In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018: No. 34/2018: No.99

IN THE MATTER OF AN APPLICATION UNDER SECTION 15 OF THE BERMUDA CONSTITUTION 1968

AND IN THE MATTER OF THE DOMESTIC PARTNERSHIP ACT 2018

BETWEEN:

RODERICK FERGUSON

Applicant

-v-

THE ATTORNEY GENERAL

Respondent

-and-

OUTBERMUDA

1st Applicant

-and-

MARYELLEN CLAUDIA LOUISE JACKSON

2nd Applicant

and

DR GORDON CAMPBELL

3rd Applicant

and

SYLVIA HAYWARD-HARRIS

4th Applicant

and

THE PARLOR TABERNACLE OF THE VISION CHURCH OF BERMUDA

5TH Applicant

-v-

THE ATTORNEY-GENERAL

Respondent

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JUDGMENT

(in Court)

Repeal of same-sex marriage rights established by a judicial decision- Constitutional validity of revocation provisions of Domestic Partnership Act 2018- freedom of conscience- discrimination on the grounds of creed Bermuda Constitution, sections 1, 8, 12, and 15

Date of hearing: May 21-24, 2018

Date of judgment: June 6, 2018

Mr. Mark Pettingill, Mr. Ronald Myers, and Ms. Katie Richards, Chancery Legal Ltd. for the Applicant in 2018:No. 34

Mr Rod Attride-Stirling, ASW Law Limited, for the Applicants in 2018: No.99

Mr. Melvin Douglas, (Solicitor-General) and Ms. Lauren Sadler-Best, Attorney General Chambers, for the Respondent

Introductory

1. Since "*sexual orientation*" became a prohibited ground of discrimination under section 2 of the Human Rights Act 1981 in 2013, the issue of legal recognition for same-sex relationships has been considered both in Parliament and in the courts. In one of the early judicial forays, I attempted to contextualize the legal 'conflict' on the issue of same-sex marriage in a manner which holds good for the present case:
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> "*1. The present application arises out of a collision of rights. The right of the courts to uphold the rule of law has clashed with the right of the Executive and legislative branches of Government to formulate and make laws. The recently protected right not to be discriminated against on the grounds of one's sexual orientation under the Human Rights Act 1981 has clashed with older but still comparatively new rights of freedom of conscience and freedom of expression which are protected by the Bermuda Constitution. In the interests of transparency, it is helpful to look at these rights in the local historical context which has tacitly informed the way in which I have both digested the various submissions advanced and decided the present application.*

2. Nearly 400 years ago, on June 15, 1616, Bermuda's first Court of General Assize sat in the original St Peter's Church in St. George's in an era in which Church and State and the Executive and the Judiciary were all closely intertwined. Religious minorities were, in the decades which followed, frequently forced to leave Bermuda in the face of persecution. The Courts were regularly involved in criminal trials for prohibited forms of sexual conduct between consenting adults based on religious prohibitions. When Methodist Minister John Stephenson arrived in Bermuda at the turn of the 19th century with the avowed aim of preaching to "African blacks and captive Negroes", a special Act of Parliament was passed to criminalize such preaching. In June1801, the Reverend was convicted of contravening this Act and sentenced to six months imprisonment, despite his attorney James Christie Esten pleading freedom of conscience as a defence.

3.Freedom of conscience and freedom of expression and the right not to be discriminated against on racial and other grounds only came to be fundamental, constitutionally protected rights with the enactment of the Bermuda Constitution Order (a United Kingdom Order-in-Council) in 1968. That Constitution created an independent judiciary based on the separation of powers and general governance structure which was explicitly secular, thus completing what had been an evolving separation of Church and State. The courts were empowered to declare that legislation which was inconsistent with the fundamental rights and freedoms in the Constitution was invalid. The antecedents for these protections included the Universal Declaration on Human Rights (1948) and the European Convention on Human Rights and Fundamental Freedoms (1950) ("ECHR"). Those international instruments were inspired by the explicit goal of deterring the 'tyranny of the majority', based on the very recent and chilling experience that a regime in a 'sophisticated' modern Western democracy, led by a man who was originally democratically elected, had perpetrated large-scale acts of genocide against an ethnic and religious minority community. Similar impulses inspired the British Government, when granting Independence to its former colonies (starting with Nigeria in 1960) and when granting self-Government to its remaining colonies (such as The Bahamas in 1963 and Bermuda in 1968), to incorporate fundamental rights and freedoms provisions into constitutions enacted by way of United Kingdom Orders-in-Council."[1]

[1] *Centre for Justice-v-Attorney-General* [2016] Bda LR 140.

2. On May 5, 2017, in *Godwin and DeRoche-v-Registrar-General and others* [2017] SC (Bda) Civ (5 May 2017), Charles-Etta Simmons J held that the Human Rights Act 1981, which since 2013 had prohibited discrimination on the grounds of sexual orientation, guaranteed same sex couples the right to marry. The legal basis for this conclusion was simple. The Human Rights Act provided that it had primacy over inconsistent provisions of statutory and common law, and the prevailing definition of marriage being limited to opposite sex couples discriminated against same-sex couples on the grounds of their sexual orientation. The Human Rights Act also expressly empowered the Supreme Court to declare that provisions of any law which were inconsistent with that Act were invalid.

3. It is a notorious fact that this decision attracted both acclaim and disdain. Prior to the decision, an organization supported by several churches was formed to campaign against same sex marriage rights (Preserve Marriage Bermuda ("PMB")). A referendum was held on the issue in 2016, which did not produce a valid result but revealed a clear majority of those voting as opposing any legal recognition for same-sex relationships. After the decision, a Private Members Bill to reverse its effect was laid before Parliament (for the second time). After the General Election of July 18, 2017, it was apparently clear that a majority in the House of Assembly supported reversing the same-sex marriage decision. The new Government grasped the nettle and introduced its own legislative scheme which introduced for the first time a comprehensive statutory scheme for recognising same sex relationships. At the same time, same-sex marriage was effectively abolished.

4. On February 7, 2018 the Domestic Partnership Act 2018 (the "DPA" or the "Act") received the Governor's assent. By a Commencement Notice dated April 9, 2018, its entry into force was fixed for June 1, 2018. An important aspect of this legislation was that it provided that the Human Rights Act 1981 would not take precedence over the provisions of the DPA which facilitated recognition only for a marriage between a man and a woman. In short, Parliament repealed the effect of the *Godwin and DeRoche* decision.

5. The present judgment determines two separate but legally related applications which were heard together. In essence, the Applicants seek declarations under section 15 of the Bermuda Constitution that Parliament could not validly reverse this Court's decision that same sex marriage was a right guaranteed by Bermudian law. Relief was sought, most importantly, on the following grounds:

    (1) Bermuda has a secular Constitution and section 8 of the Constitution prohibits Parliament from passing laws of general application for a religious purpose. The restoration of traditional marriage was primarily a response to religious lobbying by PMB and so the relevant provisions of the DPA were invalid because they were enacted for an impermissible religious purpose;

(2) denying and/or depriving each person who believed in same-sex marriage (whether on religious or non-religious grounds) of the right to manifest their beliefs through legally recognised marriage ceremonies interfered with the constitutionally protected freedom "*either alone or in community with others, and both in public or in private, to manifest and propagate* [their] *religion or belief in worship, teaching, practice and observance*" (section 8(1));

(3) maintaining or restoring a definition of marriage which favoured those who believed in opposite-sex marriage and disadvantaged those who believed in same-sex marriage discriminated against the latter group on the grounds of their "creed" contrary to section 12 of the Constitution.

The applications in outline

<u>The Ferguson application</u>

6. Roderick Ferguson is a born Bermudian who currently lives in Boston. He is gay, part of a spiritual community and complains that the DPA has deprived him of the right to marry, offering instead a separate relationship status. By his Originating Summons issued on February 16, 2018, he complains that to this extent the DPA is void for contravening his following constitutional rights:

(1) the protection of law (section 1(a));

(2) deprivation of property (section 1(c) or section 13(1));

(3) inhuman and degrading treatment (section 3);

(4) freedom of conscience (section 8);

(5) freedom of expression (section 9);

(6) freedom of association (section 10);

(7) not to be discriminated against on the grounds of his creed (section 12).

7. The Applicant complains in his First Affidavit that in taking away the right to enter a same-sex marriage, the DPA has :

(a) deprived him of the ability to form an association with another man under the Marriage Act 1944, when he finds a suitable partner and when he returns to Bermuda;

(b) prevented him from freely expressing his creed and identity.

8. The First Affirmation of Majiedah (Rozy) Azar crucially responded as follows:

> "*4…I do not see that he has put forward any facts or evidence to show how and to what extent his constitutional rights, as enumerated in his Originating Summons, have been infringed by the Act.*"

9. The bulk of the Affirmation in response (paragraphs 5-16) describes the inconclusive political machinations of the 2016-2017 period followed by comparatively decisive action after the July 2017 General Election. This was followed by apparently extensive research and consultations prior to the final drafting and enactment of the Act. Ms Azar summarised the intent of the Act as follows:

> "*16. The Act is intended to provide a legal framework consistent with the view of the European Court of Human rights ("ECHR") including providing, in a wider context, the same benefits that the Court has given same sex-couples in a piecemeal fashion over the recent years. The Government was advised that it was likely that the interest groups, the LGBT community would oppose the Act. The Government was similarly aware that it would likely be opposed by those who oppose any type of union between persons of the same sex. Bearing this in mind, as well as other potential ramifications, reputational and otherwise, the Government did its best to achieve a realistic compromise between the opposed camps.*"

10. The first application appeared to me to be somewhat thinly supported in evidential terms (as regards the extent of the interference complained of), but was the first challenge to DPA's provisions which turned the legal clock back on same-sex marriage. It clearly inspired the second application.

The OUTBermuda/Jackson application

11. OUTBermuda, formerly Bermuda Bred Company, ("Out"), is a charity devoted to addressing the challenges faced by LGBTQ Bermudians. Maryellen Jackson is a lesbian Bermudian. Supported by other individual deponents and the Wesley Methodist Church, these Applicants complained (by an Originating Summons dated

that their following constitutional rights were contravened by the reversal of the *Godwin and DeRoche* decision:

(1) freedom of conscience (sections 1 and 8); and

(2) the right not to be discriminated against (section 12).

