Easter Term
[2023] UKPC 13
Privy Council Appeal No 0015 of 2022

JUDGMENT

Attorney General (Appellant) *v* Shannon Tyreck Rolle and 4 others (Respondents) (The Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lord Stephens
Sir Mark Horner

JUDGMENT GIVEN ON
4 May 2023

Heard on 17 January 2023

Appellant
Thomas Roe KC
Kirkland MacKey
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Edward Fitzgerald KC
Damian Gomez KC
Daniella Waddoup
Bridget Ward
(Instructed by Simons Muirhead Burton LLP)

LORD LLOYD-JONES:

1. These appeals raise an issue which was described by Crane-Scott JA in her judgment in the Court of Appeal as "a matter of high constitutional importance not only for [the Attorney General], but for the people of The Bahamas generally." That issue is whether the Constitution of The Bahamas confers citizenship of The Bahamas at birth on a person born in The Bahamas who is the child of (1) an unmarried woman who is not a citizen of The Bahamas and (2) a man who is.

2. At first instance Winder J, declining to follow an earlier decision at first instance, held that the Constitution does confer citizenship at birth on such a person. On appeal, a majority of the Court of Appeal (Crane-Scott, Isaacs and Jones JJA; Sir Michael Barnett P and Evans JA dissenting) upheld that decision. The Attorney General now appeals to His Majesty in Council.

3. The respondents, who were the applicants in two sets of proceedings brought by originating notice of motion that have been heard together throughout, maintain that they are the biological children, born in The Bahamas, of unmarried mothers without Bahamian citizenship, by fathers with such citizenship. They submit that they are citizens of The Bahamas by birth and they seek declarations accordingly. The factual basis on which these claims are brought has been adjourned to be addressed at a later stage in the proceedings if it remains legally relevant.

The Constitution

4. The Constitution of The Commonwealth of The Bahamas was adopted at independence on 10 July 1973. Chapter II, comprising articles 3 to 14 of the Constitution, deals with citizenship of The Bahamas. (Unqualified references in this judgment to "citizens" and "citizenship" are to Bahamian citizens and citizenship.)

5. Article 3 concerns the citizenship of persons who were alive at independence. It provides:

> "(1) Every person who, having been born in the former Colony of the Bahama Islands, is on 9th July 1973 a citizen of the United Kingdom and Colonies shall become a citizen of The Bahamas on 10th July 1973.

(2) Every person who, having been born outside the former Colony of the Bahama Islands, is on 9th July 1973 a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death have become a citizen of The Bahamas in accordance with the provisions of the preceding paragraph, become a citizen of The Bahamas on 10th July 1973.

(3) Every person who on 9th July 1973 is a citizen of the United Kingdom and Colonies having become such a citizen under the British Nationality Act 1948 by virtue of his having been registered in the former Colony of the Bahama Islands under that Act shall become a citizen of The Bahamas on 10th July 1973:

Provided that this paragraph shall not apply to any citizen of the United Kingdom and Colonies —

(a) who was not ordinarily resident in that Colony on 31st December 1972; or

(b) who became registered in that Colony on or after 1st January 1973; or

(c) who on 9th July 1973 possesses the citizenship or nationality of some other country."

6. Article 4 made provision for persons naturalised as citizens of the United Kingdom and Colonies in the former Colony of the Bahama Islands to become citizens of The Bahamas on 9 July 1974 unless they declared that they did not desire this.

7. Article 5 provided, subject to certain qualifications, for applications for citizenship by persons who, immediately before independence, were the wives of citizens or who were ordinarily resident in the Colony of the Bahama Islands.

8. Article 6, with the meaning of which this appeal is primarily concerned, is the first provision in Chapter II applicable to people born after the independence of The Bahamas. It states as follows:

"Every person born in The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date either of his parents is a citizen of The Bahamas."

9. Article 7 provides:

"(1) A person born in The Bahamas after 9th July 1973 neither of whose parents is a citizen of The Bahamas shall be entitled, upon making application on his attaining the age of eighteen years or within twelve months thereafter in such manner as may be prescribed, to be registered as a citizen of The Bahamas:

Provided that if he is a citizen of some country other than The Bahamas he shall not be entitled to be registered as a citizen of The Bahamas under this Article unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration of his intentions concerning residence as may be prescribed.

(2) Any application for registration under this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy."

10. Article 8 provides:

"A person born outside The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date his father is a citizen of The Bahamas otherwise than by virtue of this Article or Article 3(2) of this Constitution."

