21/79

IN THE PRIVY COUNCIL No. 4 of 1978

ON APPEAL

FROM THE COURT OF APPEAL OF BERMUDA

BETWEEN:

THE MINISTER OF HOME AFFAIRS and
MINISTER OF EDUCATION — Appellants

- and -

COLLINS MACDONALD FISHER and
EUNICE CARMETA FISHER — Respondents

RECORD OF PROCEEDINGS

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Appellants

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Respondents

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INDEX OF REFERENCE

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

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THE MINISTER OF HOME AFFAIRS AND MINISTER OF EDUCATION — Appellants

- and -

COLLINS MACDONALD FISHER AND EUNICE CARMETA FISHER — Respondents

RECORD OF PROCEEDINGS

No. 1

NOTICE OF MOTION

In the Supreme Court

No.1
Notice of Motion
In the matter of an application by the Applicant for leave to apply for Prerogative Order of Certiorari and Mandamus
17th November 1976

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
1976: No. 248

B E T W E E N :-

COLLINS MACDONALD FISHER - Applicant

and

THE MINISTER OF LABOUR AND IMMIGRATION - First Respondent

and

THE MINISTER OF EDUCATION - Second Respondent

TAKE NOTICE THAT This Honourable Court will

In the Supreme Court

No.1
Notice of Motion
In the matter of an application by the Applicant for leave to apply for Prerogative Order of Certiorari and Mandamus

17th November 1976
(cont'd)

be moved on Monday, the 22nd day of November 1976 at 10.00 o'clock in the forenoon or so soon thereafter as Counsel may be heard on the hearing of an Application by COLLINS MACDONALD FISHER for an Order that the Order of the Minister of Labour and Immigration dated the 22nd day of October, 1976 refusing CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART, SAMUEL ISAIAH TAIT and COLIN MACDONALD FISHER, permission to reside in Bermuda; and the Order of the Minister of Education and the said Minister of Labour and Immigration that the said individuals be removed from suitable education at recognized schools in these Islands BE REMOVED into the Supreme Court of Bermuda for an Order for Leave to issue Writs of Certiorari and Mandamus for the purpose of their being quashed UPON the grounds set forth in the Statement on Application for leave to Apply for a Prerogative Order for Issue of Writs of Certiorari and Mandamus served herewith, filed in this Cause in the Supreme Court of Bermuda on the 17th day of November, 1976.

AND FURTHER TAKE NOTICE THAT upon the hearing of this Motion, the Applicant will use the Affidavits of COLLINS MACDONALD FISHER, EUNICE CARMETA FISHER and JULIAN ERNEST SINCLAIR HALL, sworn herein on the 17th day of November 1976

Sd: Julian E.S.Hall
of Counsel

TO: The Minister of Labour and Immigration;

The Minister of Education;

c/o The Attorney General,
Melbourne House,
Parliament Street,
Hamilton,
Bermuda.

SERVED by Messrs. Cox & Wilkinson, Milner House, Parliament Street, Hamilton, Bermuda.
Attorneys for the Applicant.

No. 2

In the Supreme Court

No.2
In the matter of an application by the Applicant

17th November 1976

STATEMENT ON APPLICATION FOR LEAVE TO APPLY FOR A PREROGATIVE ORDER FOR THE ISSUE OF WRITS OF CERTIORARI AND MANDAMUS

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1976: No. 248

B E T W E E N :-

COLLINS MACDONALD FISHER - Applicant

and

THE MINISTER OF LABOUR AND IMMIGRATION - First Respondent

and

THE MINISTER OF EDUCATION - Second Respondent

1. The name and description of the Applicant is COLLINS MACDONALD FISHER, of Parsons Road, Pembroke Parish, in the Islands of Bermuda. The Applicant is a Handyman and Bartender.

2. The reliefs sought are :

(a) Order of Certiorari and Mandamus to remove into this Honourable Court the Order of the Minister of Labour and Immigration dated the 22nd October, 1976 refusing CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART, SAMUEL ISAIAH TAIT and COLIN MACDONALD FISHER permission to reside in Bermuda; and the Order of the Minister of Education and the said Minister of Labour and Immigration that the said individuals be removed from suitable education at recognized schools in these Islands for the purpose of their being quashed.

