# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 19 of 2017**

**B E T W E E N:**

**THE MINISTER OF HOME AFFAIRS**
**THE GOVERNOR**
**THE ATTORNEY-GENERAL FOR BERMUDA**

Appellants

**-v-**

**MARCO TAVARES**
**PAULA TAVARES**

Respondents

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**Before:** **Baker, President**
**Bell, JA**
**Clarke, JA**

**Appearances:** Lauren Sadler-Best, Attorney-General's Chambers, for the Appellants
Peter Sanderson, Benedek Lewin Ltd, for the Respondents

**Date of Hearing:** **16 March 2018**
**Date of Judgment:** **20 April 2018**

**JUDGMENT**

*Immigration status – Application by British Overseas Territories Citizen for indefinite permission to work without the specific permission of the Minister of Home Affairs – Scope of section 5 of the Human Rights Act 1981 ("HRA") and its impact on the Bermuda Immigration and Protection Act 1956 (BIPA) – Primacy of the HRA over the BIPA*

**BELL, JA**

**Introduction**

1. This is an appeal from a judgment of Hellman J dated 16 Aug 2017. At the outset, the learned judge had said by way of background that this case was the latest in a growing number of decisions in which long term residents of Bermuda who do not have Bermudian status had sought to challenge the restrictions imposed on them by the Bermuda Immigration and Protection Act 1956 ("BIPA").

2. The appeal is taken by the Respondents at first instance, the Minister of Home Affairs, the Governor and the Attorney-General, after the Respondents to this appeal ("Mr and Mrs Tavares") had been successful before the learned judge.

**Background**

3. Mrs Tavares had been born in Bermuda on 27 March 1976, and consequently had become a citizen of the United Kingdom and Colonies at birth, by virtue of the provisions of section 4 of the British Nationalities Act 1948. By reason of changes in the law of the United Kingdom, that class of citizenship changed, and pursuant to the British Overseas Territory Act 2002, the status which Mrs Tavares now holds is that of British Overseas Territory Citizen ("BOTC").

4. Because neither of Mrs Tavares' parents had possessed Bermudian status at the time of her birth, Mrs Tavares did not herself possess Bermudian status; that was simply because she did not fall within any of the requisite categories contained in section 18(1) of the BIPA, which section covers the acquisition of Bermudian status by birth. Neither did she have the benefit of Bermudian status by any other means.

5. Mrs Tavares left Bermuda to move to the Azores as a child, returning to Bermuda at the age of 13, and again leaving for further education between 1995 and 2001.

6. In 2001, Mrs Tavares married the first named Respondent, who is a Portuguese citizen, in the Azores. Mr Tavares had been living in Bermuda on a work permit since 1998. Soon after the marriage the couple returned to Bermuda, and they have since had two children, both born in Bermuda.

7. Mrs Tavares found her employment opportunities to be limited by reason of the fact that she did not hold Bermudian status, and accordingly required the permission of the Minister of Home Affairs ("the Minister") in order to engage in gainful occupation. Mr and Mrs Tavares, with the assistance of their counsel Mr Sanderson, sought to avoid this restriction. They did so by seeking permission from the Minister by letter dated 12 October 2015 ("the 2015 Letter"), in which an application was made on Mr Tavares' behalf for him to become a naturalised BOTC. The consequence of success in that application would be that Mr Tavares would not have any restrictions on his ability to work, and, somewhat strangely, given that she ultimately became a BOTC by reason of her birth in Bermuda, Mrs Tavares would have the benefit of being considered a belonger under section 11 of the Bermuda Constitution Order 1968 ("the Constitution"). That was a status she did not enjoy by reason of herself having been born in Bermuda, and being, ultimately, a BOTC in consequence of that fact. In making the application Mr Sanderson acknowledged the "somewhat odd result" that this approach produced.

8. The 2015 Letter also included an application on behalf of Mrs Tavares, formally seeking confirmation of indefinite leave to reside in Bermuda, and indefinite permission to work without having to seek specific permission from the Minister. The Department of Immigration does not appear to have understood the 2015 Letter as constituting an application on Mrs Tavares' behalf and appears to have regarded the letter as representing an application only on behalf of Mr Tavares.

9. There followed an internal memorandum between the Deputy Governor and the Department of Immigration dated 28 November 2016, in which the Deputy

Governor advised that she was unable to grant Mr Tavares' application for naturalisation unless and until the Immigration Department had determined that he was free from immigration control. Since the Minister was not minded to grant Mr Tavares indefinite leave to reside, this condition was not satisfied.

10. On 1 December 2016, more than a year after the initial application made on Mr Tavares' behalf, the 2015 Letter was stamped "Refused". However, for internal reasons that refusal was not communicated to Mr Tavares, who did not become aware of the outcome of his application until approximately one week prior to the hearing on 28 June 2017 before the learned judge.

11. In the period between Mr Tavares' application and its outcome, the Supreme Court had handed down its judgment in the case of *Barbosa v Minister of Home Affairs* [2016] Bda LR 21, on 4 March 2016. In consequence of that decision, Mrs Tavares was advised that she could work in Bermuda without restrictions. However, in November 2016 this Court set aside the first instance decision in *Barbosa,* with the consequence that Mrs Tavares had to give up her job immediately. It was no doubt that event which led Mr Sanderson to write to the Minister on behalf of Mrs Tavares on 29 November 2016, and it may be that this communication had some connection with Mr Tavares' position being considered and his application made by the 2015 Letter being refused on 1 December 2016. In any event, on 15 December 2016, the Chief Immigration Officer wrote to Mr Sanderson advising that Mrs Tavares would continue to require a work permit in order to be gainfully employed in Bermuda.