12. The First Affidavit of Adrian Hartnett-Beasley, Deputy Chairperson of Out, supported the charity's application. The following averments are made which are most pertinent to the constitutional complaints:

(a) reversing the effect of *Godwin and DeRoche* was a response to a religious campaign led by PMB;

(b) in the Parliamentary debate on the Bill which was duly enacted as the DPA, Home Affairs Minister Walton Brown rightly advocated a non-religious approach to legislative policymaking, stating, *inter alia*[2]:

"*…you cannot base sound policy on a particular interpretation of religion. Yes, we may be a largely Christian society, but we are not only Christians here. And our Constitution says we should respect religious beliefs, even those who have no belief. It is embedded in our Constitution. So you cannot just articulate a view that because a particular religious interpretation argues something…that is valid….because if you say you should adopt a Christian interpretation, well, which version of Christianity should you embrace? Is it Catholicism; is it AME, is it Seventh-day Adventist, which one? They all have nuances, they all have different views…*";

(c) the opportunity to consult with the Minister and the protections introduced for the LGBT community by the Act were welcome. However, prohibiting same sex marriage was opposed because, *inter alia*:

(i) the DPA took away the right of non-faith same sex persons to celebrate a civil marriage ceremony, and

[2] Official Hansard Report, 8 December 2017, page 883.

(ii) the DPA took away the right of religious same sex persons (such as himself) to a religious marriage ceremony;

(iii) domestic partnerships provided less favourable legal protection than marriage, especially in terms of overseas recognition;

(iv) "*94. In any event, even if a majority of Bermudians were in favour of depriving a minority group of its human rights (which, in the case of same-sex marriage they are not), it would be wholly inappropriate for Government to legislate on that basis, despite what same-sex marriage opponents suggest. In civilised societies, the majority does not get to pick and choose which of a minority's human rights should and should not be protected. In fact, in a great many instances the oppressive views of the majority are exactly what minorities most need their human rights to be protected against.*"

13. The application was supported by the Affirmation of Professor Howard NeJaime of Yale Law School. He opined that US Federal law does not generally extend the same recognition accorded to foreign same sex marriages to civil unions or domestic partnerships. At the state level, he opined that most states would recognise foreign same sex marriages but not civil unions or domestic partnerships.

14. The Affidavit of Roger Frizzell of Carnival Corporation & plc was also filed in support of this application. The company considered itself duty bound to support the application because although it had only made modest income from same-sex marriages thus far "*Carnival wishes to offer the service from a human rights perspective*" (paragraph 20).

15. The 2nd Applicant, Ms Maryellen Jackson, somewhat like Mr Ferguson, lent what I initially considered to be mainly symbolic support to the application, complaining about the loss of an opportunity to marry should she find the right partner in the future. She deposed, *inter alia,* that the Act by taking away the right to celebrate a same-sex marriage, interfered with her freedom of conscience rights as a person who believes in the institution of marriage.

16. The parties to the first same-sex marriage in Bermuda, Julia Aidoo-Saltus and Judith Aidoo-Saltus, each swore Affidavits which lent essentially symbolic support to the

same-sex marriage cause. In the latter case, she pointed out that homosexuality was not only practised but accommodated in pre-colonial African societies.

17. Chai T swore an Affidavit which also lent largely moral or symbolic rather than legally tangible support, deposing: "*5…I support the right to be married , even though I am not ready to be married at this time. Having the option to marry is most important….*"

18. Sylvia Hayward-Harris swore an Affidavit in support of the application which engaged fully with the freedom of conscience complaint. She deposed that:

    (a) since 2009 she has been a Pastor in the Vision Church of Atlanta, a Progressive Pentecostal denomination;

    (b) she has officiated at two same sex marriages in 2017 (presumably in Bermuda);

    (c) "*17…the Domestic Partnership Act (DPA) and those parts which abolish the crystalized right to same-sex marriage, hinders my religious rights, in that DPA prevents me from conducting same-sex marriages, something which is an important part of my religious beliefs (although I understand that it is not part of everyone's religious beliefs, it is part of mine). The DPA also hinders the religious rights of those who want to celebrate a religious marriage fully recognised by the law.*"

19. Dr Gordon Campbell swore an Affidavit on behalf of the Trustees of the Wesley Methodist Church supporting the freedom of conscience complaint in the most cogent and poignant way. Most significantly he deposed as follows:

    (a) Methodists have a proud history of standing up for social rights. The Reverend John Stephenson of the Irish Methodist Council was appointed in 1799 to "*preach the gospel to the black and coloured people of Bermuda*". Parliament passed a law to prohibit his preaching, he continued to preach and was imprisoned for 6 months;

    (b) United Church congregations such as the Wesley Methodist Church are free to decide whether or not to conduct same-sex marriages;

    (c) "*6. When marriage equality was achieved, every church in Bermuda gained the right to choose for itself whether to perform legally-recognized same-sex marriages or not. Churches that supported same-*

sex could choose to perform them. And churches that did not support same-sex marriage could choose not to perform them.

7. However, instead of choosing not to perform same-sex marriages, several churches and individuals successfully pressured Government into enacting their religious belief against same-sex marriage into law. When that law, the Domestic Partnership Act 2018, comes into effect on 1 June 2018, everyone whether they hold that belief or not-will be bound by those churches' and individuals' belief. On that date, our congregation will lose the right to choose for itself whether or not to perform legally recognized same-sex marriages."

Summary of beliefs and positions represented before the Court

20. The Applicants complained of how the ability to practise the religious and non-religious beliefs of (a) LGBT persons who believed in marriage, and (b) churches who wished to officiate at same-sex marriages would be interfered with when the impugned portions of the Act entered into force.

Case Management Ruling

21. On receipt of substantial binders of authorities in support of the parties' skeleton arguments which I preliminarily reviewed together with the evidence filed in support of and in opposition to the applications, I gave the following directions:

"*1. The captioned matters are listed for hearing for two days at the beginning of next week. Order 1A/4 of the Rules of the Supreme Court requires the Court to actively manage cases to ensure, inter alia, that Court time is used efficiently and that time is not wasted on unmeritorious points and attention is focussed on meritorious points.*

2. In preparing for hearing, the Court has formed the following provisional views:

(a)breach of section 8 (freedom of conscience) and section 12 (prohibition on discrimination) are common issues in both applications and appear based on their potential merit to warrant receiving the benefit of most of the Court's time;

(b)the Respondent disputes whether the Applicants have adduced sufficient evidence of, inter alia, interference with their freedom of

conscience rights. Arguably the strongest evidence of such interference is provided by a supporting non-party, the Trustees of the Methodist Church. The Court should of its own motion join the Trustees as 3rd Applicant in 208: No. 99 to ensure that all matters in controversy are determined in the present proceedings: Order 15 rule 6(2);

(c)as the consent of the Trustees is required under Order 15 rule 6(2) and it is appreciated that costs may be a concern, this would be an appropriate case to make a protective costs order in the Trustees' favour, limiting their potential recovery if they succeeded to $10,000 but protecting them from any adverse costs order: Bermuda Environmental Sustainability Taskforce –v-Minister of Home Affairs [2014] SC (Bda) 56 Com (25 June 2014). Counsel is invited to advise the Court whether the Trustees are willing to be joined by close of business tomorrow, May 18, 2018;

(d)the central issues in controversy in relation to determining whether sections 8 and/or 12[3] have been contravened are likely to be the following:

> *(i)whether the Applicants can establish a prima facie breach of section 8(1) or 12 (1);*
>
> *(ii)whether the Respondent can establish that any prima facie interference is reasonably required under section 8(5);*
>
> *(iii)if any interference with the protected rights is reasonably required (i.e. a proportionate legislative pursuit of a qualifying public interest aim), whether or not the legislative measure is shown by the Applicants to be <u>not</u> reasonably justifiable in a democratic society (section 8(5));*
>
> *(iv)whether section 12(1) does not apply because such application is exempted by section 12(4)(c) and/or section 12(8) as read with section 8(5) of the Constitution.*

(e)the Respondent's evidence (First Azar in both cases) only appears to be responsive (or explicitly responsive) to issue (i). The Respondent's Skeleton Submissions also appear to adopt a similar course. The Court has never come across a section 15 case where the Crown is content to pin its colours to a single mast and rely upon the Court finding that no prima facie interference with protected rights

[3] Similar points would potentially arise in relation to the alleged breaches of sections 9 and 10.

has occurred. Should this omission be unintentional, the Court is willing to grant the Respondent leave to file and serve:

(i) a short supplementary affidavit explaining the Crown's position (if any) on these points ((ii)-(iv) in paragraph (d) above) by close of business on May 18, 2018; and

(ii) supplementary written on the same points by the commencement of the hearing on May 21, 2018.

3. It is hoped this Ruling will ensure that the scheduled hearing proceeds as a fully effective one."

22. The Respondent's response to the Court's invitation to fill an evidential chasm in the Crown's case was at first blush a surprising one. The 2nd Azar Affirmation merely reiterated the initial assertion that no interference with the Applicants' freedom of conscience rights could be established, adding that the justification for the DPA was a matter of "public policy" for the Legislature and not justiciable by the Judiciary. It is trite law that when contravention of any of the fundamental rights is alleged which the Crown may justify interfering with on constitutionally permissible grounds (sections 4-5 and 7-13), the legal controversy at the hearing of a claim on its merits (assuming it is not liable to be struck out on frivolity grounds) usually focusses on whether the interference complained of is "reasonably required" to achieve one of the specified public interests. It usually comparatively easy to establish an interference with a fundamental right, because the scheme of a Bill of Rights is in most cases to state rights very broadly and to limit relief by justifying specified forms of interference with the protected right in its most absolute or purest form.

23. On the afternoon of the first day of the hearing, however, I joined the following additional new Applicants to the second application on the terms foreshadowed in my Case Management Ruling:

(1) Dr Gordon Campbell, Trustee of the Wesley Methodist Church;

(2) Ms Sylvia Hayward-Harris;

(3) The Parlor Tabernacle of the Vision Church of Bermuda.

Godwin and DeRoche

24. The reversal by Bermuda's Legislature of Simmons J's decision in *Godwin and DeRoche-v-Registrar-General and others* [2017] SC (Bda) Civ (5 May 2017) was a trigger for the present applications. Apart from the improbable complaint that its reversal involved the compulsory acquisition of property rights, the most obviously arguable freedom of conscience complaint appeared to me to stand or fall wholly independently of the fact that same-sex marriage was lawful, for what turned out to be only a limited period of time, before it ceased to be lawful by virtue of the DPA. The DPA was enacted on the assumption that this case was rightly decided because the former Government did not appeal it. Although the DPA was enacted on the hypothesis that *Godwin and DeRoche* had been correctly decided, and accordingly needed to be expressly reversed, the Solicitor merely conceded before me that the decision had "*not been appealed*". For completeness, I consider it appropriate to confirm my full support for Simmons J's decision.