11. Article 9 provides:

"(1) Notwithstanding anything contained in Article 8 of this Constitution, a person born legitimately outside The Bahamas after 9th July 1973 whose mother is a citizen of

> The Bahamas shall be entitled, upon making application on his attaining the age of eighteen years and before he attains the age of twenty-one years, in such manner as may be prescribed, to be registered as a citizen of The Bahamas:
>
> Provided that if he is a citizen of some country other than The Bahamas he shall not be entitled to be registered as a citizen of The Bahamas under this Article unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration of his intentions concerning residence as may be prescribed.
>
> (2) Where a person cannot renounce his citizenship of some other country under the law of that country, he may instead make such declaration concerning that citizenship as may be prescribed.
>
> (3) Any application for registration under this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy."

12. Article 10 entitles the wife (but not the husband) of a person who is or becomes a citizen to be registered as a citizen.

13. Articles 11 and 12 concern, respectively, deprivation and renunciation of citizenship. Article 13 empowers Parliament to create other routes to citizenship and other grounds for the removal of citizenship acquired otherwise than at birth.

14. Article 14(1) states:

> "Any reference in this Chapter to the father of a person shall, in relation to any person born out of wedlock other than a person legitimated before 10th July 1973, be construed as a reference to the mother of that person."

Background

15. The issue in the present proceedings, namely whether the Bahamas-born child of an unmarried non-citizen mother and a citizen father is a citizen, arose for consideration in *K v Minister of Foreign Affairs* [2007] 2 BHS J No 12. Hall CJ, sitting at first instance, held that such a child was not a citizen of The Bahamas. The Chief Justice considered (at para 11) that the only possible interpretation of the word "parents" in article 6 was the ordinary grammatical meaning of "father or mother". He was not persuaded that the absence of "parents" anywhere else in Chapter II (save for article 7(1) which concerns persons born in The Bahamas "neither of whose parents is a citizen") had any significance other than the economical use of language by the draftsman of the Constitution. The Chief Justice was unable to see how any other interpretation of the word "parent" was possible. He concluded (at para 12) that:

> "The effect of Article 6 is that a person born in The Bahamas after Independence inherits the Bahamian citizenship of either his mother or father subject, however, to the clear words of Article 14(1) that, if that person is born out of wedlock, he can only inherit citizenship through his mother."

16. In July 2013 the issue was considered in the Report of the Constitutional Commission into a Review of The Bahamas Constitution. The questions referred to the Commission included "the strengthening of the fundamental rights and freedoms of the individual, with a particular focus on citizenship provisions". In their Report the Commissioners made the following statement in relation to article 6 of the Constitution:

> "Article 6: Children born in The Bahamas where either parent is Bahamian
>
> 14.14 The Commission is of the view that this provision is not discriminatory. It adopts a hybrid position between acquisition of citizenship based on birth in territory and descent, and the combination of each grants automatic entitlement at birth. However, it seems to have been susceptible to an interpretation that it is discriminatory in its effects. This results from what the Commission considers – and with the greatest of respect for the Courts – to be the erroneous interpretation of the word 'parents' in this

provision to include an unmarried Bahamian mother but not an unmarried Bahamian father.

14.15 In several cases, the courts have construed the reference to 'parents' in article 7 to be caught by the definition of 'father' in article 14(1), and therefore the potential benefit of this article to a child born out of wedlock in The Bahamas to a Bahamian male is removed. However, it seems fairly clear that the intention of article 6 is to grant automatic citizenship to a child born in The Bahamas (an objective condition) where at least one parent is Bahamian (another condition that is capable of being objectively determined). The only difference in the case of a male parent is that the common law – eminently rooted in common sense – has always required proof of paternity before those other rights can attach, as it is not readily clear who the father is. Automatic transmission of citizenship through patrilineal descent could produce absurd results. But an unmarried Bahamian man whose paternity of a child has been legally established or acknowledged should be fully able to transmit his citizenship to his offspring."

17. The Report made the following recommendations:

"10. Article 14(1), which erects the common law rule of *filius nullius* (child of no father) should be deleted to remove any difference in treatment attributable to the marital status of the parent. …"

"16. The situation described under article 6, which provides for children born in The Bahamas to acquire citizenship if either parent is Bahamian, while not discriminatory on its face, has been interpreted by the courts in a way that discriminates against men. The solution would be to repeal sub-paragraph (1) of article 14 (which assimilates the father of a child born out of wedlock to the status of the mother), and therefore the Courts would be required to give full effect to the natural meaning of 'either parent' in article 6 (subject to proof of paternity in the case of men). The

> Commission recommends the deletion of sub-paragraph (1) of article 14."