12. Against that background Mr and Mrs Tavares applied for judicial review of the Minister's refusal to allow Mrs Tavares to work in Bermuda without restrictions, and the failure of the Minister or the Governor to allow the application by Mr Tavares for naturalisation, and the application by both Mr and Mrs Tavares for indefinite residency.

**The Judgment at First Instance**

13. In terms of findings, the learned judge took as his starting point the definition of discrimination contained in section 2(2)(a) of the Human Rights Act 1981 ("HRA"), and then moved on to consider the issue of discrimination in the context of section 5 of the HRA. Section 2 (2)(a) of the HRA defines discrimination for the purposes of the HRA, and does not need to be set out. The heading to section 5 of the HRA is "Provision of goods, facilities and services", and the first two subsections are in the following terms:

> *"(1) No person shall discriminate against any other person due to age or in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.*
>
> *(2) The facilities and services referred to in subsection (1) include, but are not limited to the following namely—*
> *access to and use of any place which members of the public are permitted to enter;*
> *accommodation in a hotel, a temporary boarding house or other similar establishment;*
> *facilities by way of banking or insurance or for grants, loans, credit or finance;*
> *facilities for education, instruction or training;*
> *facilities for entertainment, recreation or refreshment;*
> *facilities for transport or travel;*
> *the services of any business, profession or trade or local or other public authority"*

14. That paragraph was the subject of consideration by their Lordships in the Judicial Committee of the Privy Council in the case of *Thompson v Bermuda Dental Board* [2008] UKPC 33, where the judgment of the Board was given by

Lord Neuberger. The learned judge below set out in his judgment paragraph 26 of Lord Neuberger's judgment, which is in the following terms:

> *"In their Lordships' view, discriminating against someone because he or she is not Bermudian, or indeed on grounds of nationality or citizenship, is discrimination on grounds of "race, place of origin, colour, or ethnic or national origins" within section 2(2)(a)(i) of the 1981 Act. A person's "national origins" under the 1981 Act would include, but not be limited to, his present nationality or citizenship, and (where it differs) his past nationality or citizenship."*

15. It is no doubt helpful at this stage to refer briefly to the issues which were in play in the case of *Thompson*. Dr Thompson was a dentist who had a work permit to work in Bermuda. Although he was a qualified dentist, in order to practise as a dentist in Bermuda, Dr Thompson also needed to be registered with the Bermuda Dental Board, under the provisions of the Dental Practitioners Act 1950. His application for registration was refused on the basis of the Dental Board's long established policy to accept applications for registration only from Bermudians or the spouses of Bermudians. So Dr Thompson's case was that he was being discriminated against by virtue of section 2(2)(a)(i) of the HRA, read with section 5(2) of the HRA, in that he was being prevented by the Bermuda Dental Board from the ability to provide his services in accordance with his profession. It is important to recognise the parameters of the Board's decision in *Thompson*, and then to consider whether Lord Neuberger's statement is of equal application in the context of applications for work permits under the BIPA, as it is in relation to cases dealing only with the HRA. This leads to a consideration of the relationship between the BIPA and the HRA, the issue which lies at the heart of this case. That issue needs to be looked at both in terms of what is alleged to be the primacy of the HRA over the provisions of the BIPA, and whether section 5 of the HRA is applicable to applications for work permits made to the Minister. Mr Sanderson accepted before us that for him to succeed, as he had before the

judge, it was necessary that he persuade this Court that he was correct on both aspects.

16. Before the learned judge, Mr Sanderson submitted, in accordance with the principles of *Thompson*, that discriminating against someone because he or she is not Bermudian in relation to the grant of a work permit under the provisions of the BIPA is discriminating against that person on a prohibited ground. Mr Sanderson's submission, which was accepted by the learned judge, included the contention that because Mrs Tavares was a BOTC by reason of her birth in Bermuda, she was "a common law belonger". I pause to say that I am doubtful whether for the purposes of this case it is appropriate to consider the word "belonger" save in the context of its use in section 11(5) of the Constitution. Mr Sanderson helpfully indicated that he did not rely on the "common law belonger" argument, and that the case turned on Mrs Tavares' status as a BOTC.

17. Mr Sanderson's next submission, also accepted by the learned judge, was that the Minister's refusal unlawfully discriminated against Mrs Tavares because it treated her less favourably than someone at least one of whose parents possessed Bermudian status at the time of his birth. The learned judge took the view that treating someone less favourably than others on the ground that she lacked Bermudian status was discrimination on the grounds of national origin, as well as holding that treating someone less favourably on the grounds of place of origin included treating that person less favourably because of their parents' place of origin.

18. These findings led the learned judge to conclude at paragraph 38 of his judgment that section 60(1) of the BIPA unlawfully discriminated against Mrs Tavares because there was a breach of section 5(1) of the HRA. My initial inclination was that I did not follow the relevance of section 5(1) of the HRA in the employment context. That section is concerned not with the grant or refusal of permission to engage in gainful occupation, pursuant to the BIPA, but with the provision (or

supply) of any goods facilities or services. But the authorities show that this issue is rather more nuanced than I had at first appreciated.