(b) A declaration that the said CHERYL

In the Supreme Court

No.2
In the matter of an application by the Applicant

17th November 1976 (cont'd)

ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART, SAMUEL ISAIAH TAIT and COLIN MACDONALD FISHER each and all of them, are deemed to possess and enjoy Bermudian Status.

And that all necessary and consequential directions be given.

3. The grounds upon which the said relief is sought are as follows :-

(i) That the said Order was in excess of the jurisdiction of the Minister of Labour and Immigration;

(ii) That the said Order contravenes the provisions of S.11 of The Bermuda Constitution Order, 1968;

(iii) That the said Order contravenes the provisions of The Education Act, 1954.

Dated this 17th day of November, 1976.

(Sgd) Julian E.S.Hall

Julian E.S. Hall
of Counsel to the
Applicant

SERVED by Messrs. Cox & Wilkinson, Milner House, Parliament Street, Hamilton, Bermuda. Attorneys for the Applicant.

No. 3

ORIGINATING MOTION

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
1976: No. 251

In the Supreme Court

No.3
Originating Motion

24th November 1976

B E T W E E N :

EUNICE CARMETA FISHER (Claiming as mother and next friend of CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT) - Appellant

and

THE MINISTER OF LABOUR AND IMMIGRATION - Respondent

TAKE NOTICE that The Supreme Court of Bermuda, Sessions House, Hamilton in the Islands of Bermuda will be moved on Friday the 3rd day of December 1976 at 10.00 o'clock in the forenoon or so soon thereafter as Counsel may be heard, by Counsel on behalf of the Appellant for the following relief:

1) An order reversing and quashing the Order of the Minister of Labour and Immigration dated the 22nd day of October 1976 that CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT do leave Bermuda;

2) A declaration that the said CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT are deemed to possess and enjoy Bermudian Status by virtue of the provisions of the Bermuda Immigration and Protection Act, 1956;

3) A declaration that the said CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY

O'NEIL STUART and SAMUEL ISAIAH TAIT belong to Bermuda by virtue of the Bermudian Constitution Order, 1968;

4) Costs

5) Such further or other relief as may be just;

AND FURTHER TAKE NOTICE that the grounds of this appeal are:

a) That, in making the said order, the Minister of Labour and Immigration acted in want or in excess of his jurisdiction;

b) That the said order contravenes the provisions of the Bermuda Constitution Order, 1968;

c) That the said CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT each and all of them are deemed to possess and enjoy Bermudian Status by virtue of the provisions of the Bermuda Immigration and Protections Act, 1956;

d) That the said CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART, and SAMUEL ISAIAH TAIT each and all of them belong to Bermuda by provisions of the Bermuda Constitution Order, 1968;

e) That the said Order hinders the said CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT in their freedom of movement.

AND FURTHER TAKE NOTICE that the Appellant appeals against the whole order.

Dated 24th day of November, 1976.

(Sgd) Julian E.S.Hall

Julian E.S. Hall
of Counsel to the Appellant
whose address for service
is c/o Messrs. Cox and
Wilkinson, Milner House,
Parliament Street, Hamilton,
Bermuda

TO: The Minister of Labour and
Immigration
c/o The Attorney General
Hamilton,
Bermuda.

SERVED by Messrs. Cox and Wilkinson, Barristers and Attorneys, of Milner House, Parliament Street, Hamilton, Bermuda - Attorneys for the Appellant.

In the Supreme Court

No.3
Originating Motion

24th November 1976
(cont'd)

No. 4

JUDGMENT OF THE HONOURABLE MR. JUSTICE SEATON

In the Supreme Court

No.4
Judgment of the Hon. Mr.Justice Seaton

6th January 1977

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION 1976 No. 248

Fisher and Fisher -v- Ministers of Immigration Labour and Education

J U D G M E N T

This is apparently the first case in which the exercise of the powers conferred by the Immigration and Protection Act, 1956, for the imposition of restrictions on the residence of persons within Bermuda has been challenged in court. In consequence there has been a certain amount of innovation in the procedural forms that have been used to seek redress.

In Civil Action No.248 of 1976 the Applicants, Collins MacDonald Fisher and Eunice Carmeta Fisher his wife (claiming as mother and next friend of Cheryl Angela Morgan, Valentine Denver Morgan, Fitzroy O'Neil Stuart and Samuel Isaiah Tait), sought

leave by originating motion to apply for a prerogative order for the issue of writs of certiorari and mandamus against the Minister of Labour and Immigration and Minister of Education respectively on the grounds that the said Ministers had ordered the removal of the above-named children from school and refused permission for them to reside in these Islands.

