Michaelmas Term
[2019] UKPC 41
Privy Council Appeal No 0048 of 2017

JUDGMENT

The Minister of Home Affairs and another (Respondents) *v* Barbosa (Appellant) (Bermuda)

From the Court of Appeal of Bermuda

before

Lord Reed
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

11 November 2019

Heard on 13 June 2019

Appellant
Richard Drabble QC
Peter Sanderson

(Instructed by Simons Muirhead & Burton LLP)

Respondents
James Guthrie QC
Lauren Sadler-Best

(Instructed by Charles Russell Speechlys LLP (London))

LORD KITCHIN AND LORD SALES:

1. Sections 11 and 12 of the Constitution of Bermuda ("the Constitution") confer protection of freedom of movement and protection from discrimination on persons who belong to Bermuda. Section 11(5) deems four categories of persons to belong to Bermuda for the purposes of section 11, and so also for the purposes of section 12. It is common ground that the appellant, Mr Barbosa, does not fall into any of those categories. The central question raised by this appeal is whether Mr Barbosa is nevertheless entitled to a declaration that he belongs to Bermuda for the purposes of sections 11 and 12 on the basis that he belongs to Bermuda at common law and that the Constitution should be construed in a manner which accommodates and reflects this common law position rather than defeats it.

The background

2. Mr Barbosa was born in Bermuda on 12 February 1976 of non-Bermudian parents. His parents have Portuguese nationality, as does Mr Barbosa. Under section 4 of the British Nationality Act 1948 ("the 1948 Act"), he was a citizen of the United Kingdom and Colonies by reason of his birth in Bermuda. On 1 January 1983 and by operation of section 23(1) of the British Nationality Act 1981 ("the 1981 Act"), he became a British Dependent Territories citizen. On 26 February 2002 and by operation of section 2 of the British Overseas Territories Act 2002, British Dependent Territories citizenship was renamed British Overseas Territories citizenship and so Mr Barbosa became a British Overseas Territories citizen.

3. In 1992 Mr Barbosa, who was then 16 years old, moved to the Azores with his parents. He returned to Bermuda in around 2003, obtained a work permit and has lived there ever since. In May 2007 he married Christine Barbosa. She was born in the Philippines.

4. On 25 October 2013 Mr Barbosa was granted indefinite leave to remain in Bermuda. However, he was told that he was unable to apply for Bermudian status. Mrs Barbosa, on the other hand, was first granted indefinite leave to remain in Bermuda and then, on 29 October 2014, pursuant to section 18 of the 1981 Act, she was granted a certificate of naturalisation as a British Overseas Territories citizen (as British Dependent Territories citizens had by then become) and from that point was deemed to belong to Bermuda for the purposes of section 11 of the Constitution because she fell within the second category of persons identified in section 11(5).

5. At the time of the commencement of these proceedings, Mrs Barbosa had a niece in the Philippines whose mother had died. Mr and Mrs Barbosa wished to bring this child to Bermuda and to adopt her. However, they were told they could not adopt her because they were not residents of Bermuda within the meaning of the Adoption of Children Act 2006 ("the 2006 Act").

The proceedings

6. On 10 August 2015 Mr and Mrs Barbosa began proceedings against the respondents by originating summons. They claimed various declarations of which only one, a declaration sought by Mr Barbosa, is relevant to this appeal. Specifically, he sought a declaration that, as a British Overseas Territories citizen, he belonged to Bermuda for the purposes of section 11 of the Constitution and was therefore entitled to the protection it confers, and so too was a resident of Bermuda for the purposes of the 2006 Act.

7. The summons came on for hearing before Hellman J in December 2015 and he gave judgment on 4 March 2016 (2015: No 336). He found that Mr Barbosa belonged to Bermuda at common law; that belonging is an important or fundamental common law right; that the Constitution would have to employ clear and unambiguous language to justify the conclusion that it protects the fundamental rights of some but not all such belongers; and that the wording of section 11 of the Constitution is ambiguous. He also found that, in these circumstances, section 11 should be interpreted as extending to and protecting the fundamental rights of all belongers and that Mr Barbosa was entitled to the declaration he sought.

8. The respondents appealed to the Court of Appeal (Scott Baker P, Bell JA and Bernard JA) which allowed the appeal by a judgment dated 25 November 2016 (Civil Appeals Nos 3 & 3A of 2016). The court found, in summary, that the Constitution defines, in section 11, the various categories of persons who belong to Bermuda for the purposes of its provisions and that the protection it confers does not extend to persons who may belong to Bermuda at common law but are not within one of those categories. It is to be noted that the court was clearly concerned by this conclusion. Bernard JA, who gave the lead judgment, thought it an unsatisfactory anomaly; and Scott Baker P observed that it seemed to him to result in an injustice to Mr Barbosa.