19. There was an alternative submission made by Mr Sanderson, that the Minister's refusal to allow Mrs Tavares to work in Bermuda without restrictions was unreasonable and/or disproportionate in light of Bermuda's treaty obligations. The judge indicated that it was not necessary for him to deal with this argument, at the same time commenting there was no relevant material before the court on this issue.

20. The learned judge then moved to consider the failure or refusal of the Minister or the Governor to consider Mr & Mrs Tavares' applications for indefinite residency, and Mr Tavares' application for naturalisation.

21. Mr Sanderson's submissions in relation to these two matters started with a submission that the delay on the part of the authorities in considering the applications was unreasonable. In the case of Mr Tavares the delay was one of 20 months (and the learned judge noted that but for the bringing of the action, that period would no doubt have been longer), and in the case of Mrs Tavares, her application had yet to be determined after 20 months.

22. In regard to the issue of delay, Mr Sanderson relied upon the case of *Oliviera v The Attorney-General of Antigua & Barbuda* [2016] UKPC 24, a decision of the Privy Council. Sir Bernard Rix gave the judgment of the Board and held that a period of one year from application to determination was in general the outside limit of a reasonable period of delay. The learned judge indicated that he had heard no evidence to suggest that absent exceptional circumstances it would not be reasonably practicable to determine such an application in Bermuda within that period of time. The learned judge also noted that there had been no evidence adduced before him to seek to provide justification for the delays, and accordingly made a declaration that the delays were unlawful.

**The Appeal before this Court**

23. The starting point for the Appellants on this appeal was to identify which of the findings of Hellman J were challenged. The first of these was the learned judge's finding that the provisions of section 12(1) of the Constitution were irrelevant to the present case. At paragraph 37 of his judgment, the learned judge described the argument (that because the BIPA does not contravene the Constitution, it does not contravene the HRA) as being a *non sequitur*. He commented that the fact that one piece of legislation complies with one instrument says nothing about whether it complies with another. The Appellants placed emphasis on the fact that the HRA post-dates the Constitution, and the Constitution therefore must have been in the mind of the draftsman of the HRA, and accordingly affects the potential conflict between the HRA and the BIPA.

**The Inter-relationship between the BIPA and the HRA**

24. The Appellants did not back away from the fact that to succeed in their argument that the BIPA was not subject to the provisions of the HRA, it was necessary for them to establish that the decision of Kawaley CJ in the case of *Bermuda Bred Co. v Minister of Home Affairs and A-G* [2015] Bda LR 106 in relation to this aspect of matters was wrongly decided. The first submission made was that the regulation of employment in Bermuda by the BIPA, and its enforcement by the Minister, did not fall within the description of the supply of services by a public authority, the key component of the section for these purposes – see paragraph 13 above. Put another way, the discriminatory provisions of the BIPA for employment purposes were said to be protected by the Constitution. But that would not protect the Minister's decision if the combination of sections 2 and 5 of the HRA prevented the Minister from discriminating in relation to the grant of work permits on the basis that such a grant involved the supply of services by a public authority. The constitutional protection was specifically directed towards the regulation of employment, and did not affect the provisions of the HRA.

**The Ambit of the *Thompson* Case**

25. Of particular significance in this regard is paragraph 44 of Lord Neuberger's judgment in *Thompson*, which is the following terms:

> *"If Dr Dyer had refused to employ Dr Thompson because he was not Bermudian, then section 6(9) might very well have been in point. However, Dr Thompson's complaint was not that Dr Dyer refused to employ him in breach of section 6, but that the respondent (the Bermuda Dental Board) refused to let him practise his profession in breach of section 5 of the 1981 Act.*

26. This paragraph emphasises the difference in context between the facts in Dr Thompson's case, premised as his case was under the provisions of section 5 of HRA, and those of a case brought under the provisions of section 6(9) of the HRA. However, neither of these sections considers the effect of the BIPA, whether with reference to section 60 or otherwise. Other cases have done so, most notably the Bermuda case of *Bermuda Bred*. The Chief Justice in that case considered the case of *In re Amin* [1983] 2 AC 818, which concerned the interpretation of language almost identical to that of section 5(2) of the HRA, preferring the reasoning of Lord Scarman (with which Lord Brandon had agreed) to that of the majority in that case.

**The *Bermuda Bred* case**

27. As the Appellants noted, while the facts of the *Bermuda Bred* case were very different from those of the present case, the case did deal directly with the first of the issues to be decided in this case, namely whether the BIPA engaged the provision of services for the purposes of the HRA. The Chief Justice concluded that section 5(2) of the HRA operated so as to prohibit discrimination in the provision of immigration services (paragraph 61 of his judgment). He then moved on to consider whether the HRA's primacy provisions trumped those of the BIPA.

28. The argument for the Appellants in this Court started from the position that the Chief Justice had been wrong in *Bermuda Bred* to consider that the interpretation of the last of the descriptions of facilities and services set out in section 5(2) of the HRA was intended to be all-embracing, rather than to be considered in accordance with the principles of the *ejusdem generis* or *noscitur a sociis* rules. The Appellants submitted that in seeking to interpret the words in question, the Chief Justice was seeking not to ascertain the meaning of the words, but to attempt to make them mean something wider than their ordinary meaning. That ordinary meaning of the provision of services, submitted the Appellants, did not cover the regulation of employment under the BIPA.