18. Article 54(3) of the Constitution provides that the citizenship provisions in Chapter II of the Constitution may only be amended if the amending Bill is supported by not less than three quarters of the members of the House of Assembly and of the Senate, and by the majority of the electors voting. In 2014 The Bahamas Constitution (Amendment) (No 3) Bill, 2014 provided for the amendment of article 14 of the Constitution. Clause 2 provided in relevant part:

> "2. Amendment to Article 14 of the Constitution.
>
> Article 14 of the Constitution is amended in the following manner –
>
> (a) by the deletion of paragraph (1) and the substitution therefor of the following –
>
> (i) 'father' in relation to a child born out of wedlock means a person who is proved in a manner recognized in law to be the father of that child; …"

The statement of "Objects and Reasons" annexed to the Bill stated:

> "This Bill seeks in accordance with Article 54 to amend Article 14 to remove the specification that a reference in the citizenship provisions contained in Chapter II of the Constitution to the father of a person born out of wedlock is to be construed only as a reference to the mother. The removal of such a reference would enable a Bahamian male who is proven to be the natural father of that person to pass on his citizenship to that person just as the natural Bahamian mother presently does under the Constitution."

The Bill was enacted by the Parliament of The Bahamas, having received the required majorities in both the House of Assembly and the Senate. However, in a referendum held on 7 June 2016 the measure was rejected by the majority of those voting and, as a result, in accordance with section 1(3), the Act did not come into operation.

19. In these circumstances, the Board is particularly mindful that the issue for decision in this appeal is a matter of considerable sensitivity and controversy in The Bahamas.

The present proceedings

20. In the present proceedings at first instance Winder J declined to follow the decision of Hall CJ in *K*. Winder J considered that the use of "parents" in article 6 was not an economy of drafting but the intentional use of different words intended to convey a different meaning, namely "the biological father or mother of the child and unaffected by the artificial construct envisioned by article 14(1)" (para 17). In his view it was ultimately not a question of counting words but of meaning. The interpretation favoured in *K* did not account for the deliberate shift in language and ignored the presumption that different words in a legislative enactment carry different meanings (at para 18). The existence of direct references in Chapter II to the "father" of a person supported his reading. Moreover, the use of the words "parent" or "parents" elsewhere in Chapter II demonstrated that the artificial construct created by article 14(1) was not intended by the drafter of the Constitution to be applied indirectly to his choice of the word "parents" (at paras 20, 21). He considered that:

> "Father is used in the Constitution in its common law meaning of a legal (and not putative) father, and this must explain why it was not possible for the drafters of the Constitution to use father and mother in article 6 in place of parents. Parliament must have intended 'parents' in article 6 to have the ordinary grammatical meaning of biological parents." (at para 22)

Winder J adopted the views of the Constitutional Commission that absurd consequences would result from the restrictive interpretation contended for by the Attorney General (at para 25). Referring to *Minister of Home Affairs v Fisher* [1980] AC 319, which is considered below, he concluded:

> "It is undeniable that the interpretation advanced by the Respondent is restrictive and offends the basic tenets of the Constitution. In a Constitution which advances fundamental rights and equality, an interpretation which avoids inconsistency with these rights must be preferred. If the establishment of such an anomalous and unfair regime was intended, one would have expected clearer direct

> words to that effect, not the artificial and strained interpretation contended for by the Respondent. In keeping with the principles outlined in *Fisher*, I prefer the interpretation which gives full recognition and effect to those fundamental rights and freedoms espoused by the Constitution. It is also my view that, had the Parliament intended this denial of fundamental rights, an indirect reference could not suffice." (at para 33)

21. On appeal, the Court of Appeal (Crane-Scott, Isaacs and Jones JJA; Sir Michael Barnett P and Evans JA dissenting) upheld the judgment of Winder J by a majority.

22. In her judgment Crane-Scott JA considered that Winder J had been correct to employ a generous and purposive approach to the interpretation of article 6 (paras 65, 70). The clear words of article 6 were broad in their application and not intended to be conditioned or limited by article 14(1) (para 96). She agreed with Winder J that the interpretation of "father" provided by article 14(1) had only been intended to apply to article 3(2) and article 8 where the word "father" had been expressly employed and not to article 6 where it had not (para 80). The practical result of "forcing" article 14(1) into the clear language of article 6 was to give article 6 a strained construction which the framers never intended. Read in the manner contended for by the Attorney General, such a construction ran counter to the fundamental rights protections of the Constitution itself, affording different treatment to persons born in The Bahamas simply on the basis that they were born out of wedlock (para 86). On the proper interpretation of article 6, every person born in The Bahamas after 9 July 1973 becomes a citizen of The Bahamas at the date of his birth if at that date either of his biological parents is a citizen of The Bahamas, irrespective of the marital status of the parents at the time of birth (para 104).