Alternatively, the Applicants sought a declaration that the four children above-named are deemed to possess and enjoy Bermuda status. This application was brought on for hearing on 22nd November, 1976 and resulted in this Court issuing orders nisi on 3rd December 1976 to the Ministers concerned to show cause why the proceedings in re the above-named children should not be removed into this Court and why the said children should not be permitted to receive suitable education at recognized schools in these Islands. In response there have been filed affidavits by Allen Fred Kowalchuk, a Customs officer, Janet Marlene Lambert, Assistant Chief Immigration Officer, Kenneth Augustus Richardson, Acting Permanent Secretary in the Ministry of Education, and Julian Ernest Sinclair Hall, of Counsel for the Applicants.

In the meantime Civil Action No.251 of 1976 was brought by originating motion in the form of appeal by Eunice Carmeta Fisher on behalf of the four above-named children against a decision of the Minister of Labour and Immigration on a question as to the residence of the children. Specifically the relief sought by the Appellant was:

(1) An order reversing and quashing the order of the Minister of Labour and Immigration dated the 22nd October, 1976, that the four children do leave Bermuda;

(2) A declaration that the four children are deemed to possess and enjoy Bermudian status by virtue of the provisions of the Bermuda Immigration and Protection Act, 1956; and

(3) A declaration that the said children belong to Bermuda by virtue of the Bermuda Constitution Order, 1968.

Despite the disparate forms of relief sought, each of these Actions appeared to raise the same basic question. Also common to both of these Civil Actions was the prayer for relief in the form of a declaration as to the status of the four above-named children. Accordingly with the consent of learned Counsel for the parties the two actions have been heard together.

The prayers that have been made for declarations raise issues sufficient to dispose of this case but I should say a few words regarding procedure for the guidance of any persons in the future who may have to apply to this Court. For the protection of fundamental rights and freedoms under the Constitution, the procedure that is simplest is that laid down in Order 112 of the Rules of the Supreme Court, i.e. by originating summons. If the matter were urgent, this Court would have jurisdiction to grant an interim injunction. See Jaundoo v. A.G. of Guyana (1971) A.C. 972, 985. Because the Immigration Act contains a built-in procedure for an appeal to His Excellency the Governor in Council, that would be ordinarily the appropriate step that should be taken by a person aggrieved by a decision or order of the Minister of Labour and Immigration. Should the Governor-in-Council's decision on the appeal be adverse or should an aggrieved person consider that an appeal is unlikely to secure for him the redress he desires, this Court is available to him. Whether it was appropriate in the present case to proceed by way of the prerogative writs of certiorari and mandamus is, however, an academic question on which it is unnecessary to pronounce.

The Minister of Education no longer debars the children, if he ever did, from attending school in Bermuda. The sole question is whether or not the children are entitled to remain in Bermuda. This question

can be answered by giving the declarations sought in respect of the rights of the children under the Bermuda Immigration and Protection Act 1956 and under the Bermuda Constitution Order 1968 respectively.

Despite some disagreement on certain points, the parties are agreed to most of the facts of the case. The Applicant Collins MacDonald Fisher was born on the 11th October, 1945 in Pembroke Parish, Bermuda of a Bermudian mother. He is in possession of Bermudian status. He lives at Parsons Road, Pembroke Parish, Bermudaand is employed as a handyman and bartender. The Applicant Eunice Carmeta Fisher was born on 20th May 1944 in St.Thomas, Jamaica. She is a citizen of Jamaica and a British subject. On the 6th May 1972, the Applicants were married and they have been living together here in Bermuda since 30th July 1975. Mrs. Fisher is accordingly by virtue of S.16(2) of the Bermuda Immigration and Protection Act, 1956 (herein called "the Immigration Act") deemed to possess and enjoy Bermudian status.

Before the marriage of the Applicants, the four children on whose behalf these actions were brought were born in St.Thomas, Jamaica; they are all under 18 years of age and were all born illegitimate. As is the custom in Jamaica and at their mother's request, they assumed as from their respective dates of birth the surnames of their putative fathers. A child of the marriage, Colin MacDonald Fisher (hereinafter called Colin Fisher Jr.) was born in St. Thomas, Jamaica on 22nd September, 1972 and is now aged 4 years. He was originally included amongst the persons on whose behalf these actions were brought but since it is conceded by the Attorney General that he possesses Bermudian status, the actions insofar as they concern him, have been discontinued.