***In re Amin***

29. Because the Chief Justice preferred the view of the minority in *Amin*, and because the wording of the statute which their Lordships were considering in *Amin* was almost identical to that of section 5 of the HRA, it is necessary to consider this case in some detail. The underlying facts concerned a UK passport holder who had applied to an entry clearance officer for a special voucher to enable her to settle in the United Kingdom. Since she was not a head of household, she was deemed to be ineligible to apply for such a voucher. The issue for their Lordships was whether the fact that the special voucher scheme was in its essence discriminatory made it unlawful, contrary to the provisions of the Sex Discrimination Act 1975 ("the UK Act"). Section 29(2) of the UK Act gave examples of the facilities and services which were unlawful by virtue of subsection 1. As indicated, the wording is to all intents and purposes the same as that used in section 5(2) of the HRA, the last example being "the services of any profession or trade, or any local or other public authority". The argument was that the wide general words of subsection 1 were not cut down by the examples given in subsection 2. Lord Fraser of Tullybelton, with whom Lord Keith of Kinkel and Lord Brightman agreed, said that while the examples in section 29(2) were not exhaustive, they were useful pointers. In his view the

section as a whole applied to the direct provision of facilities and services, and not to the mere grant of permission to use facilities.

30. Lord Scarman was of the view that the special voucher scheme did discriminate as between wives and husbands, and was therefore unlawful under the UK Act.

31. The problem I have in considering the judgments of the majority and minority, and applying the underlying facts of *Amin* to the facts of this case is that identified by the Appellants. The regulation of employment by the Minister is not, as I see it, the provision of services as those words would typically be understood. Accordingly, I have difficulty seeing how the provisions of section 5(2) of the HRA come into play in the context of the regulation of employment. And the learned judge did not explain how he reached the conclusion that section 5(2) did apply in such a context. He did not refer either to *Amin* or to the Canadian case of *Davis* (see below). He said no more than that he would apply *Bermuda Bred*, without apparently considering (and certainly not explaining) whether, and if so how, the regulation of employment under the provisions of section 60 of the BIPA represented the provision of goods facilities or services under section 5(2) of the HRA, and why, even if that were to be established, he preferred the reasoning of the minority in *Amin* to that of the majority.

32. The Chief Justice in *Bermuda Bred* referred to the passage in the speech of Lord Fraser which I have mentioned in part in paragraph 29 above. Lord Fraser concluded that passage by saying that the example given in paragraph (g) of section 29(2) of the UK Act "seems to me to be contemplating things such as medical services, or library facilities, which can be directly provided by local or other public authorities." The Chief Justice carried on to say that Lord Fraser's reasoning seemed so restrictive and technical that it turned modern notions of interpreting human rights provisions generously on their head.

33. Mr Sanderson, who appeared also in the *Bermuda Bred* case, submitted that the Court should be guided by the dissenting judgment of Lord Scarman in *Amin*, which he suggested were more in touch with the current times in interpreting human rights provisions liberally. Lord Scarman rejected the submission that the critical subsection applied only to facilities which are akin to the provision of goods and services. The problem as it seems to me is in equating the regulation of employment which is controlled by the Minister with the grant of leave to immigrants to enter the country. The need for the former to be controlled in a manner which expressly permitted discrimination was recognised in section 12(4)(b) of the Constitution. Section 12(1) expressly made the prohibition of any law which was discriminatory subject to the exception created by section 12(4)(b), so that the prohibition did not apply "with respect to the entry into or exclusion from, or the employment, engaging in any business or profession … within Bermuda of persons who do not belong to Bermuda for the purposes of section II of the Constitution". The determination of who should be deemed to belong to Bermuda is contained in section 11 of the Constitution and does not include BOTCs, thereby including Mrs Tavares within the category of permissible discrimination.

34. The Court was also referred to the Canadian first instance case of *Canada (Attorney-General) v Davis* 2013 FC 40. That case, which the Chief Justice indicated he found highly persuasive in a human rights context, took the same view of the relevant wording as did Lord Scarman in *Amin*.

35. For the reasons set out in paragraph 31 above, I do not think the principles enunciated by the majority in *Amin* come into play in the present case. If they did, I would prefer the reasoning of the majority to that of the minority. But the important aspect of *Bermuda Bred* for the purposes of this case is that while references were made in that case to the provisions of the BIPA, they were made only in an immigration context, and with consideration being given to whether

the provisions of section 30(3) of the BIPA were discriminatory. The case had no relevance in the context of the regulation of employment generally, in terms which were relevant in the case before us.

36. In my view, section 5(2) of the HRA does not cover the regulation of employment by the Minister pursuant to section 60 of the BIPA. As the Appellants submitted, *Bermuda Bred* required no consideration of the relationship between the HRA, the BIPA and the Constitution. This case does, and accordingly, I hold that because Mrs Tavares does not belong to Bermuda for the purposes of section 11 of the Constitution, then insofar as section 60 of the BIPA discriminates against her, it does so to the extent permitted by the Constitution. And I would add, given the manner in which the Appellants put their case, that I would distinguish the case of *Bermuda Bred*, rather than hold it to have been wrongly decided. In my view, the case must be looked at only in a human rights/immigration context, and there is a material difference between that context and one concerning the regulation of employment in circumstances where discrimination is expressly permitted under the Constitution, in relation to persons who do not belong to Bermuda, as provided for in section 11 of the Constitution.