23. Isaacs JA agreed with the judgment of Crane-Scott JA (para 115). Article 6 was not to be read subject to article 14(1). Although there is an assumption in nationality Acts that "child" means a legitimate child, no such assumption could be transported into article 6 because of its general words referring to "every person" (para 120). Isaacs JA considered it significant that those provisions in Chapter II which used the word "father", namely article 3(2) and article 8, relate to persons born outside The Bahamas. In those circumstances the necessity of determining the nationality of a child born out of wedlock to a Bahamian woman was of some importance because of the common law principle of 'filius nullius', ie 'a son of nobody'. Article 14(1) enabled an unwed Bahamian mother to step into the shoes of a Bahamian father to claim the Bahamian birthright for her child (para 131).

24. Jones JA agreed with Crane-Scott and Isaacs JJA that Winder J had correctly interpreted articles 6 and 14(1) (para 138). Article 6 used the word “parent” not the word “father” and as a result article 14(1) could not determine the meaning of “parent”. Jones JA referred to the canon of construction that a change in language indicates a different intent (para 149).

25. In his dissenting judgment Sir Michael Barnett P began by criticising the failure of the majority to appreciate that the appeal raised a pure question of law. The issue was whether the judgment of Winder J was correct and not, as the majority considered, whether the judge could be shown to be plainly wrong (paras 164, 167). The President accepted that a liberal construction of a Constitution should be adopted when a court is considering provisions relating to fundamental rights and freedoms like those contained in Chapter III of the Constitution. However, he did not accept that the same liberalism was necessary in respect of a court’s consideration of other parts of the Constitution (para 169). He took as his starting point a canon of interpretation “applicable to all written instruments, wills, deeds or Acts of Parliament that ‘child’ prima facie means lawful child and ‘parent’ lawful parent” (*Galloway v Galloway* [1956] AC 299, 310). The issue in the present case was whether there was anything in the Constitution which led to the conclusion that Parliament intended that the word “parent” should include the father of a child born out of wedlock. In his view the answer was provided by article 14(1) (para 180). To interpret the words “either of his parents” differently from the words “either of his father or mother” would be wholly unreasonable (para 188). The Bahamas Nationality Act 1973 showed that it was not the intention of the framers of the Constitution to enable the father of a child born out of wedlock to give his citizenship to that child. This was further demonstrated by the Status of Children Act 2002 which largely abolished the distinction between legitimate and illegitimate children but expressly excluded the law relating to citizenship from this abolition (paras 193-199). The courts should be reluctant to overturn a settled understanding of the law and its interpretation by the courts for more than 40 years. It was not for the courts by judicial interpretation to make persons citizens when this was never the intention of Parliament (paras 220-1).

26. Evans JA joined the President in dissenting. He referred to the scheme of the provisions in Part II of the Constitution. The decision by the framers of the Constitution to make citizenship available by descent created a problem for those children born out of wedlock after 1973. By virtue of articles 6 and 14, a Bahamian woman who has a child born in an independent Bahamas out of wedlock can pass her citizenship to that child but a Bahamian man cannot (paras 255, 265, 266). This could not be changed by judicial decision or by ordinary legislation, but would require amendment of the Constitution (para 267).

27. On 14 September 2021 the Court of Appeal granted the appellant final leave to appeal to the Privy Council.

Interpreting the Constitution

28. In *Minister of Home Affairs v Fisher* [1980] AC 319 the Board considered a provision in section 11(5) of the Constitution of Bermuda which provided that a "child, stepchild or child adopted in a manner recognised by law" of a qualifying person should be deemed to belong to Bermuda. The Jamaican mother of four illegitimate children all born in Jamaica married a Bermudian in 1972 and they all took up residence with the husband in Bermuda in 1975. In 1976 the children were ordered to leave Bermuda. The Supreme Court of Bermuda refused a declaration that the children were deemed to belong to Bermuda, on the ground that the children were illegitimate. On appeal, the decision was reversed by a majority. On further appeal, the Judicial Committee of the Privy Council held that a constitutional instrument should not necessarily be construed in the same way as an Act of Parliament and, therefore, the presumption applicable to statutes concerning property, succession and citizenship that "child" meant "legitimate child" did not apply. Having regard to the fact that section 11(5) of the Constitution concerned the fundamental rights and freedoms of the individual and recognised the unity of the family as a group, the Board concluded that these considerations compelled the conclusion that "child" bore an unrestricted meaning.