On 31st July, 1975 Mrs. Fisher arrived with the five children at the Civil Air Terminal, Kindley Field, Bermuda on an airplane flight from Jamaica. The Bermuda Immigration Arrival Cards, required to be filled out by all incoming passengers, indicated that the nationality of the children was "Jamaican", the purpose of

entry of the children was "residence", and that their date of departure from Bermuda was "open". (Exhibit Nos. A.F.K.1, A.F.K.2, A.F.K.3 and A.F.K.4). The children were permitted to enter Bermuda by Mr. Kowalchuk, who was then acting as an Immigration Officer. By virtue of S.38 of the Education Act, 1954, as they were of statutory school age and lawfully resident here they became entitled to free education in the primary and secondary schools of these Islands.

Immediately after their arrival, the children were placed in schools in Bermuda and duly received instruction until approximately one month after the beginning of the school year1976 - 1977. At that time Cheryl Angela Morgan and Valentine Denver Morgan were attending the St. George's Secondary School when the principal, Mr. Pearman, advised Mr. and Mrs. Fisher that the Minister of Labour and Immigration had instructed him to refuse further permission for the said children to remain at his school. As Mrs.Fisher believed that similar instructions had been sent to the Central School which Fitzroy O'Neill Stuart and Samuel Isaiah Tait attended, she simultaneously withdrew these children from school. Some time prior to this, the Minister of Labour and Immigration had issued a request to the Ministry of Education to verify the residence qualification of all children registered at their schools who were not born in Bermuda.

In August 1975, Mrs. Fisher had written a letter to the Ministry of Labour and Immigration (Exhibit No. J.M.L.1) asking permission for her mother and all of her children to reside in Bermuda. This application, according to the affidavit of Mr. Richardson, Acting Permanent Secretary, "was dealt with by the Minister in a normal procedural manner." No reply was received to this letter until after Mrs. Fisher, disturbed over the interruption of her children's schooling and worried about their residence and welfare, had made two visits to

the Ministry of Labour and Immigration and Mr. Fisher also had gone to inquire about the application. According to the affidavit of Mrs. Lambert, she became aware of the undated letter of Mrs. Fisher on 15th August 1975. Mrs. Lambert brought the letter to the attention of the Minister and as a result of his direction, on 22nd October, 1976, she wrote a letter to Mrs. Fisher (Exhibit No. E.C.F.8) as follows :

> "I am directed to acknowledge the receipt of your undated letter wherein you request permission for your mother, Gwendolyn Robinson and children Angela Morgan, Valentine Morgan, Fitzroy Stewart, and Samuel Tait and Colin Fisher, Jr. to reside here and have to inform you, that the Minister of Labour and Immigration regrets that he is unable to grant your request. I have also been instructed to inform you that the above named persons must leave these Islands on or before the 30th October, 1976."

On 27th October, 1976 Messrs. Smith, Barnard & Diel, attorneys who were then acting on behalf of the Applicants, wrote a letter to the Ministry of Labour and Immigration (Exhibit No. JESHX) stating that Mr. and Mrs. Fisher had registered on the Adopters' Register the four children (whose status is in dispute in the present case) and that their application for their adoption would proceed without delay. The letter then requested to be advised whether the four children might continue their schooling and whether "your Department will grant your specific permission" for these children to reside in Bermuda until the application for their adoption had been heard by the Courts. To this letter the Assistant Chief Immigration Officer replied on 9th November, 1976 (Exhibit No. JESHY) that the Minister of Labour and Immigration was unable to accede to the request and repeating that the said children were asked to leave Bermuda on or before 30th October, 1976.

Aggrieved by the treatment he received from the Ministry of Labour and Immigration, Mr.