**The Primacy Argument**

37. In case I am wrong in the conclusion I have reached on the ambit of section 5 of the HRA, it is necessary to consider the primacy argument, that is to say whether the provisions of the HRA take precedence over those of the BIPA. This issue also arose in the *Bermuda Bred* case, and the Chief Justice found that the provisions of the HRA, and specifically section 30B, did indeed operate so as to "trump" the primacy provisions of the BIPA. As the Appellants recognised, the issue is now only of academic interest, since the passing of the Bermuda Immigration (No.2) Act of 2017 rendered the importance of the point moot.

38. The relevant parts of the BIPA and the HRA are as follows:-

BIPA section 8(1).

> *"Conflict with other laws*
> *Except as otherwise expressly provided, wherever the provisions of this Act or of any statutory instrument in force thereunder are in conflict with the provision of any other Act or statutory instrument, the provisions of this Act or, as the case may be, of such statutory instrument in force thereunder, shall prevail."*

HRA section 30B.

> *"(1) Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless— the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act"*
>
> *(2) Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."*

39. As the Appellants pointed out, the Chief Justice had reached the conclusion that the HRA provisions trumped those of the BIPA with "some difficulty". Particularly, they relied upon paragraph 67 of his judgment, in which he had said: "The conflict between the two provisions as a matter of primary construction is irreconcilable". But the Chief Justice was clearly looking at the primacy provisions of section 30B of the HRA with the provisions of section 30B(2) firmly in mind, and to put his reasoning in context, it is necessary to consider paragraph 66 of his judgment as well as paragraph 67. The two are in the following terms:

> *"66. It is difficult to fairly construe section 30B as expressly providing that the HRA is to have primacy over the BIPA because it does not say so in terms. The legislative intent to expressly modify earlier legislation generally is made plain; a two year transitional period was provided between January 1, 1993 and January 1,*

> *1995. This was presumably to enable Parliament, if it wished, to amend other legislation to either:*
>
> *i. bring it into conformity with the HRA; or*
>
> *ii. to expressly provide that the provisions of section 30B would not apply to such extent as might be specified.*
>
> *67. So the Respondents had a two-year window between 1993 and 1995 to amend section 8 of the BIPA to expressly provide that it took precedence not just generally, but 30 specifically notwithstanding section 30B of the HRA. That opportunity was scorned. It is impossible to read section 8 of the BIPA as intending to expressly override the HRA. Yet to my mind that is still not sufficient to justify viewing section 30B of the HRA as expressly overriding section 8 of the BIPA. The conflict between the two provisions as a matter of primary construction is irreconcilable. This conflict engages the following supplementary rule of construction, which is formulated by Bennion as follows:"*

40. The Chief Justice had then gone on to consider the effect of Bennion's principle of implied amendment, which is in the following terms (Section 80):

> *"Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the 40 later by implication amends the earlier so far as is necessary to remove the inconsistency between them."*

41. Applying this canon of construction, the Chief Justice concluded that section 30B of the HRA must properly be read as amending section 8 of the BIPA by implication to exclude the HRA from the class of other legislation which the BIPA takes primacy over.

42. The argument for the Appellants in this case was that the HRA was not intended to apply to the BIPA, and that because of the effect of section 8 of the BIPA (see

paragraph 37 above), consideration of the application of section 30B of the HRA does not arise; the statutory provision in question does, say the Appellants, provide that the BIPA is to have effect notwithstanding the provisions of section 30B. In relation to the doctrine of implied amendment, the Appellants submitted that since the draftsman of the (later) HRA must have been aware of the provisions of the (earlier) BIPA, the answer must be that Parliament had decided not to interfere with it. The position was submitted to be the same in regard to the constitutional provisions.

43. That seems to me to be a compelling argument. I also think that one has to look at matters in the context of what Parliament intended in 1981, rather than in the context of human rights in 2018. In my view, if it had been suggested to Parliament in 1981 that the effect of the HRA was to take precedence over the regulation of employment by the Minister under the BIPA, the answer would have been swift and strong, to say that was not Parliament's intention. I therefore hold to the view that the HRA does not operate so as to render the provisions of the BIPA subject to the discrimination provisions of the HRA, and so find. To hold otherwise would, in my view, be to ignore the fact that the Constitution expressly recognised the need to discriminate against persons who do not belong to Bermuda in the regulation of employment.

44. I am conscious that I have not referred directly to any of the submissions made before us on behalf of Mr and Mrs Tavares. However, I have re-read these in the course of preparing this judgment, and suffice to say that nothing in those submissions causes me to alter the view I have reached as set out in this judgment.

**Conclusion**

45. To my mind, the important feature of this case, and the feature that distinguishes it from *Bermuda Bred* is that there is a material distinction to be drawn between the provision of goods facilities or services under section 5(2) of

the HRA, and the regulation of employment under section 60 of the BIPA, protected, as that latter section is, by the provisions of the Constitution. It follows that I would allow the appeal on behalf of the Appellants and set aside the orders made by the learned judge. I would direct that the parties may be heard on costs.