29. That appeal was concerned with the Bermudan Constitution and is not directly relevant to the issue we have to resolve in relation to the Bahamian Constitution. Nevertheless, *Fisher* is an important decision on the correct approach to the interpretation of a Constitution. The opinion of the Board was delivered by Lord Wilberforce who questioned whether the provisions of the Constitution were to be construed in the manner and according to the rules which apply to Acts of Parliament. He continued:

> "In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second

would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. 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. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences. In their Lordships' opinion this must mean approaching the question what is meant by 'child' with an open mind." (at p 329B-F)

30. The guidance provided in *Fisher* was affirmed by the Board in *Barbosa v Minister of Home Affairs* [2019] UKPC 41; [2020] 1 WLR 169, per Lord Kitchin and Lord Sales at para 45.

<u>The approach of the Court of Appeal</u>

31. It is necessary to address at the outset the basis on which the majority in the Court of Appeal approached the appeal before them. In her judgment Crane-Scott JA stated that the burden of showing that the trial judge's decision was wrong lay on the appellant and that if the appellate court was not satisfied that the judge's decision was plainly wrong, the appeal would be dismissed. In her view, the decision of Winder J ought not to be interfered with unless it was shown that the judge erred by considering something he ought not to have considered or failing to consider something he ought to have considered, or it was clear that his decision was plainly wrong (at paras 17, 20). Similarly, Isaacs JA observed that the narrow issue for

determination was whether the judge's interpretation was correct or plainly wrong (at para 115). In the same way, Jones JA observed that the minority had not shown the judge's decision to be wrong in that he gave weight to something which he ought not to have considered or by failing to give weight to something which he ought to have considered (at para 150).

32. This approach was inappropriate and erroneous in law in the present context. The issue for consideration before the Court of Appeal and before the Board is the correct interpretation of provisions of the Constitution. As Sir Michael Barnett P observed in his dissenting judgment (at paras 164-168) this is a pure question of law. The Court of Appeal was not reviewing the exercise of a discretion by the trial judge or deciding an appeal from a judicial review. The interpretation of the Constitution is a question of law to which there is a correct answer. Nevertheless, it is clear from the judgments delivered by all three judges in the majority in the Court of Appeal that they all considered that the interpretation adopted by Winder J was correct. On this appeal it is for the Board to interpret the relevant provisions of the Constitution and to rule on whether that reading is or is not correct.

The interpretation of article 6

33. If one takes as a starting point the natural meaning of article 6 it appears to be an uncomplicated provision expressed in wide and generous terms. At first sight it appears to confer citizenship of The Bahamas at birth on every person born in The Bahamas after 9 July 1973 if at the date of the person's birth either of his parents is a citizen of The Bahamas. Furthermore, on a straightforward reading the reference to "parents" would seem to refer to the person's biological parents. The provision addresses a person's status at birth. At that time there can only be biological parents; at that time there can be no adoptive parents or psychological parents.

34. If, as the Attorney General contends, the Constitution does not confer citizenship of The Bahamas at birth on a person born in The Bahamas who is the child of (1) an unmarried woman who is not a citizen of The Bahamas and (2) a man who is, the Attorney General has to read down article 6. On his behalf, Mr Thomas Roe KC seeks to do this by three different routes. First, he submits that as a matter of ordinary construction, a strong and long-established presumption at common law requires the words of article 6 to be read down so that the reference to "parents" is a reference to legitimate parents. Secondly, he submits that article 14(1) of the Constitution qualifies the reference to "parents" in article 6. Thirdly, he relies on subsequent legislation on the same subject to clarify any ambiguity in the meaning of article 6. Each of these routes will be considered in turn.

Presumption at common law

35. Both in his written case and in his opening of the appeal, Mr Roe placed at the forefront of his case the submission that the meaning to be given to the critical words in article 6 – "either of his parents" – is "either his mother or his father (but in the latter case only if he was married to the mother)". This, he submits, is the right meaning as a matter of ordinary construction. He relies on a presumption at common law that references in legislation to a "child" must be taken to be references to a legitimate child and, by the same token, references to "parents" must be taken to refer to parents who are married to each other. This is an approach which found favour with Sir Michael Barnett P in his dissenting judgment in the Court of Appeal in the present case. Sir Michael observed (at para 171) that "the court is not entitled to ignore canons of construction or principles of statutory interpretation which have been developed by the courts over the years". He took as his starting point an observation of Viscount Simonds in his dissenting speech in *Galloway v Galloway* [1956] AC 299, 310-311. Having observed that the question of interpretation was to be decided by an examination of the relevant words in the context of the statute in which they are found and the then prevailing general law Viscount Simonds continued:

> "First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament that 'child' prima facie means lawful child and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as 'filius nullius'. This prima facie meaning may in certain circumstances be displaced and a wider meaning given to the words, and it is said that those circumstances are present if the wider meaning is more consonant with the policy of the statute in which the words are found: see per Vaughan Williams LJ in *Woolwich Union v Fulham Union* [1906] 2 KB 240; 22 TLR 579. This is not, I think, an entirely happy phrase, for it appears to suggest that the court begins its consideration of the statute with an impartial mind towards either meaning. It is, moreover, capable of leading and, I think, has led the court to find the policy of the Act in its own predilections of a later age rather than in the provisions of the Act itself."

36. Sir Michael also cited a passage from the judgment of Lord Wilberforce in *Fisher*. After noting that different contexts might compel different approaches, Lord Wilberforce stated (at p 328):

> "In nationality Acts, which provide for acquisition of nationality by descent, the assumption is a strong one that 'child' means legitimate child: the fact that such Acts often contain a definition to this effect, and provide expressly for exceptions, for example in favouring legitimated, or illegitimate, children, does not detract from the strength of this rule."

37. Mr Roe submits that it follows that the strong presumption should be that when the Constitution speaks in article 6 of "either of his parents" this means either of his legitimate parents ie the relevant person's mother or the person's father if he was married to the mother. This, he submits, in the absence of anything to rebut the presumption, is enough to determine the matter. In this regard he also referred to *In Re M, An Infant* [1955] 2 QB 479.

38. It became apparent at the hearing of the appeal, however, that this submission is not without its difficulties. If it was the intention that article 6 should apply only to a legitimate "person" and to "parents" who are married, certain consequences would follow. Take the case of an illegitimate child born in The Bahamas after 9 July 1973 to a mother and father both of whom are citizens of The Bahamas. On this proposed reading any illegitimate child born in The Bahamas after 9 July 1973 would not be a "person" within article 6, nor would his biological parents be "parents" within article 6. Article 6 could not, as a result, have any application to such a child. Not only would this be inconsistent with the reading proposed by the Attorney General, which is that an illegitimate child born in The Bahamas of a Bahamian mother and a non-Bahamian father would have Bahamian citizenship by virtue of article 6, but it would also have the drastic consequence that no illegitimate child born in The Bahamas of Bahamian parents would have Bahamian citizenship by virtue of article 6, notwithstanding the Bahamian citizenship of both parents. The Attorney General's submission proves too much. Furthermore, the proposed reading would lead to the startling result that an illegitimate child born in The Bahamas of Bahamian parents would be disadvantaged by comparison with an illegitimate child born outside The Bahamas of Bahamian parents who would, by virtue of article 8 as modified by article 14(1), acquire Bahamian citizenship from his mother. This would run counter to the whole scheme of the legislation.

39. In the Board's view this demonstrates that the reading of article 6 founded on a presumption at common law for which the Attorney General contends is untenable. Mr Roe realistically accepted this in his submissions in reply, expressly abandoning his reliance on such a presumption in order to read down "person" or "parents" in article 6.

The effect of article 14(1)

40. As we have seen, article 14(1) provides:

> "Any reference in this Chapter to the father of a person shall, in relation to any person born out of wedlock other than a person legitimated before 10th July 1973, be construed as a reference to the mother of that person."

41. On behalf of the Attorney General it is submitted by Mr Roe that article 14(1) qualifies the reference to "parents" in article 6. Mr Roe submits that article 14(1) confirms that the framers of the Constitution did not regard biological fatherhood as sufficient to constitute fatherhood for the purposes of the Constitution's provisions about citizenship. It follows from article 14(1), it is said, that the words "either of his parents" in article 6 mean "either his mother or his father (but in the latter case only if he was married to the mother)".

42. Approached on a purely linguistic basis, this is a difficult submission. On its face, article 14(1) qualifies references to the father of a person which appear elsewhere in Chapter II. As a result, article 14(1) qualifies the references to "father" in article 3(2) and article 8, both of which confer citizenship by descent from a person's father. If the person was illegitimate the reference to his father in article 3(2) must be read as referring to his mother. In this way the provision could confer citizenship by descent from a person's mother if the requirements are otherwise met. In both cases the conditions for the application of article 14(1) are clearly satisfied – there is a reference to the father of a person – and the result makes sense in the scheme of Chapter II. In particular, it is understandable why the legitimacy or illegitimacy of the person concerned should have been thought relevant to the acquisition of citizenship.