25. The Human Rights Act 1981 prohibits public authorities from discriminating in the provision of services to the public. It expressly binds the Crown and provides that any legislation which is inconsistent with the Act may be declared to be inoperative by this Court to the extent of the inconsistency. In *Bermuda Bred Company-v-Minister of Home Affairs* [2015] Bda LR 106 (a case which concerned discrimination against Bermudians in same-sex relationships through discriminatory legislative provisions), I held that Immigration "services" were subject to compliance with the Human Rights Act. The effect of this decision (and a similar decision in relation to discrimination against foreign male spouses of Bermudians and their Bermudian wives on the grounds of sex)[4], which had not been appealed by the former Government, were reversed by the current Government when it enacted the Bermuda Immigration and Protection Amendment (No.2) Act of 2017 with effect from November 7, 2017. This was possibly to reverse the effect of the first instance decision in *Tavares*, which in effect held that the impact of the Human Rights Act in the Immigration sphere was to prevent the Minister from discriminating against non-Bermudians. In *Minister of Home Affairs and others-v- Tavares* [2018] CA (Bda) (20 April 2018), the Court of Appeal for Bermuda considered *Bermuda Bred*, a case which was followed by Simmons J in *Godwin and DeRoche*.

26. In *Tavares*, which was argued in March 2018, Bell J (giving the Court's leading judgment) rightly noted that the issue raised by *Bermuda Bred* "*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*". For reasons that are unclear, particularly bearing in mind that the factual and legal matrix in *Bermuda Bred* was distinguishable from that in *Tavares*, Clarke JA and Baker P both felt it necessary not only to decline to follow the reasoning in Bermuda Bred, but also to say that *Bermuda Bred* was

[4] *Leighton Griffiths and Frederica Griffiths -v- Minister of Home Affairs* [2016] SC (Bda) 62 Civ (7 June 2016);

wrongly decided. As the issue in question (whether the 1981 Act applied to Immigration services) was in terms of future cases already moot, the assertions that *Bermuda Bred* was wrongly decided can only fairly be viewed as *obiter dicta* in relation to a decision the direct legal effect of which (in the Immigration sphere) had already been reversed by Parliament.

27. Accordingly, nothing in *Tavares* in my judgment undermines the validity of Simmons J's decision *Godwin and DeRoche-v-Registrar-General and others* [2017] SC (Bda) Civ. Her decision that the marriage services administered by the Registrar-General were "services" for the purposes of section 5 of the 1981 Act is far more directly supported by the decision in relation to same–sex adoption, Hellman J's decision in *A and B-v- Child and Family Services* [2015] Bda LR 13 (February 3, 2015), which preceded *Bermuda Bred* (November 27, 2015) by almost ten months. Hellman J interpreted "*services*" in the Human Rights Act 1981 broadly not just because of English authority (*Catholic Care (Diocese of Leeds) v Charity Commission* [2013] 1 WLR 2105) expressly finding that "services" in the Equality Act embraced adoption services provided by a local authority. He also followed Privy Council authority commending to the Bermudian courts a liberal approach to construing the Human Rights Act generally. As those principles are broadly the same as those which govern construing constitutional fundamental rights and freedoms provisions, they merit reproduction here.

28. In *Marshall-v- Deputy Governor* [2010] UKPC 9, Lord Phillips opined as follows:

> "*15. Mr Crow QC for the appellants submits that these provisions must be given an interpretation that is generous and purposive, drawing an analogy with cases that concern constitutional rights – see Minister of Home Affairs v Fisher [1980] AC 319; Reyes v The Queen [2002] UKPC 11; [2002] 2 AC 235 at para 26. This submission is supported by the approach recently taken to the HRA by Lord Neuberger of Abbotsbury, when giving the judgment of the Board in Thompson v Bermuda Dental Board [2008] UKPC 33 at para 29. The Board accepts this submission as, indeed, did Mr Rabinder Singh QC for the respondents. The Board considers, however, that Mr Singh was correct to submit that this approach to interpretation cannot go so far as to distort the meaning of the words of the legislation.*"

29. The question before Simmons J was whether or not the services provided by the Registrar-General in relation to, *inter alia*, the issue of marriage licenses were governed by the Human Rights Act 1981 and therefore subject to the prohibition on public authorities providing "services" in a discriminatory way. It was quite obvious (and not in controversy) that the common law definition of marriage was discriminatory on the grounds of sexual orientation by excluding the possibility of same-sex marriage. Section 5 of the 1981 Act provides as follows:

> "*5. (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—

....

the services of any business, profession or trade or local or other public authority."

30. Section 5 creates a non-exhaustive definition of the types of services to which the section applies, speaking of "*the supply of any goods, facilities or services*", and including (by way of example only) the services of any "*public authority*". In *Godwin and DeRoche*, it was argued by PMB that the administrative functions carried out by the Registrar in relation to marriage were not caught by the Act because the Crown was bound by the Act only to a limited extent:

"*31(1) This Act applies—*

(a) to an act done by a person in the course of service of the Crown—

(i) in a civil capacity in respect of the Government of Bermuda; or
(ii) in a military capacity in Bermuda; or

(b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office,

as it applies to an act done by a private person." [emphasis added]

31. Simmons J held that adopting a broad and purposive construction to this provision, there was no justification to conclude that the services provided by the Registrar-General in connection with marriage were not services within section 5 of the 1981 Act. In my judgment she was right to do, having regard to other important provisions in the Act. Not only did section 31 (1) provide that the Act bound the Crown section

30B provided that the Human Rights Act had primacy over other legislation, unless expressly provided to the contrary in other legislation. After all, not only did section 30B(1) provide that the 1981 Act had primacy over all other statutory provisions save for those which specifically provided otherwise, but the effect of the supremacy provisions was postponed to enable Parliament to dis-apply the effect of section 30B(1):

> "*(2) Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995.*"

32. The only imaginable purpose for postponing the operation of the primacy provisions for so long was to afford Parliament an opportunity to limit the scope of the Act's operation in specific spheres. The 1981 Act is a single statute and the operation of only some of its provisions was being postponed. When the Constitution entered into force and it was realised that certain "existing laws" would have to be modified, it was not possible to suspend the entry into force of the entire Constitution. Instead the section 5(2) of the Bermuda Constitution Order, in conjunction with section 5(1) providing that all existing laws must be read consistently with the Constitution[5], adopted a more nuanced or softer approach:

> "*(2) The Governor may, by order published in the Gazette, at any time within twelve months after the commencement of this Order make such amendments in any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Constitution or otherwise for giving effect, or enabling effect to be given, to those provisions; and any existing law shall have effect accordingly from such date (not being earlier than the appointed day) as may be specified in the order.*"

33. There is accordingly no justification for inferring that the drafters of the Act intended its scope to be limited in its application to the Crown and/or public authorities in fields such as immigration or otherwise. What was explicitly contemplated was that during the two year transitional period legislative carve-outs would be introduced. Where no carve-outs have been enacted, the starting assumption should be that the 1981 Act is intended to have primacy. Had the Minister proposing the primacy provisions of the Human Rights Bill been asked whether the Bill would apply to all or only some Governmental services, the answer should have been as follows: 'the primacy provisions will potentially apply all Government services, but the provisions will not come into effect immediately. We will have two years to amend any other legislation to make it clear that the Human Rights Act does not have primacy over it'.

34. Under the usual canons of statutory construction, of course, it is not ordinarily relevant to enquire into what Parliamentarians enacting legislation subjectively intended an Act to mean. As Lord Reid observed in *Black-Clawson International Ltd. –v- Papierwerke Waldhof-Aschaffenburg A.G. Respondents* [1975] AC 591 at

[5] Section 5 is considered further below. The Governor did in fact make various Orders under section 5(2), primarily to import post-1968 descriptions of public institutions and public officers into pre-1968 vintage legislation.

"*We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.*"

35. Not only did the Human Rights Act 1981 contain a primacy provision in relation to inconsistent statutory provisions. Section 29 further empowered the Supreme Court to "*declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act*". This extraordinary, quasi-constitutional power makes even more explicit the legislative intention to subject public and private persons to the full weight of the supremacy provisions and supervision by the courts. The term "*public authority*", used in section 5 of the 1981 Act, is a broad one. The Interpretation Act 1971 defines it as follows:

> "*'public authority' means any designated person or body of persons (whether corporate or unincorporate) required or authorized to discharge any public function—*
>
> *(i) under any Act; or*
>
> *(ii) under any Act of the Parliament of the United Kingdom which is expressed to have effect, or whose provisions are otherwise applied, in respect of Bermuda; or*
>
> (iii) *under any statutory instrument…*"

36. The provisions of law which section 29 of the 1981 Act have primacy over are also broadly defined by section 2 of the Interpretation Act 1971:

> " *'provision of law' means any provision of law which has effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative…*"

37. Although it is at first blush impossible to construe this definition (as applied to the Human Rights Act) as empowering this Court to declare provisions of the Constitution to be inoperative by virtue of inconsistency with the 1981 Act, the breadth of the definition of "*provision of law*" found in the Interpretation Act demonstrates the grand scope of supervision over public law and public actions which the Human Rights Act was intended to confer on Bermuda's Supreme Court. The power conferred on this Court by the 1981 Act to declare provisions of law inconsistent with the Human Rights Act inoperative positively supports the view that

the drafters of the 1981 Act intended to bind the Crown as regards all public functions, rather only a narrow and ill-defined class of 'non-Governmental' functions. Against this distinctive local legislative background, it is difficult to see how more restrictive interpretations of the meaning of the word "services" in British equality legislation which did not have supremacy provisions corresponding to those in sections 29 and 31 of the Bermuda Act have any relevance, let alone persuasive force under Bermuda human rights law[6], particularly if the 1981 Act is construed so as to give the rights protected a broad and generous effect. Any minute inquiry into what public services the drafters of the Human Rights Act intended to be protected by the Act has a distinctly '*Alice Through the Looking Glass*' air to it when section 5 of the Act is read in the wider statutory context of the Act as a whole.

38. For these reasons I fully endorse Simmons J's decision in *Godwin and DeRoche-v-Registrar-General and others* [2017] SC (Bda) Civ (5 May 2017). It was in any event common ground before me that this decision should be considered as having effectively created a legally effective right to same-sex marriage.

The Courts and the Judiciary-limits on Parliamentary sovereignty under the Bermuda Constitution

39. The *Godwin and DeRoche* decision, while only a first instance one, in no meaningful sense constitutes an example of impermissible 'legislating from the Bench'. This was a straightforward instance of a court applying an express power conferred by Parliament to declare that provisions of law inconsistent with the Human Rights Act's prohibition on discrimination on the grounds of sexual orientation did not have legal effect.

40. Bermuda's Constitution Order came into force on February 21, 1968, but the Constitution set out in the Schedule to the Order came into operation in June 2, 1968. Parliamentary sovereignty, as far as the local legislature is concerned, was qualified in the following terms:

> "*34. Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Bermuda.*"

41. Parliament's power to legislate requires it to comply with the Constitution, and is subject to the restrictions on legislative authority imposed by, *inter alia*, Chapter I. As far as laws in force before June 2, 1968, Section 5 of the Constitution Order provides:

[6] E.g. the Sex Discrimination Act 1975, where "*services*" was narrowly construed as not extending to "*governmental functions*" by the majority of the House of Lords in *Amin* [1983] 3 WLR 258 (immigration); the Disability Discrimination Act 1995, narrowly construed in *Gichura v Home Office and Anor* [2008] EWCA Civ 697 (immigration), while the need for as broad as possible an approach was acknowledged and applied.