9. Upon this further appeal, Mr Richard Drabble QC, who appears with Mr Peter Sanderson for Mr Barbosa, submits that Mr Barbosa belongs to Bermuda at common law because this is the jurisdiction to which his British Overseas Territories citizenship relates. Mr Drabble continues that belonging is an important and fundamental common law right and, as a result, it would need clear and unambiguous language to justify the conclusion that the protection of section 11 does not extend to persons in the position

of Mr Barbosa who acquired British Overseas Territories citizenship by birth in Bermuda. Mr Drabble says no such clear and unambiguous language is to be found in section 11; that the concept of a person who belongs to Bermuda within the meaning of section 11 is wider than the categories of persons referred to in section 11(5); and that section 11(5) should therefore be read as being non-exhaustive so as to preserve Mr Barbosa's common law right.

The issues

10. The essential questions to which this appeal gives rise are therefore:

a) whether there is a common law right to belong to Bermuda which Mr Barbosa enjoys; and

b) whether Mr Barbosa belongs to Bermuda for the purposes of section 11 and so also section 12 of the Constitution despite not falling within any of the categories of persons set out in section 11(5).

The Constitution

11. The Constitution was brought into existence by the Bermuda Constitution Order of 1968 which was itself made under the Bermuda Constitution Act 1967 of the United Kingdom. Chapter I of the Constitution contains a series of provisions which protect the fundamental rights and freedoms of the individual. Section 11 protects a person's freedom of movement. Subsection (1) of section 11 provides:

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

12. Section 11(2) qualifies section 11(1) and provides that certain laws shall not be inconsistent with or contravene section 11. They include, by subsection (2)(d), laws which restrict the movement within Bermuda of persons who "do not belong to Bermuda". This provides:

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

…

(d) for the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion therefrom of any such person;"

13. Section 11(5) deems four categories of persons to belong to Bermuda for the purposes of section 11. It provides:

"(5) For the purposes of this section, a person shall be deemed to belong to Bermuda if that person -

(a) possesses Bermudian status;

(b) is a citizen of the United Kingdom and Colonies by virtue of the grant by the Governor of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 [1914 c 17] or the British Nationality Act 1948 [1948 c 56];

(c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person under a decree of a court or a deed of separation; or

(d) is under the age of eighteen years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies."

14. The Constitution contains no other explanation of what belonging to Bermuda means or encompasses. By contrast, section 102, the interpretation section, does address Bermudian status. Subsection (3) of that section provides:

"(3) For the purposes of this Constitution, a person shall be deemed to possess Bermudian status -

(a) in the case of a person who possesses that status on the date on which this Constitution comes into operation under the law then in force in Bermuda, if he has not lost that status under that law or any later law amending or replacing that law that is not less favourable to him; and

(b) in the case of a person who acquires that status at any date after this Constitution comes into operation, if he has not lost that status under the law in force at the date he acquired it or any later law amending or replacing that law that is not less favourable to him."

15. The acquisition and enjoyment of Bermudian status is dealt with further in Part III of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act"). As Lord Neuberger, giving the judgment of the Board, explained in *Thompson v Bermuda Dental Board (Human Rights Comrs intervening)* [2009] 2 LRC 310; [2008] UKPC 33, para 4, Bermuda is a British overseas territory and has no Bermudian nationality as such, and so the concept of a Bermudian has to be understood by reference to this Act. It identifies various categories of Bermudian status but none includes Mr Barbosa. The Board must return to this Act and its implications later in this judgment.

16. Reverting now to the Constitution, section 12(1) prohibits the making of laws which are discriminatory, that is to say which afford different treatment to different people on the basis of their race, place of origin, political opinions, colour or creed. However, section 12(4) permits a derogation from this prohibition for laws which make provision with respect to, among other things, the entry into or exclusion from Bermuda of persons who do not belong to Bermuda for the purposes of section 11. Further, section 12(5) makes clear that nothing in any law can be held to be inconsistent with or in contravention of subsection (1) to the extent that it requires a person to possess Bermudian status or to belong to Bermuda for the purposes of section 11.

17. Chapter III of the Constitution addresses the composition and the powers and procedures of the legislature. Section 29 deals with the necessary qualifications for membership of the Senate and the House of Assembly, the two component parts of the legislature. By section 29 (as amended by section 6 of the Bermuda Constitution (Amendment) Order 2001 – SI 2001/2579) and subject to section 30, a person is qualified to be appointed as a Senator or elected as a Member of the House of Assembly if, and only if, that person is a Commonwealth citizen of at least 21 years of age and possesses Bermudian status. A person also must ordinarily be resident in Bermuda to qualify for election to the House of Assembly.

18. The manner in which a person may qualify as an elector is set out in section 55 which provides, so far as relevant:

> "55(1) Subject to the provisions of subsection (2) of this section, a person shall be qualified to be registered as an elector for the purposes of elections in a constituency if and shall not be so qualified unless, on the qualifying date, he -
>
> (a) is a Commonwealth citizen (within the meaning of the British Nationality Act 1981) who has attained the age of 18 years;
>
> (b) he possesses Bermudian status or, if he does not possess that status, was registered as an elector on 1 May 1976; and
>
> (c) he is ordinarily resident in that constituency."