43. More difficult to accept, however, is the Attorney General's submission that article 14(1) qualifies the reference to "parents" in article 6. On its face, there is no direct reference in article 6 to the father of a person. The word "father" does not appear in article 6. However, Mr Roe submits on behalf of the Attorney General that

by referring to "parents" it refers indirectly to the "father". The reference to "parents" must be read as "father or mother". There is, therefore, he submits, an indirect or implied reference to the father of a person and this is sufficient for article 14(1) to qualify the meaning of article 6. The Board is unable to accept this submission.

44. First, if it had been the intention to exclude from Bahamian citizenship a child born in The Bahamas whose Bahamian father was not married to the child's non-Bahamian mother, it would have been easy to have said so expressly as opposed to employing such a convoluted approach. Moreover, if it had been intended to achieve that result by the modification of article 6, it could have been achieved with much greater clarity by expressly referring to the child's father in article 6 or, alternatively, by including a provision which expressly qualified the reference to "parents" in article 6. The suggested reading contended for by the Attorney General is cumbersome and faintly absurd. If "parents" in article 6 is to be read as "father and mother", on the Attorney General's submission article 14(1) would then qualify it so that it referred to "mother and mother".

45. Secondly, contrary to the suggestion of Hall CJ in *K v Minister of Foreign Affairs* the use of the words "either of his parents" in article 6 cannot be explained as a simple "economical use of language by the draftsman of the Constitution". No economy is achieved by the suggested substitution of "either of his parents" for "his mother or father".

46. Thirdly, while article 14(1) makes perfect sense in its application to the references to "father" in articles 3(2) and 8, as we have seen, its application to the other references to "parents" in Chapter II is problematic. Article 5(6) deals with who may make an application for registration as a citizen. Article 7(1) provides that a person born in The Bahamas after 9 July 1973, neither of whose parents is a citizen of The Bahamas, may make an application to be registered as a citizen of The Bahamas. In neither context does the qualification of "parents" by article 14(1) make any sense. In both provisions the legitimacy of the person concerned is wholly irrelevant. This strongly supports the view that article 14(1) was not intended to apply beyond the strict circumstances where, as in articles 3(2) and 8, the word "father" is expressly used.

47. Fourthly, the presumption that where different words are used in a legislative instrument they carry different meanings applies in this context and is not rebutted. Different words or phrases are used to denote a different meaning unless the context otherwise requires (*Bennion, Bailey and Norbury on Statutory Interpretation,* 8th ed (2020), section 21.3). As Winder J observed in his judgment at first instance in

the present case (at para 17), the drafters of the Constitution cannot be presumed to have indulged in elegant variation but must be taken to have kept to the use of the word "father" when wishing to convey the meaning imposed by article 14(1).

48. Fifthly, the Board considers that there is a sound explanation for the use in article 6 of the term "parents" as opposed to "father and mother". It is, however, not one which assists the Attorney General's case. In Chapter II "father" is used in a very specific sense. It is given a narrow, technical meaning. The effect of article 14(1) is to limit "father" to a biological father who is married to the child's mother. However, the use of the word "parents" in article 6 discloses an intention to convey a different meaning. The intention was not to refer to the child's mother and his "father" in this narrow sense, but to the child's parents in the biological sense of the term. The legislation having established the word "father" as a term of art, the word could not then be used when it was intended to convey a more general meaning.

49. As Mr Edward Fitzgerald KC points out on behalf of the respondents, the reading of article 6 for which the Attorney General contends would lead to some anomalous results. First, it would frustrate the clear intention expressed by the words of article 6, namely to confer automatic citizenship on every person born in The Bahamas after 9 July 1973 where at least one parent is Bahamian. Secondly, it would mean that the child of an unmarried Bahamian mother born in The Bahamas would have an entitlement to automatic citizenship whilst the child of an unmarried father also born in The Bahamas (whose paternity had been legally established) would have no such entitlement. Thirdly, the child of a Bahamian father where the mother is a non-citizen would be placed on the same footing as a child whose parents are both non-citizens. Both would have to wait until they had attained the age of 18 to make an application for citizenship pursuant to article 7.

50. This is sufficient to dispose of the submission on behalf of the Attorney General. However, the Board also notes that the effect of the submission would be to read into article 6 a discriminatory approach founded on the illegitimacy of the child and on which of its parents is a Bahamian citizen, thereby discriminating between the father and the mother. As has been shown, there is no requirement to adopt such a discriminatory reading of the provision. Moreover, the Board can see no possible justification for reading into the Constitution such an approach reflecting, as it does, values which have long been rejected. Bahamian citizenship is an important and fundamental right and the provisions governing entitlement to citizenship are rightly entrenched in the Constitution. In particular, Bahamian citizenship confers freedom of movement and access to The Bahamas. In the Board's view, there can be no justification for introducing restrictions on entitlement to this right of citizenship by reference to such arbitrary and discriminatory considerations when there is no requirement to do so.