Fisher on 23rd October 1976 wrote a letter to His Excellency the Governor (Exhibit No.CMF2) requesting his assistance in getting his "stepchildren" to be put back in school. To this letter, His Excellency replied by letter dated 8th November, 1976 (Exhibit No.CMF3) as follows :

> " I must acknowledge your letter of the 23rd October but point out to you that the matter about which you wrote to me comes entirely within the authority of the Minister of Labour and Immigration, and I have no means whatever to interfere with this authority.
>
> I have in fact asked the Immigration Inspector concerned for a report on the case, but I am afraid there is nothing I can do to help you.
>
> Yours sincerely,
> (Sgd) EDWIN LEATHER)
> Governor and Commander in Chief. "

Mr. Fisher instructed new attorneys, Messrs. Cox & Wilkinson, who telephoned the Ministry of Labour and Immigration on 15th November, 1976 to advise the Minister to this effect and were informed by Mr. Perry Johnson, the Immigration Inspector, that the Minister was not disposed to reconsider his position and decision on the ground that the children were born illegitimate. Messrs. Cox & Wilkinson then wrote a letter on 17th November, 1976 (Exhibit No. JESH1) to the Ministers of Labour and Immigration and of Education claiming that the said children were deemed to possess and enjoy Bermudian status by virtue of the provisions, inter alia, of the Immigration Act, and giving notice of intention to seek relief through the Courts. On the same day Civil Action No.248 of 1976 was commenced, and this was followed on 24th December, 1976, by Civil Action No. 251 of 1976.

From the facts set out above it is clear

that the Applicants were applying for permission for the four children to reside in Bermuda and also to attend the schools; that the Minister of Labour and Immigration purported to refuse them permission to reside and that his request for the co-operation of the Ministry of Education in verifying the residence qualification of non-Bermudian born students triggered the reactions which resulted in the children's withdrawal from schools. The Minister justified his action on the children having been born illegitimate, relying on the provisions of the Immigration Act. It will be convenient therefore to examine its relevant provisions.

S.25 declares that it is unlawful for any person other than one possessing Bermudian status or a bona fide visitor to remain or reside in these Islands without the specific permission of the Minister of Labour and Immigration. It is obvious that the children in this case were not bona fide visitors so one must see whether they possess Bermudian status or, as claimed by their attorneys in the letter, Exhibit No. JESH1, they should be deemed to possess and enjoy Bermudian status. In this connection S.16(4) states as follows :

> "Any person -
> (a) who is a British subject; and
> (b) is a legitimate or legitimated child, or a step-child or child adopted in a manner recognized by law, of a person who has Bermudian status; and
> (c) who is under the age of twenty-one years,
>
> shall for the purposes of this Act, be deemed to possess and enjoy Bermudian status. "

It is not disputed that the four children are British subjects and under the age of twenty-one years, thus fulfilling the requirements of sub-paragraphs (a) and (c) above. But as regards (b) above, they were admittedly born illegitimate and have not been legitimated or adopted in any manner recognized by law,

although adoption proceedings have allegedly been initiated. Can it be said that they are the step-children of Mr. Fisher, a person who has Bermudian status? There is no definition of either "child" or "step-child" in the Immigration Act. Nor had an earlier Act the Immigration Act, 1937 contained such definitions. However the omission was remedied by the Immigration Act, 1937, Amendment Act, 1938, which contained the following provision :

> "-(1) For the removal of doubt it is hereby declared -
>
> (a) that the expression 'child' in paragraph (e) of subsection (1) of section five of the Immigration Act, 1937, does not include an illegitimate child;
>
> (b) that the expression 'step-child' in that paragraph is to be construed accordingly. "

Learned Counsel for the Applicants submitted that the definitions in the Immigration Act, 1937, are applicable to that Act alone; that one must construe the words "child" and "stepchild" according to common, everyday usage; and that we have come a long way in our attitudes and concepts since 1937. If, Counsel argued, today one were to ask the question: "What do you call a human animal of tender years?" The answer must be, whether or not it is illegitimate: "A child."

It would seem that at common law the principle of construing the word "child" to mean "legitimate child" has a hoary tradition. In the case of The Queen v. The Inhabitants of Totley (1845) 7 Q.B. 596, Paupers had been removed to the settlement of G.B. as their father, on an examination stating that G.B. died on May 1st, 1843, and his wife the previous day, leaving eight children, some of whom were the paupers; and that the said children were residing with their said parents, G.B. and his said wife, until their deaths as aforesaid. On appeal, and objection taken that the examination did not

show that the paupers were legitimate, and therefore did not warrant the order of removal, the sessions decided in favour of the appeal, subject to the opinion of the Court of Queen's Bench on the question, whether or not the objection was fatal. In holding that the legitimacy appeared sufficiently to warrant the order of removal, Lord Denman C.J. stated as follows :

> "The question here submitted to us being whether the examination was or was not sufficient to warrant the order of removal, no one accustomed to legal language can have a doubt on the subject. The law does not contemplate illegitimacy. The proper description of a legitimate child is "child". (p.600)"

In some statutes the word "child" is defined to mean "legitimate child", as in the British Nationality Act 1948, S.32(2).

