



11 November 2019

PRESS SUMMARY

The Minister of Home Affairs and another (Respondents) v Barbosa (Appellant) (Bermuda) [2019] UKPC 41

On appeal from the Court of Appeal of Bermuda

JUSTICES: Lord Reed, Lord Lloyd-Jones, Lord Briggs, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

The appellant, Mr Barbosa, was born in Bermuda in 1976. His parents were not Bermudian. Under the British Nationality Act 1948, Mr Barbosa's birth in Bermuda made him a citizen of the United Kingdom and Colonies. By operation of the British Nationality Act 1981 ("the 1981 Act"), he became a British Dependent Territories citizen in 1983. This citizenship was renamed British Overseas Territories citizenship by the British Overseas Territories Act 2002, which also conferred British citizenship on Mr Barbosa. Mr Barbosa has lived in Bermuda continuously since around 2003. In 2007, he married Christine Barbosa, who was born in the Philippines.

In 2013, Mr Barbosa was granted indefinite leave to remain in Bermuda. He was, however, told that he was not able to apply for Bermudian status. Mrs Barbosa's situation was different: she was first granted indefinite leave to remain in Bermuda and then a certificate of naturalisation as a British Overseas Territories citizen under the 1981 Act. This meant that she was "*deemed to belong to Bermuda*" under section 11(5) of the Bermudian Constitution. When these proceedings were commenced, Mr and Mrs Barbosa wished to bring Mrs Barbosa's niece to Bermuda and adopt her. They were told that the adoption would not be permitted because they were not residents of Bermuda within the meaning of the Adoption of Children Act 2006 ("the 2006 Act").

Mr and Mrs Barbosa began proceedings against the respondents in August 2015, seeking several declarations. The only one of those which is relevant to this appeal is the declaration sought by Mr Barbosa that, as a British Overseas Territories citizen, he belonged to Bermuda for the purposes of section 11 of the Constitution and was a resident of Bermuda within the meaning of the 2006 Act. The Supreme Court of Bermuda found that Mr Barbosa was entitled to the declaration. The respondents successfully appealed to the Court of Appeal of Bermuda, and Mr Barbosa now appeals to the Judicial Committee of the Privy Council.

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the appeal should be dismissed. Lord Kitchin and Lord Sales give the advice of the Board.

REASONS FOR THE JUDGMENT

Mr Barbosa does not have a relevant common law or other right which informs the proper interpretation of section 11 of the Bermudian Constitution. The concept of belonging to an overseas territory does not derive from the common law. Instead, it derives from the local constitution or the local legislation of the overseas territory in question. Mr Barbosa cannot appeal to the common law to

modify the meaning of the Constitution [25]. Prior to the enactment of the Constitution, 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. Individuals in Mr Barbosa's position 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 after its enactment, which Mr Barbosa was [38]. Mr Barbosa is not assisted by the House of Lords' decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 or the Supreme Court of the United Kingdom's decision in *Pomiczowski v District Court of Legnica, Poland* [2012] UKSC 20, because both of those decisions can be distinguished from the facts of this case [39-41].

Mr Barbosa is both a British Overseas Territories citizen and a British citizen, but neither status gives him a right of abode in Bermuda or a right to be treated as a person who belongs to Bermuda. Those are rights defined by the law of Bermuda, not by a United Kingdom statute [43].

It remains to interpret the relevant terms of the Constitution according to the words used and their context [46]. The Constitution embraces the concept of Bermudian status. The rights of persons on whom this status was conferred by the Bermuda Immigration and Protection Act 1956 and the rights of those who acquire this status are preserved and recognised in the Constitution [47]. The concept of belonging to Bermuda is of importance in the Constitution. 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. There is no definition of the wider class outside the Constitution, and the definition within the Constitution is found in section 11(5) [48]. The natural inference from the wording of section 11(5) is that it sets out an exhaustive list of people who belong to Bermuda [49]. There is nothing surprising in this context about the use of the phrase "*shall be deemed*" in section 11(5) to introduce what is intended to be an exhaustive list. There is an established tradition of using that phrase to introduce exhaustive lists of classes of person who are intended to have a relevant status [50]. Moreover, section 11(5) was understood by the Board in *Minister of Home Affairs v Collins MacDonald Fisher* [1980] AC 319 to be a provision with exhaustive effect [51]. Finally, section 12 of the Constitution (which concerns protection from discrimination) contains no definition of the concept of belonging to Bermuda. Its drafting strongly suggests that the definition of a person who belongs to Bermuda is found in section 11 [52].

The principle under international law that a state cannot deny its nationals a right of entry is well recognised. However, there is no good argument that the interpretation of the Constitution could be modified so as to assist Mr Barbosa in this case [55]. Even if the concept of belonging to Bermuda were to be regarded as a status analogous to citizenship or nationality, recourse to international law would still not assist Mr Barbosa. 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 [56]. There is a difference between the position of women and men within the definition of a person who belongs to Bermuda. It would be desirable if consideration could be given at some point as to whether this feature of the Constitution should be revised, but that is not a matter for decision in this appeal [57]. There is no anomaly or inconsistency in the fact that Mr Barbosa is a British Overseas Territories citizen by virtue of having been born in Bermuda, and yet he is not treated as a person who belongs to Bermuda for the purposes of the Constitution [58-60].

Under the Constitution, Mr Barbosa does not enjoy Bermudian status or belong to Bermuda and the Board will humbly advise Her Majesty that the appeal must be dismissed [61-62].

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.