19. The Board will return to the question of the proper interpretation of section 11(5) and the submissions advanced on behalf of Mr Barbosa in relation to it. But first we must consider whether Mr Barbosa is right in his contention that he belongs to Bermuda at common law.

Whether Mr Barbosa belongs to Bermuda at common law

20. The foundation for Mr Drabble's submission that Mr Barbosa belongs to Bermuda at common law are statements made by Lord Bingham of Cornhill and Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453. Lord Hoffmann began by stating the position in England at common law at para 44:

> "… The Crown has no authority to transport anyone beyond the seas except by statutory authority. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases: see *R v Bhagwan* [1972] AC 60. The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not empowered the Crown to change English common or statute law. …"

21. Then, at para 45, he continued:

> "… the right of abode is a creature of the law. The law gives it and the law may take it away. … I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131-132. …"

On Lord Hoffmann's interpretation of the legislation at issue in *Bancoult (No 2)*, however, it was unambiguous and clearly had the effect that the relevant right of abode in that case had been removed.

22. Mr Drabble also referred the Board to para 70 of the speech of Lord Bingham in *Bancoult (No 2)*. There Lord Bingham cited with approval this passage in the judgment of Laws LJ in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2001] QB 1067, para 39:

> "For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in *Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137: 'But no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will; no, not even a criminal.' Compare Chitty, *A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. Plender*, International Migration Law*, 2nd ed (1988), Ch 4, p 133 states: 'The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute …' - and cites authority of the European Court of Justice in *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 378-379 in which the court held that 'it is a principle of international law … that a state is precluded from refusing its own nationals the right of entry or residence'."

23. A similar and powerful statement of principle is to be found in the judgment of Lord Mance in *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20; [2012] 1 WLR 1604, para 31.

24. On the basis of these authorities Mr Drabble submits that it is clear that Mr Barbosa possessed at common law the very same rights of freedom of movement, right

of entry and immunity from expulsion which are protected by section 11(1) of the Constitution.

25. In the Board's opinion and for the reasons which follow, this submission cannot be sustained. Mr Barbosa has no relevant common law or other right which informs the proper interpretation of section 11 of the Constitution. The concept of belonging to an overseas territory does not derive from the common law, but from the local constitution or from the local legislation of that territory. Therefore, Mr Barbosa cannot appeal to the common law to modify the meaning of the Constitution of Bermuda arrived at according to ordinary principles of interpretation.

26. At common law, there was no concept of belonging to a particular territory within the dominions of the Crown for the purposes of considering whether a person had rights of entry or abode there. The relevant relationship was that of King (or Queen) and subject, which was a personal relationship based on allegiance owed by a person born within the dominions of the King of England to the King in his personal capacity. *Calvin's Case* (1608) 7 Co Rep. 1a is the most important authority on this point (Sir William Holdsworth, *A History of English Law*, vol IX, pp 79-86; Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, 1957, Part One, Chapter 2; Fransman's *British Nationality Law*, 3rd ed (2011), p 130). It was held that persons born in Scotland after the accession of James I and VI to the English throne in 1603 were to be regarded as natural born subjects of the English King rather than as aliens (a status which carried many disabilities under the common law). This was on the basis that the personal allegiance owed by such persons to the King was universal, and was not limited or defined by reference to the particular territory within the King's dominions from which a person happened to come: see especially p 27b. This reasoning was followed as the British empire grew in the period that followed and more territories were added to the King's dominions. As Parry notes, in the period after *Calvin's Case* "The status of native-born Colonials as subjects in England was apparently not seriously disputed" (op cit, p 57). Natural born subjects generally enjoyed rights to move freely within the King's dominions. By contrast, naturalisation was effected pursuant to statutes of local legislatures or the Westminster Parliament and its effect was confined to the particular territories legislated for in each case (Parry, op cit, pp 442-449).

27. As particular territories within the empire acquired their own legislatures, it was accepted that those legislatures could promulgate laws governing rights of entry or abode (and later, for territories which became independent states, nationality and citizenship) in relation to their respective territories as they saw fit. At the same time, an overarching idea of imperial nationality was maintained (in the form of the concept of a British subject), which would be recognised and respected to different degrees by particular territories within the empire. Importantly, of course, this meant that persons belonging to one territory would not be classed as aliens for the purposes of the law applied in another territory. This two-tier model was discussed at an Imperial

Conference in 1911, which led to the passing of the UK's British Nationality and Status of Aliens Act 1914 (see Fransman, op cit, p 145; Parry, op cit, p 82). Section 1(1) of that Act stated:

> "The following persons shall be deemed to be natural-born British subjects, namely: (a) Any person born within His Majesty's dominions and allegiance; and (b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject [and who fulfilled various conditions]; and (c) Any person born on board a British ship whether in foreign territorial waters or not: [subject to certain provisos]."