However, in other statutes, it may mean an illegitimate child, as e.g. in the Matrimonial Causes Act 1973 (U.K.) S.52: '"child" in relation to one or both of the parties to a marriage, includes an illegitimate or adopted child of that party or, as the case may be, of both parties.' The same definition of "child" appears in our Matrimonial Causes Act 1974.

Whether or not the word "child", when it is not expressly defined in a statute, includes an illegitimate child would seem to depend upon the intention of the Legislature insofar as that intention may be inferred from the purpose of the legislation and other provisions of the particular statute. With respect to the Immigration Act, legislators must be deemed to have known the history of the earlier legislation, the Immigration Act 1937, which contained provisions inter alia relating to the domicile of persons including the following provision in S.5:

> "Subject to the provisions of this section, a person shall be deemed to be domiciled for the purposes of this Act in these Islands who is a British subject, and -

(a) who was born in these Islands or of parents who, at the time of his birth, were ordinarily resident in these Islands; or.....

(b) who is a child or a step-child or an adopted child having been adopted in a manner recognized by law...under the age of sixteen years, of a person to whom any of the foregoing paragraphs applies."

Persons domiciled or deemed to be domiciled in Bermuda had certain rights or privileges with respect inter alia to residence and employment in these Islands under the 1937 Immigration Act. There was at the same time enacted the Deportation (British Subject) Act, 1937, which inter alia gave power to the Governor-in-Council to make deportation orders but this Act provided for the non-applicability of its provisions to British subjects domiciled in Bermuda and defined persons deemed to be domiciled in these Islands in terms identical to S.5 of the Immigration Act, 1937.

The Immigration Act, having repealed both of the 1937 Acts before-mentioned, made provision for Bermudian status as a basis for the rights or privileges of inter alia, residence and employment in Bermuda, created status as a basis for enjoyment of rights in addition to or other than domicile and included provisions for deportation from these Islands. The legislators must be deemed to have known of the amending Act of 1938, the effect of which was to restrict the rights and privileges of children and stepchildren to those born legitimate. The legislators have included in Part VII of the Immigration Act provisions authorizing the Governor to make deportation orders. However, by S.100 this power was made non-applicable to persons possessing Bermudian status and certain others in the following words:

"Nothing in this Part shall apply or

have effect so as to authorize or empower the Governor to make a deportation order in respect of a person -

(a) who possesses and enjoys Bermudian status; or.....

(c) who, although not deemed to possess and enjoy Bermudian status, is the child (including, in the case of a woman, her illegitimate child) or step-child, or adopted child, under the age of twenty-one years of a person who both possesses Bermudian status and is ordinarily resident in these Islands. "

May one infer that the express mention in sub-paragraph (c) of S.100 above, of the phrase "including in the case of a woman, her illegitimate child" indicates that its omission in sub-paragraph (e) of S.16(4) was deliberate? This would not, however, dispose of the matter because in 1968 there was established a Constitution for Bermuda which makes detailed provision for the protection of fundamental rights and freedoms. According to the Bermuda Constitution Order 1968, which was made under the Bermuda Constitution Act 1967, every person in Bermuda is entitled to the fundamental rights and freedoms of the individual (i.e. the right, whatever his race, place of origin, political opinions, colour, creed or sex) but subject to respect for the rights and freedoms of others and for the public interest. Among the fundamental rights and freedoms of the individual is freedom of movement. By virtue of S.11(1) of the Bermuda Constitution Order 1968 (hereinafter referred to as "the Constitution"), no person is to be deprived of the right to move freely throughout Bermuda, to reside in any part thereof, or to enter or leave here, and he has immunity from expulsion from the territory. However according to S.11 (2)(d) nothing contained or done under the authority of any law is inconsistent with that principle to the extent that the law in question makes provision for the imposition of. restrictions on movement or residence within

Bermuda of any person "who does not belong to Bermuda."

The four children involved in the present case may claim the protection of this Court from any restriction on their freedom of movement unauthorized by law by virtue of S.15(1) of the Constitution which provides as follows :

> "(1) If any person alleges that any of the foregoing provisions..... has been, is being or likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to (sic) the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction -
>
> (a) to determine any question arising in the case of any person which is referred to it in pursuance of sub-section (3) of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate....."