51. For all these reasons, the Board concludes that the reference to "parents" in article 6 is a reference to biological parents and that article 14(1) does not import a requirement of legitimacy into article 6.

52. In the light of this conclusion, founded on entirely conventional principles of statutory interpretation which seek to ascertain the meaning of the words used in the light of their context and purpose, it is not necessary to address further submissions advanced by Mr Fitzgerald that the Board should apply a more generous interpretation that is consistent with the basic tenets of the Constitution as a whole or one which is consistent with the momentum of international human rights law.

Interpretation by reference to subsequent legislation

53. The third line of argument advanced on behalf of the Attorney General in support of his proposed reading of article 6 is that, to the extent that there may be thought to be any ambiguity in the words "either of his parents" in article 6, the meaning for which the Attorney General contends is confirmed by subsequent legislation in The Bahamas. Here, the Attorney General adopts the reasoning of Sir Michael Barnett P in his dissenting judgment in the Court of Appeal in the present case (at paras 193-200).

54. While it is permissible, in certain circumstances, to look at later legislation in order to clarify ambiguity in the meaning of earlier legislation (*Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403; *Commissioner of Inland Revenue v Hang Seng Bank Ltd* [1991] AC 306, 324; *DSG Retail Ltd v Mastercard Incorporated* [2020] EWCA Civ 671; [2020] Bus LR 1360 at para 57; *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7, para 59), in the Board's view it is not permissible to do so in the present case. The principle of interpretation is stated as follows by *Bennion*:

> "where the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning." (*Bennion, Bailey and Norbury*, 8th ed (2020), section 24.19)

In the Board's view the meaning of article 6 is clear as a matter of ordinary construction. Moreover, the later legislation relied on here cannot illuminate the provisions in Chapter II of the Constitution with which we are concerned.

55. The first matter relied upon by the Attorney General in this regard is section 6 of the Bahamas Nationality Act 1973 which provides:

> "The Minister may at his discretion cause the minor child of a citizen of The Bahamas to be registered as a citizen of The Bahamas upon application made in the prescribed manner by the parent or guardian of such child."

Section 2(1) of that Act includes the following definitions:

> "'child' includes an illegitimate child but 'parent' in relation to any such child shall not include a putative father;…"

In the Court of Appeal Sir Michael Barnett P considered (at para 193) that these provisions of the 1973 Act showed that Parliament did not intend to give the father of an illegitimate child any rights under that Act to have his child registered as a citizen and on this basis he concluded (at para 196) that in 1973 it was not the intention of the framers of the Constitution to give the father of an illegitimate child the ability to give his citizenship to that child. In the Board's view these provisions cast no light on the meaning of article 6 of the Constitution, not least because section 6 of the 1973 Act concerns registration of minors at the discretion of the Minister for Nationality and Citizenship whereas article 6 of the Constitution concerns acquisition of citizenship as a birthright. Section 6 of the 1973 Act is not "subsequent legislation on the same subject" (see *DSG Retail Ltd v Mastercard Inc* [2020] Bus LR 1360, para 57).

56. Secondly, the Attorney General (adopting the reasoning of Sir Michael Barnett in the Court of Appeal) relies upon section 3 of the Status of Children Act 2002 which provides in relevant part:

> "3. (1) …, for all the purposes of the law of The Bahamas the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.
>
> (2) The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in

> the absence of a contrary expression of intention is hereby abolished.
>
> (3) Nothing in the section shall affect or limit in any way any rule of law relating to –
>
> … (b) the citizenship of any persons; …”

In the Board’s view, however, this provision does not assist. It cannot clarify ambiguity in the meaning of article 6 because there is no such ambiguity and because, in any event, section 3(3)(b) expressly provides that it does not affect any rule of law relating to citizenship. To the extent that the provision may be said to support the existence of a presumption at common law that references in legislation to a “child” must be taken to be references to a legitimate child and that references to “parents” must be taken to refer to parents who are married to each other, that is irrelevant for the reasons given above.

Conclusion

57. For these reasons the Board concludes that the Constitution of The Bahamas confers citizenship of The Bahamas at birth on a person born in The Bahamas who is the child of (1) an unmarried woman who is not a citizen of The Bahamas and (2) a man who is.

58. The Board will humbly advise His Majesty that this appeal should be dismissed.