"*(1)Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

42. Section 5(2) of the Order contemplated that within 12 months of the "*appointed day*" the Governor might amend legislation to bring it into conformity with the Constitution. However, section 5(1) effectively conferred on the courts the power to declare that inconsistent existing laws were inoperative to the extent of the inconsistency[7]. The jurisdiction of this Court to declare post-1968 legislation which is inconsistent with the Constitution void has explained by the Court of Appeal for Bermuda as follows

"*27…In Robinson-v-R [2009] Bda LR 40, Nazareth JA opined as follows:*

'2. The appellant's submission is that the combined effect of relevant statutory human rights and constitutional provisions entitles him to seek appropriate remedies in respect of his sentence. The Bermuda Constitution (the Constitution), unlike those of many of the Caribbean independent states of the Commonwealth, does not declare that the Constitution is the supreme law of Bermuda; but that position is achieved by the Bermuda Constitution 1967, which by Order-in-Council applied the Bermuda Constitution to Bermuda, in conjunction with the Colonial Laws Validity Act 1865, which provides by Section 2:

Colonial Laws, when void for repugnancy
2 Any colonial law which is or shall be in any respect repugnant to the provisions of an Act of Parliament extending to the Colony which such law may relate or repugnant to any order or regulation made on the authority of such Act of Parliament or having in the Colony the force and effect of such Act shall be read subject to such Act order or regulation and shall, to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.

Thus, as submitted, the effect of Section 2 of the Act of 1865 is that any law passed in Bermuda will be void to the extent of any inconsistency with the Bermuda Constitution…'"[8]

[7] E.g. *Attride-Stirling-v-Attorney-General* [1995] Bda LR 6.
[8] Cited in *Centre for Justice-v-Attorney-General* [2016] SC (Bda) 72 Civ (11 July 2016).

43. Accordingly, the Legislative branch of Government has not for 50 years had more than qualified Parliamentary sovereignty in Bermuda. The Judiciary has been tasked by Chapter I of the Bermuda Constitution with ensuring that both executive action and legislative provisions do not contravene the fundamental rights of freedoms of the citizens and residents of Bermuda.

Approach to the interpretation of fundamental rights and freedoms provisions in the Bermuda Constitution

44. Although the power of the fundamental rights and freedoms provisions guaranteed by Chapter I of the Bermuda Constitution may have, since their adoption in 1968, often seemed like they have been hidden from local view, they have served as a guiding light to how similar provisions should be interpreted both in Bermuda and throughout the British Commonwealth since 1979. It was common ground that the approach to interpretation of Chapter I articulated by Lord Wilberforce in the Bermudian case of *Minister of Home Affairs-v-Fisher* [1980] AC 319[9] at 328 (Lord Wilberforce) should inform this Court's approach in the present case:

> "*Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 United Kingdom, but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (United Kingdom S.I. 1968 No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual.' It is known that this chapter; as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations" Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.*"

[9] Julian Hall of the Bermuda Bar and Narinder Hargun (then of the English Bar) appeared for the successful appellants.

45. It was common ground that these principles applied to how the provisions of the Constitution relied upon in this case were construed. The Applicants, understandably, laid greater emphasis on these principles than the Respondent. Mr Myers in reply (for the Applicant Ferguson) helpfully referred the Court to an even earlier judicial statement which enunciates the same principle with reference to the important legal issue of how much interference with fundamental rights an applicant must demonstrate. In *Olivier-v-Buttigieg* [1967] A.C. 115 at 136-137, the Judicial Committee of the Privy Council (Lord Morris) opined as follows as follows:

> "*…where 'fundamental rights and freedoms of the individual are being considered a court should be cautious before accepting the view that some particular disregard of them is minimal account…*
>
> *In this connection their Lordships were referred to an American case, i.e. Thomas v. Collins*[10]*, in one of the judgments it was said:*
>
> > *'The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the republic may exercise throughout its length and breadth, which no state, nor all together, not the nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.'*"

46. The practical effect of these governing principles on the Court's approach to considering whether an application for constitutional redress establishes an answerable case of interference with a fundamental right may be summarised as follows. The Court should define the legal scope of the relevant right as broadly as possible and set the evidential bar for establishing an interference as low as possible with a view to ensuring that the importance of the right in question is vindicated rather than disappointed. The Court should not rifle through its deck of legal cards with a view to finding a 'get out of jail free' card for the Executive. Every judge is in this regard required, as it were, to be a fundamental rights and freedoms activist. This is merely the first stage of the analytical process. And it is important to add an important *caveat*. Respect for the importance of fundamental rights as a check on the

[10] (1944) 323 U.S. 516.

Executive and Legislative branches of Governments requires the Court to be careful to avoid according too much deference to what can fairly be characterised as frivolous or vexatious complaints.

47. Where an applicant establishes a *prima facie* case (a case that calls for an answer from the Crown) in relation to an interference which can potentially be justified, the Court is required to balance more evenly the interests of the State (the public generally or other relevant categories of people) with the rights of the aggrieved citizen (or Bermuda resident or visitor) who has established a legally recognisable interference with a fundamental right. It is at this stage of the analysis that there is greater room for differing legal policy approaches, depending on how much importance individual judges place upon individual liberty as opposed to Executive or Legislative authority and/or collective, community rights.

48. Unusually, in the present case, the Respondent chose to fight mainly on the terrain which most favoured the Applicants, choosing to stand or fall on the proposition that the Applicants could not make out a *prima facie* case of interference with their fundamental rights. This position was unsurprising as regards many of the contraventions complained of which, in my judgment, it took little analysis to conclude fell short of establishing a case to answer. However by the end of the hearing I was less surprised than I was at the beginning that the Respondent chose to dispute the fact that any arguable case of freedom of conscience had been made out. The factual and legal matrix was so unusual that the issue of whether or not any interference with the Applicants' section 8(1) rights had occurred turned out to be a genuinely controversial issue which did not initially reveal an obvious answer which the Court could confidently embrace.

49. However, the Applicants' primary submission was not a traditional interference with freedom of conscience complaint at all. It entailed the assertion that the impugned provisions of the DPA were invalid because they were enacted for a religious purpose, a purpose which it was unconstitutional for a secular Legislature to approve. This is an ordinary question of law which I consider does not benefit from the interpretative rule that fundamental rights and freedoms should be interpreted in a broad and generous manner.

50. Beyond these high-level guiding principles of how courts should approach the task of interpreting constitutional provisions creating and protecting fundamental rights it is important to sound another note of caution. Care must be taken, as always, when relying upon authorities from other courts, to ensure that that they are truly applicable in Bermuda's legal landscape.

The Domestic Partnership Act 2018: the impugned provisions

51. The Domestic Partnership Act 2018 creates a comprehensive statutory framework for the recognition of local same-sex relationships ("domestic partnerships") and overseas same-sex marriages and civil unions. In time the DPA may be viewed in general terms as one of the most progressive single pieces of legislation enacted by Bermuda's Parliament in the 1968 Constitution's first 50 years.

52. The Applicants however complain that section 53 and all other provisions in the Act that deal with or give effect to the revocation of same-sex marriage or make same-sex marriage void (the "revocation provisions") are unconstitutional. Section 48 provides as follows:

> "***Application of Human Rights Act 1981***
>
> *48(1) The following provisions have effect notwithstanding anything to the contrary in the Human Rights Act 1981—*
>
> *(a) section 4 (persons must be 18 years of age to enter into a domestic partnership);*
>
> *(b) section 29(2) (no marriage officer shall be compellable to permit the use of any place of worship under his control for the formalisation of a domestic partnership);*
>
> *(c) sections 36 to 39 (overseas relationships treated as domestic partnerships in Bermuda);*
>
> *(d) section 53 (clarification of the law of marriage);*
>
> *(e) section 54 (saving for certain same sex marriages);*
>
> *(f) Schedule 3 (certain enactments not to be read as if modified in the case of domestic partnerships);*
>
> *(g) Schedule 4 (consequential and related amendments).*
>
> *(2)Section 15(c) of the Matrimonial Causes Act 1974 (which provides that a marriage is void unless the parties are male and female) has effect notwithstanding anything to the contrary in the Human Rights Act 1981.*" [Emphasis added]

53. The revocation provisions are essentially objected to insofar as they provide that:

- overseas same-sex marriages may only be recognised in Bermuda as domestic partnerships;

- same-sex marriages are void;

- only qualifying same-sex marriages entered into between the date of *Godwin and DeRoche* (May 5, 2017) and the commencement date (June 1, 2018) in Bermuda or abroad remain valid.

54. The revocation provisions achieve two legislative results. Firstly, they expressly provide that the Human Rights Act 1981 does not have primacy over those provisions of Bermuda law (the common law and the Matrimonial Causes Act) which only permit men and women to marry. Secondly, they expressly provide that the Human Rights Act 1981 does not have primacy over those provisions in the DPA which provide that same-sex marriages are not legally recognizable. It is important to view the revocation provisions against the wider back-drop of the 1981 Act.

55. Section 30B of the Human Rights Act 1981 as originally enacted on April 8, 1993 with operative effect from April 8, 1995, contemplated that it would be competent for Parliament to exclude the primacy of the 1981 Act in legislative contexts of its own choosing. However darkness seemingly covered the face of these primacy provisions and this Court's jurisdiction to enforce them under section 29 until Hellman J's landmark decision establishing the right of same-sex adoption in *Re A and B-v-Department of Child and Family Services* [2015] Bda LR 13 (February 3, 2015). The same provisions were deployed in the *Bermuda Bred* case (November 27, 2015). These decisions seemingly inspired Parliament to make it easier to opt out of the 1981 Act's supremacy provisions. Because, as of June 22, 2016, section 30B was amended to:

    (a) set out in Schedule 2 those statutory provisions which the supremacy provisions of section 30B(1) did not apply to; and

    (b) introduce a new subsection (1A), which empowered the Minister to amend (by adding or deleting exempted statutory provisions) Schedule 2 "*by order subject to the affirmative resolution procedure*", in addition to through primary legislation as before.

56. This wider statutory context is relevant for two reasons. Firstly, it emphasises that the Human Rights Act supremacy provisions have always been subject to Parliamentary dilution; and that is more so post-June 22, 2016 than it was before. The starting assumption must be that, as unattractive it may be to those who believe that human rights should be a continually developing and expanding legal sphere, that Parliament

had the right to enact the revocation provisions. That is the tacit assumption which I brought to my consideration of the present case.

57. Secondly, the 2016 fortification of Parliament's ability to dis-apply the supremacy provisions of section 30B(1) of the Human Rights Act merely fortifies the conclusion set out above when considering *Godwin and DeRoche* . Namely, the scheme of the 1981 Act is only sensibly viewed as being consistent with a strong presumption that it applies to all Government services unless Parliament has through primary or (since June 2016) delegated legislation signified otherwise. This presumption was even stronger when *Godwin and DeRoche-v-Registrar-General and others* [2017] SC (Bda) Civ was decided in May 2017 than it was before.