28. The two-tier system governing nationality and citizenship or similar status, with the basic legislative choices about who should qualify for such status and associated rights of entry and abode being made by local legislatures, meant that it was by no means the case that simply having the status of being a British subject carried with it any right of citizenship or similar status, entry or abode within any territory of the empire which had a legislature which had legislated on those subjects or which had a constitution which defined the relevant rights. By the time of the deliberations which culminated in the Statute of Westminster 1931, "the undoubted right of each member of the Commonwealth to determine which individuals belonged to that member" was well established (Parry, op cit, p 88).

29. Although Bermuda is regarded as being in the Commonwealth by virtue of being a colony of the United Kingdom (or now, a British Overseas Territory), rather than as a member state (see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, 1966, p 5 and Chapter 2), it was recognised that it likewise had the right to determine which individuals belonged to it and to control immigration. A number of Bermudian Immigration Acts were enacted in the period 1931 to 1934.

30. The two-tier system was discussed further at the Imperial Conference of 1937: see *Summary of Proceedings*, June 1937 (Cmd 5482), pp 23-27. Attention was drawn to the fact that British subjects enjoyed this common status across the Commonwealth, but also, generally speaking, had a particular connection with one or other member of the Commonwealth; and that "in the absence of rules for determining the part of the Commonwealth with which any particular person has [such] connection …, practical difficulties arise, or might arise, with regard to such matters as immigration, deportation [etc]" (p 24). It was noted that it was the practice of the United Kingdom to make no distinction between different classes of British subjects as regards the right of entry and residence in the UK; however practical difficulties arose in relation to other parts of the Commonwealth:

> "The questions that arise are seen most clearly in the case of a part of the Commonwealth which has defined membership of its community in terms of distinct nationality … But it was recognised that to a greater or less extent Members of the Commonwealth, whether or not they have given legislative definition to such a concept, do distinguish for some practical purposes between British subjects in general and those British subjects whom they regard as being members of their own respective communities. When the question arises, for example, whether a person has a right to enter a particular part of the Commonwealth or can be excluded as an immigrant; when a particular part of the Commonwealth has to decide whether or not to accept the responsibility for admitting a person on deportation from abroad; when the question is whether or not a person is liable in some part of the Commonwealth to be deported; in all these cases (apart from the special position in the United Kingdom referred to above), the deciding factor will not be whether the person is a British subject, but whether or not, being a British subject, he is regarded by virtue of birth or residence, or otherwise, as a member of the community in the territory concerned. When, therefore, persons are described [below] as 'members of the community' of a particular Member of the Commonwealth, the phrase is intended to have a rather technical meaning, as denoting a person whom that Member of the Commonwealth has, either by legislative definition of its nationals or citizens or otherwise, decided to regard as 'belonging' to it, for the purposes of civil and political rights and duties, immigration, deportation, diplomatic representation, or the exercise of extra-territorial jurisdiction. In the light of these considerations the following are the conclusions which have been reached - 1. It is for each Member of the British Commonwealth to decide which persons have with it that definite connection … which would enable it to recognize them as members of its community. …" (p 25)

31. In line with this statement of the position, the Legislative Council and Assembly of Bermuda promulgated the Immigration Act 1937 ("the 1937 Immigration Act") with effect from 2 August 1937 to define the persons who were to be regarded as domiciled there and to set out controls on immigration into and working in Bermuda in respect of other persons (including British subjects). It is relevant to note that the drafter of the 1937 Immigration Act used the word "deemed" in section 5(1), the provision which exhaustively defined the persons having Bermudian domicile ("… a person shall be deemed to be domiciled for the purposes of this Act in these Islands who is a British subject, and [who satisfies various qualifying criteria there set out]"). This followed the drafting formula employed in section 1(1) of the British Nationality and Status of Aliens Act 1914 (para 27 above). In each case, the formula was used as the means to define an exhaustive category of persons having the status in question. At the same time and with effect from the same date the Legislative Council and Assembly promulgated the

Deportation (British Subjects) Act 1937. By section 2, this Act was not applicable to British subjects domiciled in Bermuda; and section 3 set out the same definition of persons deemed to have Bermudian domicile as was used in the 1937 Immigration Act, using the same "shall be deemed" formula.

32. In 1947 there was a Commonwealth conference which again considered the question of the relationship between nationality or citizenship (or similar status) of the various countries or territories in the Commonwealth and the status of being a British subject. This led to the passing of the 1948 Act (see Fransman, op cit, pp 167-168). As the White Paper for the Act (Cmd 7326) stated at para 1, the Act "provides a new method of giving effect to the principle that the people of each of the self-governing countries within the British Commonwealth of Nations have both a particular status as citizens of their own country and a common status as members of the wider association of peoples comprising the Commonwealth." In an adaptation of the two-tier system, the former parts of the empire which had become independent countries (as listed in section 1(3) of the Act) legislated for themselves in relation to who would be their citizens, and section 1(1) provided:

> "Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject."

33. Section 1(2) provided that any person having that status "may be known either as a British subject or as a Commonwealth citizen". The United Kingdom and Colonies were those parts of the empire which remained after the countries listed in section 1(3) became independent.