**CLARKE, JA**

46. I agree that this appeal should be allowed, essentially, but with one qualification, for the reasons set out by Bell JA.

**The meaning of section 5 of the HRA**

47. Section 60 (1) of the BIPA provides, so far as relevant that "*no person (a) other than a person who for the time being possesses Bermudian status …shall, while in Bermuda, engage in any gainful occupation without the specific permission (with or without the imposition of conditions or limitations) by or on behalf of the Minister*". When the Minister declines to permit a person without Bermudian status to be engaged in gainful occupation, or when he permits someone to be so engaged either with or without conditions or limitations, he cannot, in my view, properly be regarded as supplying facilities or the services of a public authority within the natural or ordinary meaning of those words, even if those words are given a generous and purposive interpretation. He is making the determination called for by section 60 of BIPA.

***Amin***

48. In reaching this conclusion I regard as persuasive the decision of the majority of the House of Lords in *Amin*, in respect of provisions of the UK *Sex Discrimination Act 1975,* which do not materially differ from those of the HRA. In that case Lord Fraser (with whom Lords Keith and Brightman agreed) observed:

(i) that, while the examples in section 29 (2) – the equivalent of 5 (2) of the HRA - were not exhaustive, they were useful pointers to aid in the construction of subsection (1);

(ii) that section 29 seemed to apply to the direct provision of facilities or services and not to the mere grant of permission to use such facilities; and

(iii) that example (g) – "*the services of any profession or trade, or any local or other public authority"* – seemed to be contemplating things such as medical services, or library facilities, which can be directly provided by local or other public authorities.

I agree.

49. I would also accept his analysis of section 85 (1) of the 1975 Act, which is in similar terms to section 31 of the HRA, as applying only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person – of which the grant or refusal of permission to work in Bermuda is not one – so that "*acts in pursuance of government policy or the performance of distinctively governmental functions do not fall with the ambit of the provision of services"*. I would also adopt the observation of Buxton LJ in *Gichura v Home Office and Anr* [2008] EWCA Civ 697 that it would be strange to say that one is providing a service to somebody when one is in fact restricting them from doing what they want to do.

***Bermuda Bred***

50. In *Bermuda Bred* – which concerned the rights of Bermudians to have their same sex partners reside and work in Bermuda - the Chief Justice was persuaded that the dissenting speech of Lord Scarman (with whom Lord Brandon agreed) in *Amin* was to be preferred and suggested that the view there expressed was more

in touch with the liberal interpretation which is presently applied to human rights legislation. I would not, however, regard the decision of the majority in *Amin*, which was concerned with the human right not to be discriminated against on the ground of sex, as unacceptably illiberal.

51. The context in which the present case arises is the control of immigration and the restriction of the occupations of those who are not Bermudian. Any system which restricts immigration or limits rights of employment or occupation, or access to benefits, of those who are not of a particular nationality or citizenship (the usual criteria for the imposition of control in this context) is inherently likely to be discriminatory on the grounds of race, place of origin, colour, or ethnic or national origin or more than one of these. It was no doubt for that reason that the prohibition in section 12 (1) of the Constitution against discriminatory laws was subject to the exception in section 12 (4) (b).

52. If the regulation of engagement in gainful occupation of non-Bermudians is to be regarded as the provision of a service by the Ministry, I find it difficult to see why the regulation of entry into, and of stay and residence within, Bermuda are not also the provision of such a service. I note that in *Amin* Lord Scarman, in his dissenting judgment, regarded the facility provided as being "*access for voucher holders to the United Kingdom for settlement*" and "*the opportunity to settle in this country*"; and rejected any distinction between "*activities akin to the provision of goods and services*" and "*the grant of leave to enter under the Immigration Act*".

53. By this logic it would be unlawful to refuse to allow a non-Bermudian with no links whatever with Bermuda to enter, remain and work in Bermuda. To do so would be direct discrimination. The UK citizen would be at liberty to come, reside, and work in Bermuda without restriction, in company with the citizens of any other State.

54. In *Bermuda Bred* the Chief Justice said at [41]:

> *"There is perhaps some room for doubt as to whether the function of the Immigration Department involves the delivery of services to which section 5 applies, but only if one (a) construes that section as a self-contained provision, and (b) ignores the wider context of both Part II of the Act and the Act as a whole, Statutory interpretation is a more refined process than simply looking at words in a statutory provision divorced from their wider statutory context. Fortunately, light had been shed on how the term "services" in the human rights context should be construed by both local and overseas judicial authorities"*

55. I do not accept that a conclusion that the operation and implementation of the immigration regime does not constitute the provision of a service is one which ignores "*the wider context*" of Part II of the Act and the Act as a whole. I do not know exactly what the Chief Justice meant by his phraseology at (a) and (b) above but, in any event, the construction which I favour places the HRA in the context in which it sits, namely the provisions of the BIPA and of the Constitution (as to the significance of which see [67] and [73] – [74] below).

***AG of Canada v Davis***

56. Nor do I derive much assistance from overseas authorities other than *Amin*. Much reliance was placed on the Canadian case of *AG of Canada v Davis* [2013] FC 40. In that case the Federal Court of Ontario (a first instance court) had before it an application for judicial review, which it refused, of a Tribunal decision that officers of the Canada Border Services Agency ("CBSA") had infringed the rights of a young indigenous woman in the way in which they processed her vehicle through primary and secondary examinations at the border between Ontario and the United States. The case concerned section 5 of the *Canadian Human Rights Act 1985* ("CHRA") which dealt with discriminatory practices in

the "*provision of goods, services, facilities or accommodation customarily available to the general public*".

