter of being able to manifest their religious beliefs through practice and observance. The Legislature could not legislate to punish them for marrying. Nor in my view could it legislate to remove recognition and legal effect for marriages between Roman Catholics; that would be a breach of the state's duty of neutrality inherent in section 8(1). The same would be true for other religious denominations.

198. This interpretation of section 8(1) is reinforced by reference to the ECHR. Section 8(1) should be interpreted to include a right to marry for opposite-sex couples if it is possible to do so, since article 12 of the ECHR creates such a right: see para 148 above. In the context of the Constitution, section 8(1) is the only place in which coverage of that right in the ECHR could be located. Unlike the ECHR, there is no lex specialis provision on marriage in the Constitution, so the right to marry has to be derived from the general language in section 8(1) and from the general concepts inherent in the right to enjoyment of freedom of conscience without hindrance under that provision.

199. The interpretation of section 8(1) must depend on its own language and its position in the structure of the Constitution. Although section 8(1) must be interpreted to cover a right of marriage for opposite-sex couples in order to cover the right conferred by article 12 of the ECHR, it is not possible to read the general wording of section 8(1) which provides that coverage as limited only to a right of marriage for opposite-sex couples. On the contrary, in accordance with the guidance in *Fisher* and *Reyes*, the right set out in section 8(1) is to be given a generous interpretation in line with developing understanding of personal fundamental rights. In my view, the conclusion that it applies equally to same-sex couples under modern conditions is inescapable.

200. Other rights in the ECHR which fall to be accommodated within the rights set out in the Constitution in accordance with the principles of interpretation set out above (paras 135-140) point strongly to the same conclusion. If the Legislature legislated to recognise and give legal effect to marriages entered into under the auspices of the Anglican church but not to marriages entered into under the auspices of the Roman Catholic church, that would be a violation of the duty of neutrality inherent in article 9 of the ECHR. Again, since there is no lex specialis limitation to restrict the impact of this duty to marriage between opposite-sex couples, under section 8(1) the duty of neutrality has general application and it applies equally in relation to same-sex couples who wish to marry for reasons of conscience, be they religious, ethical or cultural.

201. Further, the right of freedom of conscience in section 8(1) of the Constitution is the principal place in that instrument in which it is possible to locate protection for the right of autonomy and choices regarding one's identity and how to live one's life which falls within the private life limb of article 8 of the ECHR. There is a considerable overlap between those concepts and the right to freedom of conscience set out in section 8(1). The same is true for the right to respect for family life in article 8 of the ECHR. As discussed above, marriage may be a way of expressing profound aspects of one's own personal identity and may be chosen as the best way in which to carry on family life. In the absence of any lex specialis limitation in section 8(1), these concepts have general application in that provision and apply equally to choices made by same-sex couples as to those made by opposite-sex couples.

202. In addition, article 14 of the ECHR prohibits discrimination within the ambit of any of articles 8, 9 or 12 on grounds including sexual orientation or "other status", which in my view would cover religious affiliation and equivalent forms of "status" (such as being an atheist). The relatively narrow concept of "creed" in section 12 of the Constitution would not cover all these matters. So, to accommodate rights under article 14 also, section 8(1) falls to be interpreted as prohibiting discrimination regarding the right to marry as between different religious denominations or

equivalent forms of "status" (in parallel with the duty of neutrality inherent in the right to freedom of conscience) and as prohibiting discrimination on grounds of sexual orientation. Again, since there is no lex specialis on the right to marry to limit the impact of those rights, they have general application in the context of section 8(1).

(9) Other issues in the appeal

(i) Religiously inspired change in the law to target gay people

203. The Chief Justice ruled that the revocation provision did not have a religious primary purpose, but found that it breached section 8(1) of the Constitution in its effect. The Court of Appeal upheld that finding, but also concluded that the revocation provision had a religious primary purpose and was unlawful for that reason also. In my judgment, as explained above, the revocation provision breaches section 8(1) by reason of its effect and it is not necessary to examine whether it was enacted for an illegitimate religious primary purpose. To the extent that could be shown, as the Court of Appeal considered it could be, I consider that the violation of the state's duty of neutrality inherent in section 8(1) would be all the clearer. I would simply add that I think there is merit in the reasoning of the Court of Appeal on this point, but it is not necessary to go so far in order to conclude that there has been a breach of that duty. Although the revocation provision was, in the event, included in legislation which sought to achieve a form of compromise between opposing views, it seems to me that it can be said with force that the object of the revocation provision itself was to withdraw the legitimacy of state endorsement from same-sex marriages, and what other reason was there for that than a desire to give effect to religious objections entertained by some to recognition of same-sex marriage?

(ii) Absence of objective justification for interference/hindrance

204. Section 8(5) of Constitution provides for a defence of objective justification for interference with the right under section 8(1). However, in the courts below the Government did not seek to justify any such interference. After hearing argument on the point, the Board has indicated it would have been inclined to refuse permission for the Government to raise this as an issue in the appeal.

205. In any event, in my judgment there is no sound basis on which the revocation provision could be justified. The fact that some people, or even a majority of people, object to same-sex marriage by reason of their own sincerely held religious or conscientious views, cannot justify the discrimination against gay people involved in the state refusing to recognise same-sex marriage in the same way as opposite-sex

marriage. The Strasbourg Court has repeatedly emphasised that democratic society is founded on principles of pluralism, tolerance and broadmindedness.

206. As Sachs J put it in *Fourie* (para 98):

> "It is clear … that acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity."

He went on to find that denial of the right of marriage for same-sex couples could not be justified: "[g]ranting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion" (para 111) and cannot be taken to devalue the institution of marriage (paras 112-113). The US Supreme Court in *Obergefell* made similar points.

207. As Lady Hale explained for the Board in *Rodriguez*, in holding that a policy in Gibraltar to grant access to social housing only to (opposite-sex) married couples was unconstitutional and that the discrimination involved could not be justified (para 26):

> "No-one doubts that the 'protection of the family in the traditional sense' is capable of being a legitimate and weighty aim: see *Karner v Austria* (2003) 38 EHRR 528, para 40. Privileging marriage can of course have the legitimate aim of encouraging opposite sex couples to enter into the status which the State considers to be the most appropriate and beneficial legal framework within which to conduct their common lives. Privileging civil partnership could have the same legitimate aim for same sex couples. But, to paraphrase Buxton LJ in the Court of Appeal's decision in *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533; [2003] Ch 380, at para 21, it is difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not be

saying to one another 'let's get married because we will get this benefit and our gay friends won't'. Moreover, as Baroness Hale said in the same case in the House of Lords [2004] UKHL 30; [2004] 2 AC 557, at para 143:

> 'The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to "everyone", including homosexuals, by article 8 since *Dudgeon v United Kingdom* (1981) 4 EHRR 149. If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships … Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern.'
>
> …"

(iii) Section 12 of the Constitution

208. As to the attempt by the respondents, by their cross-appeal, to rely on the prohibition in section 12 of the Constitution against discrimination on grounds of "creed", I agree with the judgment of the Court of Appeal and with what Lord Hodge and Lady Arden say.

Conclusion

209. For the reasons given above, I would have dismissed this appeal.