34. Having the status of a British subject did not carry with it a right of entry or abode in any country listed in section 1(3), since those were matters in relation to which those independent countries had their own legislation. Similarly, that status did not carry any right of entry or abode in relation to any overseas dominion which had its own legislation in place governing such matters, as did Bermuda at this time. In *R v Bhagwan* [1972] AC 60 at 77G, Lord Diplock identified the common law rights of British subjects as being "to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm"; he did not suggest that such rights extended to overseas dominions. Lord Hoffmann followed Lord Diplock's formulation in *Bancoult (No 2)* at para 44, as did Lord Mance in his judgment in *Pomiechowski*, at para 31. The position regarding rights of entry into the United Kingdom has been changed by later legislation.

35. Section 4 of the 1948 Act stated that, subject to certain provisos, "every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth". However, once again, such citizenship did not carry any right of entry or abode in relation to any overseas dominion which, like Bermuda, had its own legislation in place governing such matters.

36. In 1956 the Bermudian legislature passed the 1956 Act. This Act introduced the concept of Bermudian status, which is the Bermudian status which is most closely analogous to citizenship or nationality. The preamble to the Act stated, among other things, that it was "expedient to make further and better provision with respect generally to the regulation and control of the activities within these Islands of persons who do not belong to Bermuda; and accordingly to make provision with respect to the acquisition and enjoyment, by persons who belong to these Islands, of Bermudian status …". Part III of the Act dealt with the acquisition and enjoyment of Bermudian status. It set out a comprehensive code governing identification of persons who have Bermudian status. No distinct concept of a person who belongs to Bermuda was employed in the operative provisions of the Act.

37. It is again relevant to note that the drafter of the 1956 Act used the formula of "deeming" persons to possess Bermudian status when setting out in exhaustive terms the persons who would qualify as having that status: see, in particular, the opening words of section 16(1) of the Act ("A person shall, for the purposes of this Act, be deemed to possess Bermudian status if such person is a British subject and possesses any of the following qualifications, that is to say [as set out in the detailed provisions in sections 16 to 19 of the Act]"). A person in the position of Mr Barbosa, born in Bermuda to parents of foreign nationality, could not acquire Bermudian status by birth: section 18(1) provided that Bermudian status would only follow from birth in Bermuda if at least one of the parents possessed Bermudian status at the time of the birth and both parents were at that time domiciled in Bermuda. Sections 23 to 25 of the 1956 Act tied the right to enter and reside in Bermuda to Bermudian status (and to visitors and certain persons in special categories set out in Schedule 1 to the Act); and extended those privileges to the alien wife and alien dependent children of a person with Bermudian status. Section 57 tied the right to work in Bermuda without a permit to Bermudian status (and to persons in the special categories); but this privilege was not extended to alien wives and children.

38. This was the background for the enactment of the Bermudian Constitution by the Bermuda Constitution Order 1968. Prior to that enactment, rights of abode in Bermuda were attached to Bermudian status. The Constitution did not remove or displace any common law rights or other relevant rights in Bermuda. All persons with Bermudian status at the time of enactment had their rights fully protected: see the definition of Bermudian status in section 102(3). Individuals in the position of Mr Barbosa at the time of the enactment had no Bermudian status and no relevant common law rights, so the enactment of the Constitution had no effect on their rights. Still less could it be said

that the Constitution had the effect of removing any common law or other relevant rights of a person born thereafter, as Mr Barbosa was.

39. The Board does not consider that *Bancoult (No 2)* assists Mr Barbosa, contrary to the submission of Mr Drabble. The case concerned a challenge to the lawfulness of two Orders in Council made in relation to the British Indian Ocean Territory ("BIOT"), namely the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004 ("the 2004 Orders"). The claimant had been born in BIOT and was therefore a British subject. However, he was removed from BIOT along with the whole population in 1971 pursuant to an Immigration Ordinance of that year and was forbidden by that Ordinance from returning. This was done to facilitate the building and operation of a military base in BIOT. In 2000 the claimant's status was as a British Dependent Territory citizen by virtue of having been born in BIOT. In that year he brought a successful challenge to quash the 1971 Ordinance. As a result, the Immigration Ordinance No 4 of 2000 was promulgated, which allowed those persons who were British Dependent Territory citizens by virtue of their connection with BIOT, such as the claimant, to return to parts of BIOT and live there without being subject to entry control. Due to the remoteness of BIOT, this initially had no practical effect. However, when it appeared that a determined effort was to be made by significant numbers of people to re-enter the islands comprising BIOT, the 2004 Orders were promulgated to remove the rights of those persons derived from common law (see paras 20 to 22 above) and re-affirmed by the 2000 Ordinance to enter and take up residence in BIOT.