57. It is noticeable that the Court proceeded on the basis that the question was whether the decision of a specialised Tribunal as to what constituted a "service" was reasonable, i.e. fell within a range of possible acceptable outcomes, rather than applying the stricter standard of correctness. Noticeably the relevant statute – the *Canada Border Services Agency Ac*t S.C. 2005, c.38 - provided that the CBSA was "*responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods … that meet all requirements under the program legislation."* ; and the CBSA's own publication held itself out as offering services to the public and made it clear that the CBSA's "*service commitment*" was intended to apply specifically in the context of examinations at border crossings.

58. The Court made it clear that each situation giving rise to a human rights complaint had to be examined in the light of its own particular circumstances in order to determine whether the specific activities in issue constituted "*services*" for the purposes of section 5 of the CHRA; and that not everything that the CBSA did would necessarily constitute a service customarily available to the general public within the meaning of section 5 thereof. The complaint in that case was that Ms Davis was singled out for further examination as a result of racial profiling based upon her status as a young indigenous woman; that she was treated with heightened suspicion and aggression on that account; that she was subject to racist slurs; and that the incident reflected a pattern of systemic discrimination by CBSA officers against members of her community. These circumstances are far removed from those of the present case.

**Conclusion**

59. I respectfully agree with the conclusion of Bell JA at [36] that section 5 (2) of the HRA does not cover the regulation of employment by the Minister pursuant to section 60 of the BIPA; and that, insofar as section 60 of the BIPA discriminates against her it does so to the extent permitted by the Constitution. The same applies to section 5 (1).

**The Qualification**

60. I do not, however, think it possible simply to distinguish *Bermuda Bred* on the ground that it must be looked at only in a human rights/immigration context as opposed to one concerning the regulation of employment in circumstances where discrimination is expressly permitted under the Constitution in relation to persons who do not belong to Bermuda. I say that for three reasons.

61. First, the present case arises in a human rights context since the right invoked (not to be discriminated against) is a human right. It also arises in an immigration context since the power in question is that conferred by section 60 of the BIPA.

62. Second, the fact that discrimination in relation to the regulation of employment is expressly permitted under the Constitution does not obviate the need to consider whether section 5 (2) is applicable and has been infringed.

63. Third, and most importantly, in *Bermuda Bred* the Chief Justice was dealing with the right of Bermudians to have their foreign same sex partners reside and work in Bermuda (see [7] - [8]) and the immigration policy which prevented them from so doing). He rejected the submission that the phrase "*services of any ... public authority*" did not encompass the BIPA regime for regulating entering and working in Bermuda [38] and held that "*in the Immigration context, there is no 'bright dividing line' between the services of, say, entertaining passport applications, processing visa applications and generally regulating residence and*

*employment on the part of non-Bermudians in Bermuda*" [45]. He also held that "*construing the words as encompassing Immigration services and potentially the services provided by any other public authority, involves no distortion of the statutory language and does not entail an artificially wide meaning*" [58].

64. Accordingly, I regard it as necessary for us to decide whether *Bermuda Bred* was wrongly decided insofar as it found that regulation of employment by the Minister pursuant to section 60 (1) of BIPA fell within the description of services under section 5 of HRA. In my opinion it was.

65. I recognise that there is English Court of Appeal authority – *Cook v Southend Borough Council* [1990] 2 QB 1 - which indicates that the Court of Appeal should "*pause long before interfering*" with a line of authority established by a number of decisions; and that there is authority that a right to work may be regarded as an aspect of private life - a right to which is fundamental in human rights terms. I do not regard either circumstance as justifying a different conclusion to the one that I have reached.

66. As to the former, the line of authority established by *Bermuda Bred*, the judgment in which was given on 27 November 2015, is not long in length; and is at first instance only. It is also based on an adoption of the approach taken in two dissenting speeches in *Amin* and contrary to the decision of the majority. In *Cook* there were a considerable number of decisions relied on as a line of authority, including cases decided by a Divisional Court presided over by the Lord Chief Justice of the day who had great experience of administrative law. That notwithstanding, the Court was persuaded that the Divisional Court "*took a wrong turning*" between 1951 and 1960.

67. As to the latter, the importance of the right to private life cannot justify a departure from the natural meaning of the provisions of the HRA or compel a

decision that the HRA must either take precedence or be treated as having impliedly amended the BIPA, especially when the conclusion that it does neither tallies with the situation under the Constitution.

**The Primacy Argument**

68. As to the question of primacy as between the BIPA and the HRA I agree with the judgment of Bell JA. In *Bermuda Bred* the Chief Justice thought that the conflict between section 8 (1) of the BIPA and section 30 B of the HRA was irreconcilable such that recourse must be made to the principle set out in section 80 of *Bennion* on *Statutory Interpretation* by holding that section 30B of the HRA is to be treated as impliedly amending section 8 of the HPA.

69. This is avowedly an approach of last resort. I do not regard it as necessary to adopt it. The BIPA provided that "*except as otherwise expressly provided*" its provisions were to prevail if they were in conflict with "*any other Act".* The expression "*any other Act*" is not confined to Acts which were in force in 1956. It must have been intended to apply to subsequent Acts as well. Thus, when the HRA came to be enacted it was in the context that, absent some express provision in the HRA, the BIPA was to prevail in the case of inconsistency between it and the HRA.