58. It is accordingly unsurprising that *Godwin and DeRoche* was not appealed and that the new post-July 18, 2018 Government took the view that legislative action was the most appropriate means of reversing that decision, a course which the ruling party foreshadowed in its election platform.

Are the revocation provisions invalid because they have a religious purpose?

Is Bermuda's Constitution a secular one?

59. It was not disputed that Bermuda has a secular Constitution. That conclusion does not mean that all public institutions in Bermuda fully embrace secularism in practical terms. As I observed in *Centre for Justice-v-Attorney-General and Minister for Legal Affairs* [2016] Bda LR 140:

> "*88. It seemed to me that Bermuda was not yet a country which, at a popular level at least, clearly either fully or predominantly prided itself on being a secular democracy, despite the fact that our Constitution is explicitly a secular one and our legal system is generally both heavily influenced by and often indistinguishable from English law. The judicial function is unambiguously a secular one with the courts legally bound to afford equal treatment to litigants of every faith, denomination or non-faith. On the other hand, despite the predominance of Christianity, it seemed self-evident to me that Bermuda had in recent years moved gradually, if sometimes haltingly, towards a more secular 'modern' approach to governance. This movement was doubtless due in part to increasing internationalisation and cultural diversification, but was partly attributable increasing maturity and sophistication in a democracy which is not yet 50 years old. Against this background, the clash between advocates for equal rights for the LGBT community and the advocates for preserving traditional Christian values appeared to me to represent, in part at least, a collision between modern,*

cosmopolitan and predominantly Anglo-American and Western European values and traditional, local and predominantly African-Bermudian values."

60. There are other Commonwealth constitutions which are on their face less secular than Bermuda's. In Commodore of the *Royal Bahamas Defence Force and others-v-Laramore* [2017] UKPC 13, the Judicial Committee (Lord Mance) nevertheless opined as follows:

> "*7. While the recitals to the Constitution express a commitment to the supremacy of God and to an abiding respect for Christian values, it is not suggested that this qualifies or limits the freedoms guaranteed by the substantive text of Chapter III of the Constitution, though it could, arguably, have some relevance to an issue of justification…*"

61. In considering whether or not fundamental rights have been *prima facie* interfered with, as opposed to considering whether any interference which is established can be justified by the State, Mr Attride-Stirling submitted that it is legal rather than cultural traditions and principles which ultimately matter. He aptly cited the following observations of Baroness Hale in *Re G; Re P and others* [2009] 1 AC 173 which spoke to the need for the courts to enforce secular legal traditions which conflicted with prevailing religious cultural norms:

> "*121. My Lords, I accept that there are differences between the cultural traditions of Northern Ireland and of Great Britain which should be taken into account in deciding whether this difference in treatment can be justified. On all the conventional measures, such as the rates of marriage, divorce, cohabitation and birth outside marriage, adherence to traditional family values is more widespread in Northern Ireland than in the rest of the United Kingdom, as is religious belief. <u>But the legal traditions are the same as those in England and Wales</u>. There is no special constitutional status afforded to marriage as there is in the Republic of Ireland. The sort of considerations which might lead Strasbourg to accord them a margin of appreciation on this matter do not apply.*
>
> *122. The different cultural traditions in Northern Ireland might, however, make it more difficult for the legislature to act. It is, as Lord Hope has pointed out, a particular duty of the courts in a democracy to safeguard the rights of even unpopular minorities against unjustified discrimination: therein lies the balance between majority rule and the human rights of all. As I said in Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557 , para 132, 'democracy values everyone equally even if the majority does not'. If, therefore, we have formed the view that there is no objective and reasonable justification for this difference in treatment, it is our duty to act compatibly*

with the Convention rights and afford the appellants a remedy." [Emphasis added]

62. Accordingly I find that there is no reason why this Court should not be guided by the Commonwealth authorities on the secularist approach to governance which constitutions such as ours require. Those authorities supported a principle with which all parties agreed. Parliament may not validly promulgate laws which are motivated by a religious purpose. It seems to me by necessary implication that the same principle applies with equal force to the courts and the judicial function as regards 'judge-made' law. The broadest and clearest statement of this principle is found in *McFarlane-v-Relate Avon Limited* [2010] EWCA Civ 880 and the judgment of Laws LJ, which was the foundational case upon which Mr Attride-Stirling (who appeared for Out and others) relied:

> "21. *In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society. The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious imprimatur, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty. The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed by law. <u>But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion.</u> This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer who is alone bound by it; no one else is or can be so bound, unless by his own free choice he accepts its claims.*

> *22. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law, but the State, if its people are to be free, has the burdensome duty of thinking for itself.*
>
> *23. So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime."* [Emphasis added]

63. The Solicitor-General in his response rightly emphasised the point that the core of Laws LJ's statement of principle, underlined above, prohibited the making of laws whose content was based "*only*" on the grounds of the beliefs of a particular faith. The crucial controversy was how this broad principle was to be applied in the present case: the revocation provisions clearly reflected the beliefs of PMB which had canvassed for their adoption on explicitly religious grounds. The revocation provisions were clearly substantially the same as those contained in the Private Members Bill introduced by the Honourable Wayne Furbert on explicitly religious grounds. However, the revocation provisions formed part of the DPA which was introduced as part of a political compromise by a Minister, the Honourable Walton Brown, a political scientist, who gave an eloquent 'lecture' on the secularist role of our Parliament. The DPA as a whole clearly had a predominantly secular purpose. The most straightforward way of viewing the matter was, it seemed to me, was to characterise the revocation provisions as having a mixed religious and secular purpose.

64. Mr Attride-Stirling sought to meet this response by contending that if statutory provisions are in their derivation wholly religious in purpose, recycling or rebranding the provisions in apparently secular form did not expunge the mark of the original religious purpose. This principle is supported by high authority although its application to the present case is somewhat problematic. In *R-v-Big M Drug Mart* (1985) 1 SCR 295, the Supreme Court of Canada held that the Lords Day Act was unconstitutional because it had a religious purpose. Dickson J (as he then was) opined as follows:

"*78. A finding that the Lord's Day Act has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country.*

79. The Attorney General for Alberta concedes that the Act is characterized by this religious purpose. He contends, however, that it is not the purpose but the effects of the Act which are relevant. In his submission, Robertson and Rosetanni, supra, is support for the proposition that it is effects alone which must be assessed in determining whether legislation violates a constitutional guarantee of freedom of religion.

80. I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity…

91. the theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of "Parliamentary intention". Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

92. As Laskin C.J. has suggested in R. v. Zelensky, 1978 CanLII 8 (SCC), [1978] 2 S.C.R. 940, at p. 951, "new appreciations" and "re-assessments" may justify a re-interpretation of the scope of legislative power. While this may alter over time the breadth of the various heads of power and thereby affect the classification of legislation, it does not affect the characterization of the purpose of legislation, in this case the Lord's Day Act.

65. In my judgment, this reasoning only supports a finding that the relevant time for scrutinising purpose is the date of enactment of the impugned statutory provisions. It is convenient to set out at this juncture further statements in the same case which articulate the broader principle that the laws of a secular State may not validly impose the beliefs of religious majorities on minorities. These remarks speak to not just the question of impermissible religious legislative purpose, but also impermissible religious effects. Dickson J went on to opine:

"94. *A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is*

one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

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

96. What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority."

66. I also accept the Applicants' submission that the Court must be astute to avoid favouring form over substance when analysing what the purpose of legislation actually is. Support for this proposition may be found in *R-v-Edwards Books and Art Limited* (1986) 2 SCR 713, where the Retail Business Act was actually found not to be a surreptitious attempt to reintroduce religious legislation. Dickson CJ defined the issue before the Canadian Supreme Court as follows:

"*61. What must be determined in the present appeals is whether the purpose of the Retail Business Holidays Act was to confer holidays on retail workers in common with the holidays enjoyed by other members of the community, or whether it was a carefully drafted colourable scheme to promote or prefer religious observance by historically dominant religious groups."*

Findings: are the revocation provisions of the DPA invalid because they were enacted for a religious purpose?

67. Despite the conviction with which this submission was advanced, I find that the revocation provisions are not invalid because they were made "solely" or even substantially for a religious purpose. Applying the principles established by the cases upon which the Applicants relied, it matters not that:

    - the traditional definition of marriage prior to *Godwin-v-DeRoche* was a religious definition;

    - the revocation provisions are derived from the "Furbert Bill" which I assume, for present purposes, was indeed promoted (but ultimately not enacted) for religious purposes; and/or that

    - the revocation provisions were proposed in 2017 in response to religious lobbying.

68. The undisputed evidence is that the revocation provisions formed part of a package partly pursuant to a pre-election promise made by the Progressive Labour Party. It was also essentially agreed that revocation provisions reflected what PMB had been campaigning for but that the majority of the DPA did not. It is clear from Out's own evidence that before the DPA Bill was tabled consultations took place between the Government and key stakeholders. Bearing in mind that the Furbert Bill was reintroduced to the House in 2017 after it had previously been passed by the House but not the Senate, I also accept that it was plausible that the Bill would have been passed again had the new Government not enacted its own legislation. (Whether or not it would have received the Governor's assent is for present purposes immaterial). I regard the crucial averment in the First Azar Affirmation in response to the Ferguson application as being the following which I can find no proper grounds to reject:

> "16… *The Government was advised that it was likely that the interest groups, the LGBT community would oppose the Act. The Government was similarly aware that it would likely be opposed by those who oppose any type of union between persons of the same sex. Bearing this in mind, as well as other potential ramifications, reputational and otherwise, the Government did its best to achieve a realistic compromise between the opposed camps.*"

69. I find that the revocation provisions were made for mixed purposes, which included the following motivations:

- fulfilling an Election promise to revoke same-sex-marriage;
- introducing a comprehensive scheme for same-sex relationships;
- satisfying the religious demands of opponents of same-sex opponents;
- meeting the expectations of the LGBT community;
- mitigating the adverse publicity for Bermuda flowing from what would obviously be a controversial reversal of this Court's decision in *Godwin and DeRoche*.

70. In my judgment it would be against the weight of the evidence to find that the revocation provisions were enacted solely or substantially for religious purposes. Clearer evidence would in my judgment be required to justify such a finding in the present circumstances where the Court is being asked to intrude into the privileged sphere of present day Parliamentary debates. Moreover, any such finding, lightly made, could have an unintended effect of making religious lobbyists anxious about the legality of exercising their own constitutionally protected freedom of conscience and freedom of expression rights. As far as Government-sponsored legislation is concerned, the secularity principle constrains the way in which a bill is promoted by the proposer of the legislation and also the conduct of public office-holders acting in their official capacity. The secularity principle is not intended to restrict the political freedoms of the ordinary citizen or organised lobbyists. This attack on the legality of the revocation provisions fails.