40. This was the relevant setting for the speeches in the House of Lords. They proceeded on the footing that prior to the promulgation of the 2004 Orders the claimant had a common law right of abode in BIOT, as recognised by legislation of BIOT in the form of the 2000 Ordinance, which was sought to be removed by those Orders. But this is precisely what is lacking in the present case. From well before the enactment of the Bermudian Constitution, persons in a position equivalent to that of Mr Barbosa had no right of abode in Bermuda, whether at common law or pursuant to legislation. Whereas the principle of interpretation identified in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131-132 was relevant in *Bancoult (No 2)*, it is not applicable in the present case.

41. Similarly, the Board does not consider that Mr Barbosa is assisted by *Pomiechowski*. The relevant part of the decision concerned Mr Halligen, a British citizen who was present in the United Kingdom, where he had a right in international law and at common law to come and remain: see paras 31 (Lord Mance) and 49 (Baroness Hale). Lord Mance described him as "a citizen of the United Kingdom" (para 39) and Baroness Hale described him as a "national" in relation to the United Kingdom (para 49). The Extradition Act 2003 affected that right in such a way as to justify a modified interpretation of the statute in order to make it compatible with the requirements of the Human Rights Act 1998. But the decision is to be distinguished

from the current case, because Mr Barbosa does not have Bermudian status (or any other relevant status analogous to nationality in relation to Bermuda) according to its law and has no right of abode there other than as granted by the Constitution.

42. To bring the position up to date in terms of relevant legislation in relation to British nationality, the British Nationality Act 1981 made new provision in respect of British citizenship and introduced a new type of citizenship in place of the category of citizens of the UK and Colonies created by the 1948 Act, namely British Dependent Territories citizenship. British Dependent Territories included Bermuda and BIOT. According to section 1, mere birth in the United Kingdom was not sufficient to be a British citizen; the mother or father had to be a British citizen or settled in the United Kingdom at the time of the birth. A similar rule was laid down in section 15 in relation to being a British Dependent Territories citizen: at the time of birth, the mother or father had to be a British Dependent Territories citizen or settled in a Dependent Territory (in each case, it was not necessary for them to be such a citizen or so settled with reference to the same British Dependent Territory as that in which the child was born). A person's status as a British Dependent Territories citizen was likewise distinct from his connection to any particular Dependent Territory and carried no right of abode in respect of any such territory, that being a matter governed by local legislation. In addition, section 23(1) provided among other things that a person would at commencement become a British Dependent Territories citizen if, immediately before commencement, he was a citizen of the United Kingdom and Colonies who had that citizenship by his birth, naturalisation or registration in a Dependent Territory (again, his status as a British Dependent Territories citizen was not tied to any particular Dependent Territory).

43. British Dependent Territories have been renamed as British Overseas Territories and British Dependent Territories citizens have been renamed British Overseas Territories citizens: sections 1 and 2 of the British Overseas Territories Act 2002, respectively. Section 3(1) of that Act has the effect that, subject to certain exceptions, anyone who was a British Dependent Territories citizen at its commencement became a British citizen. As a result, Mr Barbosa is now a British Overseas Territories citizen and also a full British citizen. As a British citizen he has rights of entry and abode in the United Kingdom. However, neither status gives him a right of abode in Bermuda or a right to be treated as a person who belongs to Bermuda. These are rights defined by the law of Bermuda, not a United Kingdom statute.

44. The current position regarding nationality and belonger status is as summarised in I Hendry and S Dickson, *British Overseas Territories Law* (2nd ed, 2018), Chapter 11. The authors explain that whilst most of the population in any British overseas territory have some form of British nationality, which is exclusively determined and regulated by the UK Parliament, in most such territories there is also a local status, called "belonger status" or "belongership" in a generic sense (ie these are not terms of art), "which is determined by the Constitution or ordinary legislation of the territory

concerned and not by Act of Parliament"; and it is noted that the relevant belongership concept in Bermuda is that of Bermudian status (p 212; the Board would add that in the context of the Constitution there is a limited additional category of persons who for particular purposes are taken to "belong to Bermuda", namely as defined in section 11(5)). There is no uniformity in the disparate legislative provisions enacted by the various overseas territories that define who qualifies as a belonger (p 221). The specification of the right of abode in an overseas territory such as Bermuda is a matter for the local legislature, with the result that in several territories there is no right of abode there for a number of people who have British citizenship or British Overseas Territories citizenship, even if such citizenship exists only by virtue of a connection with the territory in question (p 225).

Interpretation of the Constitution

45. The Board now turns to the interpretation of section 11 of the Constitution and, in doing so, is conscious of the guidance given by the Board in *Minister of Home Affairs v Fisher* [1980] AC 319. Lord Wilberforce, giving the advice of the Board, explained that the Constitution is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality (p 328F); that its antecedents (the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations' Universal Declaration of Human Rights) and the form of Chapter I call for a generous interpretation, avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedoms to which it refers (p 328G-H); and that respect must be paid to the language that has been used and the traditions and usages which have given rise to that language, but there must also be a recognition of the character and origin of the instrument, and a need to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms (p 329E-F).