70. The HRA provided that it was to prevail unless the conflicting statutory provision "*specifically provides that the statutory provision is to have effect notwithstanding this Act*". In my view the BIPA contained such a specific provision since it provided that the provisions of the BIPA were to prevail when in conflict with the provision "*of any other Act*". The latter phrase embraces the HRA which is another Act. It is not necessary to hold that, in order for the statutory provision to be one that "*specifically provides*" that it is to have effect "*notwithstanding this Act*", the HRA must be specifically named. A provision which, in effect, says that the BIPA is to prevail over all other Acts is sufficiently specific. What would be

insufficient would be a conflict with a preceding Act when the latter had no provision about which Act should prevail in the case of competition. In such a case any argument that the HRA cannot have intended to penalise what an earlier Act permitted would be foreclosed.

71. Further, the draftsman of the HRA must be presumed to have had the terms of the BIPA in mind when the HRA was passed. On that assumption I find it difficult to accept that section 30 B (1) of the HRA was regarded by him, or should be treated by the Court, as falling within the words "*Except as otherwise expressly provided*" in BIPA section 8 (1); and in *Bermuda Bred* the Chief Justice held that section 30 B of the HRA did not expressly override section 8 of the BIPA.

72. It is, however, arguable that, for the purposes of section 8 (1) of the BIPA, it is not necessary for the BIPA to be named in order for some other statute expressly (as opposed to impliedly) to provide that that statute shall prevail. However, on that footing, by parity of reasoning, reference to the BIPA by name is not necessary in order for the BIPA specifically to provide, within the meaning of section 30 B of the HRA, that, in the case of conflict, it shall prevail. This is particularly so since section 30 B uses the word "*specifically*", as opposed to what might be regarded as the stronger "*expressly*".

73. If there is a construction which avoids the need to invoke the principle of implied amendment it should be more readily adopted than a conclusion that there is an irreconcilable difference between two statutory provisions which can only be resolved by holding that the later enactment impliedly amended the earlier one. Such an approach in effect assumes that neither the draftsman nor Parliament noticed the inconsistency. A conclusion that there was no such inconsistency and that Parliament decided not to interfere with the working of the BIPA, of which it must be taken to have been aware, is, in my view, preferable, particularly in circumstances where the Constitution itself recognises the need to discriminate against non-Bermudians in relation to employment.

74. The fact that it does so provides some support for the proposition that such discrimination is not outlawed by the HRA since such a conclusion would tally with the provisions of the Constitution. If the decision below is correct Parliament has derogated from the protection accorded to the BIPA by section 12 (4). No doubt it can do so; but, where possible the HRA should or, at any rate, can be interpreted consistently with the provisions of the Constitution. At the lowest the Court should not be shy of a construction which has that effect.

75. Further, in circumstances where the BIPA requires an *express* provision if it is to be overridden there seems to be no room for an *implied* amendment of it by a subsequent Act. Lastly, I agree with what Bell JA says as to the unlikelihood that Parliament in 1981 intended that the HRA should take precedence over the regulation of employment by the Minister under the BIPA.

76. For these reasons I would allow the appeal against the findings of Hellman J that section 60 (1) of BIPA 1956 unlawfully discriminated against Mrs Tavares contrary to section 5 of the HRA 1981 and that section 60 (1) is inoperative insofar as it prevents BOTC citizens for whom Bermuda was the constitutional unit to which their citizenship relates, from engaging in gainful occupation without the specific permission of the Minister of Home Affairs.

**BAKER, P**

77. I agree that the appeal should be allowed and with the reasoning in both judgments, subject to Clarke JA's qualification. For the reasons that he has given I do not think that *Bermuda Bred* can be distinguished, and I am unable to avoid the conclusion that it was wrongly decided.

78. For my part the meaning of section 5 of the HRA is clear. It applies to the supply of goods, facilities or services. The Minister, in exercising his powers through an

immigration officer under s.60 of the BIPA is quite simply not supplying goods, facilities or services. That view is supported by the majority of the House of Lords in *Amin* which, like my Lord, I find strongly persuasive. The Chief Justice found support for his conclusion in the Canadian case of *Davis.* However, *Amin* was not referred to in *Davis* and I have not found it to be of any assistance.

79. Hellman J understandably followed the decisions of the Chief Justice in *Bermuda Bred* and *Griffiths v Minister of Home Affairs* [2016] SC Bda (Civ) (7 June 2016) but, as Bell J A has pointed out, he did not examine the reasoning that led the Chief Justice to his conclusion in *Bermuda Bred.*

80. As is apparent from section 60 of the BIPA, regulation of a person's employment in Bermuda is closely interlinked with their immigration status. As Hellman J pointed out, this has led to a growing number of challenges against restrictions imposed by the BIPA. This is hardly surprising in the light of the number of inconsistencies and anomalies thrown up by legislation that has developed piecemeal. However it is not for the Courts to strain the meaning of the legislation to assist individual litigants who may have been hard done by. Rather it is for Parliament to legislate to produce a comprehensive scheme that is consistent and fair.

**Bell JA**

**Clarke JA**

**Baker P**