Breach of the Applicants' freedom of conscience rights; section 8 of the Constitution

<u>Section 8(1)</u>

71. Section 8(1) of the Constitution provides as follows:

> "*(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.*"

72. The rights protected may be summarised as follows:

(1) freedom to hold religious and non-religious beliefs;

(2) freedom to change such beliefs;

(3) freedom to manifest and propagate such beliefs in "*worship, teaching or practice*".

73. Section 8 of our Constitution is for present purposes in the same terms as section 22 of the Bahamian Constitution which was considered by the Privy Council in Commodore of the *Royal Bahamas Defence Force and others-v-Laramore* [2017] UKPC 13. That section was considered to be similar to article 9 of the ECHR and articles 1 and 2 of the Canadian Charter. The Judicial Committee, considering what the Bahamian equivalent of our section 8(1) meant (in a case concerning a Muslim soldier who objected to being on parade when Christian prayers were read) held that hindrance and interference embodied the same concepts and should be broadly interpreted. Lord Mance stated:

> "*11… article 9 of the European Convention and articles 1 and 2 of the Canadian Charter both contain outright conferrals or guarantees of freedom of conscience and religion, subject to necessary or justifiable limitations. Article 22 of the Bahamian Constitution operates, in contrast, by prohibiting any person being "hindered in the enjoyment of his freedom of conscience". The Board doubts whether this is a difference of substance or likely to have real effect in practice. The conferral or guarantee of freedom of conscience or religion constitutes a promise that such freedom will be protected, and not interfered with by, the state. The language of interference is commonly used when assessing whether article 9 of the Convention is engaged: see eg the citation from Lord Bingham's speech in the Denbigh High School case (para 9(vi) above). The promise in article 22 that "no person shall be hindered in the enjoyment of his freedom conscience" can readily be equated with the concept of interference. Such positive duties as the state may have to confer or guarantee freedom of conscience are more visible in article 9 of the Convention and articles 1 and 2 of the Charter, but it seems to the Board likely that similar duties would be held to arise implicitly under article 22 of the Constitution.*
>
> *12. The suggestion that article 22(1) deals in its first part with inner freedoms and in its second part with outward behaviour (appellants' point (ii)) is in the Board's view a misreading. The first part of article 22(1) defines the*

protection afforded. It covers both of what the European Court of Justice recently called "the forum internum, the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public": Case C-188/15 Bougnaoui v Micropole SA, para 30. The second part specifies various aspects of the freedom (of conscience), the enjoyment of which is by virtue of the first part not to be 'hindered'. By use of the word "includes" it specifies them on a non-exclusive, rather than an exclusive, basis."

74. I find that that section 8(1) does not exhaustively define the ways in which protected beliefs may be enjoyed. The Privy Council also held in the same case that whether or not a person's enjoyment of their freedom of conscience has been hindered has to be judicially assessed by reference to what the relevant beliefs mean to the applicant, not on a purely objective basis:

> "*14. The appellants' point (iv), that whether Mr Laramore was hindered in the enjoyment of his freedom of conscience must be judged objectively, requires further consideration of what the enjoyment of freedom of conscience involves. Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment, but it arises only once the nature of the individual's particular beliefs has been identified. This is not the place to address the relationship between faith and works, still less their relationship to salvation, in religious history or thought. In the United States the First Amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, …") has been seen as involving a dichotomy between two concepts - freedom to believe and freedom to act, it being said that "That the first is absolute, but, in the nature of thing, the second cannot be": Cantwell v Connecticut (1940) 310 US 296, 303-30. But beliefs feed into action (or inaction) as Chief Justice Berger noted in Wisconsin v Yoder (1972) 406 US 203, 220, where Amish parents had been convicted for their "actions" in refusing to send their children to the public high school. In Freedom of Religion under the European Convention on Human Rights (OUP, 2001), 75, Carolyn Evans quotes in this connection a statement by HA Freeman, A Remonstrance for Conscience (1958) 106 Pa L Rev 806, 826 that 'great religion is not merely a matter of belief; it is a way of life; it is action'. She adds (pp 75-76) that: 'Forcing a person to act in a way which is against the teachings of his or her religion or belief … is not irrelevant to the core of many people's religion or belief'. A requirement to take part in a certain activity may be incompatible with a particular person's conscience, however much his or her internal beliefs are otherwise unaffected and unchallenged.*" [Emphasis added]

75. At first blush, compelling a person to take part in an activity which is incompatible with their conscience and depriving someone of the opportunity to take part in an activity which is important to their beliefs are simply opposite sides of the same coin. As Lord Mance observed on behalf of the Privy Council in *Laramore:*

> "*22…Sir Michael Barnett CJ aptly quoted in this connection from the judgment of Dickson J in The Queen v Big M Drug Mart Ltd [1985] 1 RCS 295, 336:*
>
> > *'Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.'*
>
> *Big M Drug itself concerned a challenge by company charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act.* <u>*The freedom affected was that of persons prevented by the Act from working on a Sunday. Even that was held to constitute a relevant restriction by the court.*</u> *It is not necessary to go so far in the present case, but the first two sentences of the quotation from Dickson J's judgment are in the Board's view in point.*" [Emphasis added]

76. The Judicial Committee also in *Laramore* (at paragraphs 16-17) approved its earlier statement in *Olivier-v-Buttigieg* [1967] A.C. 115 at 136-137 that courts should be slow to dismiss complaints of interference with freedom of conscience rights on the grounds that the interference is too trivial to qualify for protection.

77. Finally, the Court of Appeal for Bermuda has considered what beliefs are entitled to protection under section 8(1). In *Attride-Stirling-v-Attorney-General* [1995] Bda LR 6 , Sir Alan Huggins JA (Astwood P and da Costa JA concurring) stated as follows (at page 5):

> "*We have mentioned that the policy of the Defence Act 1965 as it stands is to exempt only those who genuinely object to being required to do combatant duty. We do not think it is disputed by the Attorney General that recognition*

is now widely given to the fact that there are those who genuinely object to being compelled to serve in a military organisation in any capacity whatever. It is not for us to consider whether such an attitude is reasonable: it is one falls within section 8(1) of the Constitution…"

78. Without limiting the scope of genuine beliefs which warrant protection under section 8(1) in any way, the Court of Appeal for Bermuda merely seem to have signified that it will be easier to establish the genuineness of beliefs and that they deserve constitutional protection if similar beliefs have been recognised and protected elsewhere.

The relevant beliefs: do they qualify for protection?

79. The Applicants through their evidence seek protection for the following main categories beliefs:

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

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

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

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

80. The sincerity of such beliefs and the assertion by Out that many others share such beliefs was not disputed. Not only was same-sex marriage legally recognised in Bermuda following *Godwin-v-DeRoche*; it is recognised in various parts of the (primarily Western) world. The battle over ownership of the very idea of marriage in Bermuda and elsewhere is irresistible proof of the fact that a belief in marriage matters. It is self-evident that the beliefs (as regards same-sex marriage) qualify for protection; indeed the Azar Affirmations acknowledged the Applicants entitlement to hold their beliefs, contesting that the DPA infringed them in any meaningful way.

The hindrance complained of: are the hindrance complaints legally admissible?

81. The following conclusion is only ultimately self-evident and obvious after one pursues a somewhat painstaking legal analysis and is able to grasp what the protected rights of freedom of conscience mean in legal and practical terms. A law which prevents same-sex couples from marrying interferes with (or hinders) the ability of those who believe in a legally recognised marriage as an important institution to manifest that belief by participating in a legally recognised marriage ceremony. Those adversely affected include not simply LGBt persons, but their families, friends and/or their religious ministers as well. The hindrance is not in my judgment dependent upon the right to marry having been granted by this Court in May 2017. The hindrance complained of is merely aggravated by the fact that a hard won right is sought to be taken away by the revocation provisions of the DPA.

82. The best the Respondent could do, the Government having committed itself to an unhappy legislative compromise, was to raise a jurisdictional objection to the Applicants' complaints. The most coherent line of authority relied upon by the Crown, ECHR case law turned out to be, properly analysed, not relevant at all.

83. Article 12 of the ECHR, which has no corresponding provision in the Bermuda Constitution, provides as follows:

> "***ARTICLE 12***
>
> ***Right to marry***
>
> *Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*"

84. Accordingly, various decisions on the ECHR have held that because the right to marry is expressly dealt with by Article 12 which defines marriage as between a man and woman, it is not possible to complain of a breach of other articles in the Convention in relation to the denial of access to same-sex marriage. An attempt to complain of an interference with the right to family life (article 8) of same-sex couples by a Government not enacting same-sex marriage laws was rejected on this ground in *Schalk and Kopf-v-Austria* (2011) 53 E.H.R.R. 20 at page 633, and in *Oliari-v- Italy* [2015] ECHR 716. A complaint that freedom of conscience rights (article 9) were interfered with by denying a British Muslim the right to marry a girl under 16 was rejected by the Commission on the on the grounds that "*the right to marry guaranteed under article 12 is subject to the internal laws governing the exercise of this right*": *Khan-v- United Kingdom*, Application No. 11579/85, July 7, 1986. The ECHR has been incorporated into British domestic law, so British authorities applying such case law have no relevance to the Bermuda law position.

85. ECHR cases are only relevant and highly persuasive in terms of construing fundamental rights and freedoms under the Bermuda Constitution when the relevant ECHR provisions have been incorporated into Bermuda's Constitution. The Caribbean British Overseas Territories, for example, have adopted a version of article 12 of the ECHR which would make the cases relied upon by the Crown in the present case more relevant. The Cayman Islands Constitution Order 2009, for instance provides:

> "*14. (1) Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.*"

86. Mr Douglas, the Solicitor-General, impressively, did find one Canadian case which supported his central submission that it was legally impermissible to complain about a breach of freedom of conscience rights in relation to a denial of access to same-sex marriage. In *Halpern-v-Attorney-General of Canada and Others* (2003) 65 O.R.(3d) 161 the Ontario Court of Appeal dismissed the complaint of a church that its freedom of conscience rights were being infringed by being prevented from performing same-sex marriages. The Court held:

> "*[53] In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.*
>
> *[54] Even if we were to see this case as engaging freedom of religion, it is our view that MCCT has failed to establish a breach of s. 2(a) of the Charter. In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 at p. 336 S.C.R., Dickson J. described freedom of religion in these terms:*
>
> > *The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs [page178] openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.*
>
> *[55] Dickson J. then identified, at p. 337 S.C.R., the dual nature of the protection encompassed by s. 2(a) as the absence of coercion and constraint, and the right to manifest religious beliefs and practices.*

[56] MCCT frames its submissions regarding s. 2(a) in terms of state coercion and constraint. We disagree with MCCT's argument that, because the same-sex religious marriage ceremonies it performs are not recognized for civil purposes, it is constrained from performing these religious ceremonies or coerced into performing opposite-sex marriage ceremonies only.