46. The Board also has well in mind, however, that the cornerstone of Mr Barbosa's argument, namely that he belongs to Bermuda at common law, has fallen away. It necessarily follows that his contention that the Constitution should be construed in a manner which reflects any such common law position must be rejected. But it is still necessary to construe the Constitution on its own terms and consistently with the principles explained in *Fisher*.

47. It is the opinion of the Board that the following matters are material. First, the Constitution embraces the concept of Bermudian status. This is conferred upon a person by the terms of the 1956 Act and those who enjoy it may be considered to have a status in relation to Bermuda broadly analogous to nationality or citizenship (see Hendry and Dickson, op cit, p 221). The rights of such persons and the rights of those who acquire Bermudian status are, respectively, preserved and recognised in the Constitution through sections 102(3), 11 and 12. Further, as has been seen from the provisions of

Chapter III of the Constitution, it is by reference to Bermudian status, among other requirements, that a person may be registered as an elector and qualify for election to the House of Assembly or the Senate.

48. Secondly, the concept of belonging to Bermuda is of importance in the Constitution because it embraces a wider class of persons than those who enjoy Bermudian status and the Constitution confers specific rights on persons within that wider class. The persons who fall within this wider class but do not have Bermudian status are nevertheless considered to have a connection sufficiently close to Bermuda to merit the extension to them of the fundamental rights which are the subject of sections 11 and 12 of the Constitution. One would therefore expect to see this wider class of persons defined with some precision, as the class of those having Bermudian status has been. That is especially so where the concept of a person who belongs to Bermuda had not been used in Bermudian law prior to the enactment of the Constitution. There being no such definition outside the four corners of the Constitution, one must look for the definition within it, and it is to be found in section 11(5). This identifies the four classes of belonger to which the Board has referred. The first, those who enjoy Bermudian status, is undoubtedly the largest but, as Scott Baker P observed in his judgment in the Court of Appeal, the next three are persons who do not possess Bermudian status but are nevertheless brought under the same umbrella.

49. Thirdly, in the list in section 11(5) of persons who are deemed to belong to Bermuda, subparagraph (a) refers to persons who possess Bermudian status. There could be no question but that persons who possess Bermudian status belong to Bermuda: they are the most obvious class of people who do belong to Bermuda. Accordingly, it is not plausible to infer that the phrase "shall be deemed to belong to Bermuda" in section 11(5) has been used to introduce a series of classes of person about whom there is some doubt whether they belong or not, leaving open the possibility that there might be some other classes of person who in fact belong to Bermuda without any need of being deemed to do so. The more natural inference is that the list in section 11(5) is intended to be exhaustive.

50. Fourthly, there is nothing surprising in this context about the use of the "shall be deemed" formula to introduce what is intended to be an exhaustive list. The use of the same formula to introduce exhaustive lists of persons having nationality or equivalent status is a well-recognised drafting technique in both United Kingdom and Bermudian legislation (see paras 27, 31 and 37 above). As Lord Wilberforce said in *Fisher* at 329E, in construing the Constitution "[r]espect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language". In the Board's view, there is an established tradition in this context of using the "shall be deemed" formula to introduce exhaustive lists of classes of person who are intended to have a relevant status. The inference that the draftsman intended the formula to have this meaning in section 11(5) of the Constitution is particularly strong, because in the

other place in the Constitution where the formula is used, in section 102(3), it is plainly used to introduce an exhaustive list of persons who have Bermudian status.

51. Moreover, section 11(5) was in fact understood by the Board in the *Fisher* case to be a definition provision, that is to say a provision with exhaustive effect. Lord Wilberforce said this at p 326D-E:

> "Thus fundamental rights and freedoms are stated as the right of every individual, and section 11 is a provision intended to afford protection to these rights and freedoms, subject to proper limitations. Section 11 states the general rule of freedom of movement, which is to include the right to enter and to reside in any part of Bermuda, but it allows, as a permissible derogation from this right, restrictions in the case of any person who does not 'belong to Bermuda'. Section 11(5) then defines the classes of persons who 'belong to Bermuda'."

52. Fifthly, section 12 contains no definition of the concept of belonging to Bermuda. Instead, in section 12(5), the concept is tied back to section 11 in permitting a derogation from the prohibition it contains for those persons who belong to Bermuda for the purposes of section 11. This strongly suggests that the definition of belonger is to be found in section 11, and the only definition in that section is that which appears in subsection (5).

53. The Board recognises that, as Lord Reid explained in *Barclays Bank Ltd v Inland Revenue Comrs* [1961] AC 509, 528, the word "deemed" is not generally used to introduce a definition. However, Lord Reid also explained that sometimes it is so used and that the context may indicate that the draftsman intended to use it in that way. That is the position here. In the opinion of the Board, the matters set out above constitute strong indications that section 11(5) contains an exhaustive definition of the concept of belonging to Bermuda for the purposes of the Constitution.

54. The Board has already rejected Mr Drabble's attempt to call this answer into question by reference to Mr Barbosa's rights at common law and the interpretive principle, often called the principle of legality, explained by Lord Hoffmann in *Simms* and referred to by him in *Bancoult (No 2)* in the passage recited at para 21 above.