[57] In Big M Drug Mart, the impugned legislation prohibited all persons from working on Sunday, a day when they would otherwise have been able to work. Thus, the law required all persons to observe the Christian Sabbath. In sharp contrast to the situation in Big M Drug Mart, the common law definition of marriage does not oblige MCCT to abstain from doing anything. Nor does it prevent the manifestation of any religious beliefs or practices. There is nothing in the common law definition of marriage that obliges MCCT, directly or indirectly, to stop performing marriage ceremonies that conform with its own religious teachings, including same-sex marriages. Similarly, there is nothing in the common law definition of marriage that obliges MCCT to perform only heterosexual marriages."

87. Mr Attride-Stirling invited the Court to ignore this decision because the quality of the reasoning was diluted by the main result in the case in which several individuals succeeded in establishing, as the applicants did in *Godwin and DeRoche*, that the common law definition of marriage discriminated against same sex couples on the grounds of sexual orientation. The practical result was that the church would be able to celebrate legally recognised same-sex marriages in any event. In my judgment the fact that the freedom of conscience issue was peripheral to the Court's main decision undermines the persuasive force of *Halpern* on the freedom of conscience issue. It is also distinguishable on two important grounds:

(a) the complaint of the Ontario church was a somewhat diluted version of the complaint here where legally recognised marriages have been possible and the effect of the impugned provisions of the DPA are to remove that recognition; and

(b) the beliefs said to be hindered in the present case are not simply a belief in marriage as a religious ceremony but marriage as a <u>legally recognised</u> civil ceremony as well.

88. I do not find Halpern to be persuasive for all of the above reasons. Further, the overly restrictive approach in *Halpern* is generally inconsistent with the generous approach commended by the Privy Council in this area of the law in *Royal Bahamas Defence Force and others-v-Laramore* [2017] UKPC 13. Following this approach, I accordingly decline to find that those Applicants (like the Applicants Ferguson and Jackson) who merely complain of the loss of the right to marry when they wish to do

so have suffered a hindrance with their rights too trivial for the law to take cognizance of, which I would otherwise have been inclined to do. Further and in any event, the issue of trivial interference (for instance the fact that the DPA permits same-sex couples to enter into domestic partnerships and have them "blessed" in religious ceremonies of their choosing) goes to the extent of interference with beliefs, and in no way supports a finding that the protected beliefs have not been interfered with at all. This is properly viewed as an aspect of the issue of the proportionality of the State's interference. Proportionality logically falls to be determined in the context of considering whether or not the Crown can establish a justification for a *prima facie* interference with fundamental rights, a burden the Respondent in the present case expressly elected not to seek to discharge.

89. The effect of the DPA's revocation provisions is to force persons wishing to achieve legal recognition for their same-sex relationships to enter into a new State-mandated union described as a "domestic partnership", irrespective of whether or not such an institution is consistent with their beliefs. Prior to the DPA coming into force, same-sex couples who believed in the institution of marriage could manifest their beliefs by participating in legally recognised marriage ceremonies. The suggestion that legal recognition of marriage can be wholly detached from the religious or secular concept of marriage for the purposes of this analysis is simply untenable. PMB's campaign to preserve marriage to conform to their religious beliefs was not merely about preserving the autonomy of churches, which was never seriously in doubt. It was primarily about seeking to persuade the State to not extend <u>legal protection</u> to marriages which contravened PMB's beliefs. Just as PMB and its members genuinely believe that same-sex marriages should <u>not</u> be legally recognised, the Applicants and many others equally sincerely hold opposing beliefs. It is not for secular institutions of Government, without constitutionally valid justification, to direct the way in which a citizen manifests their beliefs.

90. The Applicants do not seek the right to compel persons of opposing beliefs to celebrate or enter into same-sex-marriages. They merely seek to enforce the rights of those who share their beliefs to freely manifest them in practice. Persons who passionately believe that same-sex marriages should not take place for religious or cultural reasons are entitled to have those beliefs respected and protected by law. But, in return for the law protecting their own beliefs, they cannot require the law to deprive persons who believe in same-sex marriage of respect and legal protection for their opposing beliefs. As Dickson J pointed out in *Re Drug Mart Ltd* [1985] 1 S.C.R 295:

> "*In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here,*

it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to."

91. These complaints have been for me 'blindsiding' arguments which have had to be approached on the basis of first principles. My starting assumption was that because sexual orientation was not a prohibited ground of discrimination in the Constitution itself (section 12), no valid constitutional complaint about the DPA could be raised. I have in the final analysis found that there is no fundamental legal objection to a complaint of a breach of section 8(1) (freedom of conscience) rights being made in relation to a failure of the State to provide legal protection for same-sex marriage and/or a decision of the Legislature to remove legal protections granted by this Court.

92. It is difficult to imagine parallel instances where a similar intrusion on freedom of conscience would in current prevailing social conditions in Bermuda be likely to arise. However it is easy to conjure up colourful hypothetical scenarios which serve to illustrate the principle at play, including introducing new Sabbath day observance legislation and prohibiting the use of wine in communion rituals, which would potentially be subject to constitutional challenges. Perhaps the best analogy is in the domain of sex discrimination, because (a) discrimination on the grounds of sex is, like sexual orientation, only prohibited by the Human Rights Act and not by section 12 of the Constitution, and because (b) there is a similar tension between modern notions of gender equality and older religious notions of gender hierarchy. The following scenario is `to my mind instructive:

> *A consortium of churches lobby Parliamentarians on religious grounds to support a campaign to put mothers back into the home by (a) most broadly, providing that the primacy provisions of the Human Rights Act do not apply to gender discrimination and the field of employment at all, and (b) more narrowly, imposing punitive payroll tax rates for all companies which hire mothers and reducing payroll taxes for companies who reach prescribed targets for male hiring rates. A private members bill is introduced on explicitly religious grounds. The bill proposes to amend the Human Rights Act to provide that the prohibition against discrimination on the grounds of sex does not apply to the sphere of employment at all and to amend the Payroll Tax Act to give incentives to employers to hire men and dis-incentivize employers from hiring mothers.*
>
> *The bill attracts surprisingly broad support. Government introduces its own legislation, after consulting with the consortium of churches, employers and women's rights organisations, and does not amend the Human Rights Act so that employers can discriminate against women on the grounds of sex generally. The Government legislation <u>does</u> implement the tax changes the churches sought. Aggrieved women and employers who believed in gender equality would potentially be able to complain that their freedom of conscience*

rights under section 8(1) of the Constitution have been hindered and the amendments to the Human Rights Act should be struck down as unconstitutional.

Justification

93. The Crown made no attempt to justify any interference which was established. It is unclear what justifications could have been advanced. Section 8(5) of the Constitution provides:

> "(5) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required—*
>
> > *(a) in the interests of defence, public safety, public order, public morality or public health; or*
> >
> > *(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited interference of persons professing any other religion or belief,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*"

94. Section 8(5)(b) makes it clear that each group of believers is entitled to defend their right to practise their own beliefs and not to force their beliefs on others. This reinforced the Applicants' broad complaint that the revocation provisions, which reflected the beliefs of others, were interfering with their ability to practise their beliefs in an impermissible way.

Conclusion on section 8(1)

95. The Applicants have succeeded in establishing that the DPA's revocation provisions contravene their rights of freedom of conscience protected by section 8(1) of the Bermuda Constitution by depriving them of the opportunity to participate in legally recognised same-sex marriages.

Discrimination on the grounds of creed; section 12 of the Constitution

Section 12

96. Section 12 of the Constitution, so far as is material to the present applications, provides as follows:

> "(1) *Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.*
>
> *(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
>
> (4) *In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*" [emphasis added]

97. The Applicants contended that "creed" should be defined broadly to include non-religious beliefs while the Respondent commended a narrower religious-based definition of creed. This controversy was somewhat academic as the Applicants' case, viewed as a whole, to a significant extent complained about an interference with a religious belief in marriage. My personal linguistic bias is towards the Crown's narrower definition of creed. At first blush, a creed signifies to me a religious belief. However, adopting such a definition is not a legally available way of construing the term "creed" in its constitutional context for three important reasons:

> (1) adopting a narrow definition of "creed" would run counter to the guiding principles of interpretation of language defining the scope of fundamental rights. In *Minister of Home Affairs -v- Fisher* [1980] AC 319, the broader meaning of "child" including children born out of wedlock was preferred to the narrower legally and religiously inspired meaning of legitimate child;

(2) having found that the Constitution is a secular one, it would be inconsistent and illogical to conclude that section 12 only prohibited discrimination on the grounds of religious beliefs and did not prohibit discrimination on the grounds of other beliefs (unless they qualified as "political opinions");

(3) while it is true that section 12(3) does not repeat the word "conscience" which is used in section 8, it is to my mind clear that "creed" broadly corresponds to beliefs protected by section 8. This is because subsection (8) of section 12 provides as follows:

> "*(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by section 7, 8, 9, 10 and 11 of this Constitution, being such a restriction as is authorised by section 7(2)(a), 8(5), 9(2), 10(2) or 11(2)(a), as the case may be.*"

98. Section 8(5) applies to both religious and non-religious beliefs which are protected by section 8(1) of the Constitution. If interference with section 12 rights can be justified by reference to section 8(5), it is far more logical to infer that "*creed*" embraces all rights protected by section 8(1) rather than only the religious ones. The issue of justification, however, is not raised by the Respondent in the present case. The only issue for determination is (assuming that the Applicants' beliefs in a legally recognised form of same-sex marriage qualify for protection under section 8(1) of the Constitution) whether or not the revocation provisions of the DPA discriminate against the Applicants (and people holding similar beliefs) on grounds "*wholly or mainly attributable to*" their creed or beliefs. Discrimination is clearly and simply defined as treatment which is differential and which either:

(a) disadvantages protected groups to which an applicant belongs; or

(b) confers advantages on other groups to which an applicant does not belong.

The discrimination complained of

99. At first blush it was easier to accept that the DPA clearly discriminated on the grounds of sexual orientation, which is not a ground protected by section 12 at all,

than that the discrimination was attributable to creed or belief. Mr Pettingill evocatively submitted that same-sex couples being permitted to participate in legally recognised domestic partnerships but not marriages was akin to people of colour in Bermuda being permitted to enter the theatre but required to sit in special seats. It was not an answer for the Crown to say that being allowed into the theatre meant that no discrimination was taking place. Section 12 defines discrimination in a way which focusses on the effects of laws and Executive action, and is not to any meaningful extent concerned with the purposes of the laws.