55. Mr Drabble also submitted that the Constitution should be construed in the light of international law and that under international law there is a principle that a state cannot deny its nationals a right of entry. The principle is well recognised: see *Bancoult (No 2)* at para 70 (Lord Bingham of Cornhill) and *Pomiechowski* at para 31 (Lord Mance). However, it does not assist Mr Barbosa in this case. Although Bermuda is not a state, it is an overseas territory which has responsibility for setting the criteria for a

status akin to nationality, namely Bermudian status. On the assumption that a relevant analogy can be drawn between Bermudian status and nationality, in so far as international law applies it might be said that Bermuda could not deny rights of entry or abode to persons with Bermudian status. But the appellant is not a person with Bermudian status, so there could be no violation of international law when Bermuda declines to afford him such rights.

56. As Lord Wilberforce observed in *Fisher* at pp 329H-330A, the concept of persons belonging to Bermuda is not identical with citizenship, but reflects a different, social test. However, even if that concept were to be regarded as the relevant status analogous to citizenship or nationality, recourse to international law would still not assist the appellant. For the reasons given above he does not qualify as a person who belongs to Bermuda, and any argument that he should so qualify by reason of international law is circular.

57. It only remains to deal with a submission by Mr Drabble that certain differences in status under the Constitution are anomalous. First, there is a difference between the position of women and men as regards the definition of a person who belongs to Bermuda in section 11(5)(c), in that the wife of a person who possesses Bermudian status or of a person who is a citizen of the United Kingdom and Colonies by virtue of a grant by the Governor of a certificate of naturalisation (like Mrs Barbosa) is treated as a person who belongs to Bermuda whereas the husband of such a person (like Mr Barbosa) is not. However, Mr Drabble rightly accepted that this difference is the result of the clear language of the Constitution and did not suggest that it is open to the Board to try to amend the position by any process of interpretation. The Board considers that it would be desirable if consideration could be given at some point as to whether this apparently discriminatory feature of the Constitution should be revised, but this is not a matter for decision in this case.

58. Secondly, Mr Drabble argues that it is anomalous that Mr Barbosa is a British Overseas Territories citizen by virtue of his having been born in Bermuda - and thereby acquired United Kingdom and Colonies citizenship at a time when simple birth in the United Kingdom or any of the Colonies, as defined in the 1948 Act, was sufficient, which citizenship was converted into British Dependent Territories citizenship pursuant to the 1981 Act and then into British Overseas Territories citizenship pursuant to the 2002 Act - yet is not treated as a person who belongs to Bermuda for the purposes of the Bermudian Constitution. He submits that this anomaly is another reason why the definition in section 11(5) of a person who belongs to Bermuda should not be regarded as exhaustive and further, why Mr Barbosa should be regarded as a person who belongs to Bermuda for the purposes of section 11(2)(d) and section 12 of the Constitution.

59. The Board does not accept this submission. There is no anomaly or inconsistency. The citizenship status on which Mr Drabble seeks to rely is a creature of

laws enacted by the United Kingdom Parliament, whereas it is the Constitution and legislation of Bermuda which define who is to be regarded as being the equivalent of a citizen of Bermuda (that is to say, who has Bermudian status) and who has a right of abode in Bermuda (that is to say, as defined in section 11(5) of the Constitution). The United Kingdom legislation to which Mr Drabble refers says nothing about those matters. Indeed, in the light of the long constitutional tradition outlined above according to which it is for the local legislature of what is now called a British Overseas Territory (formerly a Dependent Territory and before that, a colony) to set out who is entitled to a right of abode in that territory, it would require clear and express language in a United Kingdom statute before it could be concluded that the United Kingdom Parliament was purporting to legislate about such matters for one of the British Overseas Territories. There is no such language to be found in any of the statutes on which Mr Drabble relies. Therefore, just as there is no common law right available for the purposes of an interpretive analysis along the lines explained in *Simms*, the United Kingdom statutes provide no relevant external statement of rights which could act as a reference point capable of affecting the construction of the Bermudian Constitution.

60. In any event, there is nothing to indicate that the drafter of the Constitution intended to invoke the concept of British Overseas Territories citizenship or its forebears when using in the Constitution the completely distinct concept of a person who belongs to Bermuda. As set out above, British Overseas Territories citizenship and its forebears are types of status which, where they exist or existed, are not tied to any particular territory but rather apply or applied in respect of the United Kingdom and all such territories.

61. In the Board's view, the Bermudian Constitution identifies in clear terms who enjoys the relevant status equivalent to nationality or citizenship of Bermuda (that is to say, Bermudian status) and also, in section 11(5), who falls within the additional category of persons who belong to Bermuda for the more limited purposes of enjoying the rights set out in section 11(2)(d) and section 12. Mr Barbosa falls outside both these categories.

Conclusion

62. For all of these reasons the Board will humbly advise Her Majesty that this appeal must be dismissed.