100. No reasonable court properly directing itself could possibly find that providing differing types of legal recognition for same-sex and heterosexual couples was not differential treatment in general terms. Mr Attride-Stirling encouraged the Court, in considering whether or not the differential treatment was wholly or mainly attributable to creed, a more nuanced question, to have regard to the advantages conferred by the DPA's revocation provisions. Viewed through this lens, the advantages conferred on those who believe in traditional marriage become crystal clear:

(a) PMB campaigned for Parliament to reverse the effects of *Godwin and Deroche* on religious grounds;

(b) the Furbert Bill was introduced on explicitly religious grounds (even if it also was grounded in traditional Bermudian cultural beliefs);

(c) the revocation provisions gave effect to the desired reversal of same-sex marriage, and (although the Government's purposes in enacting them were mixed ones), their enactment (it is a notorious fact) were understandably seen by their religious supporters (PMB and overseas supporters or sympathisers) as a vindication of their beliefs;

(d) the revocation provisions gave believers in traditional marriage an advantage which took the form of the State solely recognising a form of marriage which that clearly identified group of believers adhered to. Because the essence of the content of the new provisions was that it reflected the preferred group's religious (and/or cultural) beliefs in how the institution of marriage should be legally defined, this group was clearly preferred on grounds which were wholly or mainly attributable to their beliefs;

(e) the disadvantage side of the coin was for my part most vividly demonstrated by the Applicants Hayward-Harris, her Church and Campbell, whose sole complaint was that the ability of members of their creed to celebrate legally recognised marriages, a right which had been taken away. However noble (or politically-motivated) the Government's

motives in achieving a "compromise" may have been, reversing *Godwin and DeRoche* through the DPA was (in terms of legislative effects) wholly or mainly about a supposedly secular Parliament privileging majority beliefs about how marriage should be legally defined over minority beliefs;

(f) reference was also made in the course of argument to the fact that certain religious minorities have persuaded Parliament to enact special legislation giving legal protection to their religious marriage ceremonies. This is further confirmation of the fact that there is nothing unusual about the suggestion that the legal protections given to a religious marriage ceremony matter. The desire for secular/State legal protection and recognition to be given to a particular type of marriage cannot in all cases be separated from the purely religious dimensions of such beliefs.

101. In my judgment it is impossible to avoid distinguishing between the position of (a) those Applicants whose main complaint is that the revocation provisions deny them the opportunity enter into same-sex marriages, and (b) those Applicants (Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr Gordon Campbell) who complain solely about the impairment of their ability to manifest their beliefs by celebrating same-sex marriages. Out falls into the same category to the extent that it seeks to represent non-LGBT persons (such as family members or ministers of religion) who are likewise affected. The discrimination which category (b) Applicants complain of is very clearly "*wholly or mainly attributable to*" their creed, as the definition in section 12(4) of the Constitution requires. Category (a) Applicants (Mr Ferguson, Out and Ms Jackson) clearly are hindered in their ability to manifest their beliefs as I have found in relation to their freedom of conscience complaints. But the discrimination they experience is mainly because of their sexual orientation (but for which there would be no impediment to their beliefs as they would be able to access heterosexual marriage on equal terms). In cases where the ground of discrimination was slightly more ambiguous, a broad and purposive construction of section 12(4) might perhaps entitle the Court to take a more generous view of whether or not the operative ground of discrimination was a constitutionally protected or unprotected ground[11].

102. I find, having rejected the Respondent's unsupportable contentions that the Constitution in effect gives the State *carte blanche* to define the institution of marriage without being required to have regard to freedom of conscience rights, that the section 12 rights of Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the

[11] In the hypothetical case described in paragraph 92 above, aggrieved women and women's groups whose main complaint was arguably gender discrimination would have no valid case under section 12; however, employers complaining that their belief in gender equality in the workplace was being interfered with would have a potentially valid section 12 case.

Vision Church of Bermuda and Dr Gordon Campbell have been interfered with in a legally impermissible way. The Respondent's submissions may well accurately reflect the position under the ECHR at the public international law level, and indeed in those jurisdictions (like the British Overseas Territories in the Caribbean and Britain itself) where article 12 of the ECHR has been incorporated into domestic law. But I am satisfied the State does not have such latitude under Bermuda domestic law; because marriage is <u>not</u> defined in our Constitution as being between a man and a woman and/or as a freestanding constitutionally protected right. As Baroness Hale observed in *Re G; Re P and others* [2009] 1 AC 173, dealing with a parallel ground of discrimination:

> "*122. …It is, as Lord Hope has pointed out, a particular duty of the courts in a democracy to safeguard the rights of even unpopular minorities against unjustified discrimination: therein lies the balance between majority rule and the human rights of all. As I said in Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557 , para 132, 'democracy values everyone equally even if the majority does not'. If, therefore, we have formed the view that there is no objective and reasonable justification for this difference in treatment, it is our duty to act compatibly with the Convention rights and afford the appellants a remedy.*"

<u>Justification</u>

103. The Respondent, as already noted, did not attempt to justify any discrimination which occurred, abandoning initial tentative reliance on the following provisions of section 12:

> "*(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—*
>
> *…*
>
> *(c) for the application, in the case of persons of any such description as is mentioned in subsection (3) of this section (or of persons connected with such persons) of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description…*"

104. However, section 12(4)(c) in my judgment provides confirmation of two important points about the scope of section 12. Firstly, it does potentially apply to

marriage as forming part of a person's creed or beliefs. Secondly, the fact that one cannot complain of discrimination in relation to a person's "*personal law*" in relation to marriage is an indication of the importance the Constitution places on freedom to enjoy and practise individual beliefs. Rather than permitting the State to prefer some beliefs over others, section 12(4)(c) is designed to facilitate diversity in beliefs. Religious majorities cannot complain if Parliament creates special statutory regimes adding to (rather than subtracting from) the number of faiths whose religious observances are accorded the dignity and respect which comes from official State recognition. The Jewish Marriage Act 1946, the Baha'i Marriage Act 1970, and the Muslim Marriage Act 1984, are examples of legislation which is facilitated by section 12(4)(c) of the Constitution.

105. These Acts do not so much as provide advantages to members of those faiths as they ensure equality. They do not, it is important to note, intrude on the rights of persons who hold different beliefs. The authority conferred by section 12(4)(c) to make special provision for marriage for the benefit of persons whose personal law is different to that of the law of the land confirms this central point. Minorities can complain under section 8 and/or section 12 that their beliefs are being interfered because the law of the majority reflects the majority's beliefs, but not the minority's beliefs. The Bermuda Constitution, therefore, clearly favours expanding freedom of religion and other beliefs, not restricting it.

Summary

106. For the above reasons, the Applicants have established that the revocation provisions of the DPA discriminate against them (and others who share similar beliefs) contrary to section 12 of the Bermuda Constitution.

Other contraventions relied upon

107. Mr Pettingill abandoned his client's complaints about an alleged breach of sections 1(c) and 13 (deprivation of property) of the Constitution. He all but formally abandoned the complaints under section 3 (cruel and degrading treatment), and section 9 (freedom of expression), but clung valiantly to section 10 (freedom of association). These remaining complaints are not in my view sufficiently meritorious to warrant formal determination in light of my conclusions on the claims under section 8 and 12. While the submission that section 1(a) of the Constitution provides freestanding protection to a right of "due process" was seriously arguable, the facts of the present case did not seem to me to engage the principle contended for.

Conclusion

108. Bermuda's Constitution is a secular one designed to require the State to give maximum protection for freedom of conscience. It only permits interference with such freedoms in the public interest for rational and secular grounds which are permitted by the Constitution. The present decision vindicates the principle that Parliament cannot impose the religious preferences of any one group on the society as a whole through legislation of general application. The Respondent offered no justification for interfering with the protected rights, and limited its opposition to the present applications to contending that no protected rights had been infringed. As the Privy Council observed in *Royal Bahamas Defence Force and others-v-Laramore* [2017] UKPC 13, courts should be slow to conclude that interference with freedom of conscience rights are, in the eyes of the beholder, too slight to warrant judicial intervention. In the same case it was also stated:

> "14…*In Freedom of Religion under the European Convention on Human Rights (OUP, 2001), 75, Carolyn Evans quotes in this connection a statement by HA Freeman, A Remonstrance for Conscience (1958) 106 Pa L Rev 806, 826 that 'great religion is not merely a matter of belief; it is a way of life; it is action'. She adds (pp 75-76) that: "Forcing a person to act in a way which is against the teachings of his or her religion or belief … is not irrelevant to the core of many people's religion or belief". A requirement to take part in a certain activity may be incompatible with a particular person's conscience, however much his or her internal beliefs are otherwise unaffected and unchallenged.*"

109. One side of the freedom of conscience coin is that as a general rule no one can be compelled to participate in activities which contravene their beliefs. The other side of the same coin is that the State cannot use the legislative process to pass laws of general application which favour some beliefs at the expense of others. The present case was aggravated by the fact that the DPA took away legal rights which had only recently been recognised by the Courts applying the supremacy provisions expressly conferred by an Act of Parliament (the Human Rights Act 1981).

110. It ought in fairness to be conceded, however, that the Government only acted as it did having been placed between the proverbial 'rock and a hard place'. The Government also acted fully confident that, based in large part on European Convention on Human Rights case law (which I myself previously assumed had relevance) it had free reign to delineate the scope and content of the legal protections accorded to same-sex relationships. Presumably it was informed by this same 'conventional wisdom' that the Governor signified his assent to the DPA Bill.

111. Be that as it may I have found, not without some difficulty, that whatever the position at the public international law level may be, the Bermuda constitutional law position is different. The Applicants were entitled to complain that their beliefs in same-sex marriage as an institution which deserves legal protection have been hindered and that those same beliefs have been treated by the DPA in a discriminatory manner. They have established that those protected fundamental rights have been contravened in a way which qualifies for judicial protection because Parliament's legislative power may not validly be used to override the fundamental rights protected in Chapter I of the Constitution.

112. The Applicants are accordingly entitled to a declaration that the provisions of the DPA purporting to reverse the effect of this Court's decision in *Godwin and DeRoche -v-Registrar-General and others* [2017] SC (Bda) Civ (5 May 2017) are invalid because they contravene the provisions of section 8(1) of the Bermuda Constitution and (in respect of Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr Gordon Campbell) section 12(1) as well. The impugned provisions of the DPA interfere with the rights of those who believe (on religious or non-religious grounds) in same-sex marriage of the ability to manifest their beliefs by participating in legally recognised same-sex marriages (as parties to a marriage or as religious officiants). The impugned provisions of the DPA discriminate against the holders of such belief by according them access to legal protection for same-sex marriages on different terms to the equal access conferred by *Godwin and DeRoche*. The revocation provisions also discriminate by giving believers in traditional marriage the advantage of State sanction for their beliefs while withholding such approval from 'non-believers'. It was not disputed that the Applicants' beliefs were sincerely held and deserving of constitutional protection. It was merely argued on behalf of the Crown that no admissible interference with those rights had occurred, an argument which this Court, for the reasons set out above, has firmly rejected.

113. I will hear counsel as to the form of the final Order and as to costs.

Dated this 6th day of June 2018 _____

IAN RC KAWALEY CJ