Learned Counsel for the Applicants submitted that the said four children are entitled to protection of their freedom of movement, i.e. their right to reside in these Islands because they "belong to Bermuda." For this submission Counsel relied on S.11(5) of the Constitution, which provides as follows :

> "For the purposes of this section, a person shall be deemed to belong to Bermuda if that person -
>
> (a) possesses Bermudian status - .....
>
> (c) is the wife of a person (who possesses Bermudian status) not living apart from such person under a decree of a court or a deed of separation; or

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

As Mr. Fisher possesses Bermudian status he belongs to Bermuda; as Mrs. Fisher is the wife of Mr. Fisher then she also belongs to Bermuda; and as the four children are the children of Mrs. Fisher, then the said children equally belong to Bermuda, so runs the argument of learned Counsel for the Applicants. This is contested, however, by the learned Solicitor-General who submitted that the word "child" in sub-paragraph (d) of S.11(5) above-quoted refers only to children born legitimate. In effect, the learned Solicitor-General would ask the Court to say, in terms similar to those used by Lord Denman C.J. over one hundred and thirty years ago in R -v- Inhabitants of Totley:

"The law does not contemplate illegitimacy. The proper description of a legitimate child is 'child'."

It is noted that the definition of a person who "shall be deemed to belong to Bermuda" in S.11(5) of the Constitution is not identical with that of a person who shall, for the purposes of the Immigration Act, "be deemed to possess and enjoy Bermudian status" by virtue of S.16(4) of the Immigration Act. For one thing, the age of such person is three years younger in the constitutional provision. Another difference is that the Constitution omits the words "legitimate or legitimated" which qualify the word "child" in S.16(4) of the Immigration Act. Learned Counsel for the Applicants urged the Court to infer that the omission was a conscientious desire to reflect the liberal attitude of the present age on the question of illegitimacy. The learned Solicitor-General was of the view that the reference to the age of eighteen years in S.11(5) of the Constitution was due to oversight and suggested that, despite the omission of the qualifying adjectives, if the

word "child" were to be interpreted differently by the Court in S.11(5) of the Constitution and in the S.16(4) of the Immigration Act, it would lead to ridiculous results.

It will be appropriate at this stage to consider the significance of the term used in the Constitution: "deemed to belong to Bermuda". As is well-known, Bermudians form part of that Commonwealth (formerly the British Empire) based upon common allegiance to the Crown and of protection at home and abroad by the Crown. The British Nationality Act, 1948 recognizes that some of the component parts of the Commonwealth are independent and some like Bermuda, are non-self governing. Persons born in Bermuda are styled British subjects and, although we carry passports issued in Bermuda, have a common citizenship with persons born in the United Kingdom as well as other parts of the Commonwealth, which if they are independent, such as Barbados and Jamaica, would also have a citizenship of their own.

As it has become customary for persons born in various other parts of the Commonwealth to wish to travel and work in Bermuda a method was devised of permitting such persons to have a degree of close association with Bermuda, if they wished to make it their home. Hence the rights or privileges granted by the Immigration Act, 1937, to persons deemed to be domiciled in these Islands who were British subjects. The Immigration Act, which repealed the Immigration Act of 1937, provided for the dual concepts of: "British subject", which embraced all persons who were such by virtue of any provision of the British Nationality Act, 1948, and "Bermudian status", which embraced native born Bermudians whose parents were born or domiciled here. Bermudian status could be acquired by non-native Bermudians by application to and grant by the Board of Immigration. This status carried with it, incidents which persons domiciled in these Islands had possessed under the 1937 Immigration

Act, i.e. the freedom of abode and the freedom to work in Bermuda.

A non-native Bermudian has by virtue of the Immigration Act no absolute or automatic right to be granted Bermudian status. The economic situation of these Islands, the character of the applicant and the potential advantage of his continued residence are among the matters to which the Board will have regard.

Certain persons, whether or not they have made application for and been granted certificates of Bermudian status, are deemed to possess it for the purposes of the Immigration Act. These include British subjects who are the spouses and children (as e.g. Mrs. Fisher and Colin Fisher Jr.) of persons who possess Bermudian status. One may consider that the Constitution provides for the retention and protection of all of the incidents of British nationality, Bermudian status and domicile in these Islands insofar as these are fundamental rights and freedoms of the individual.

It must be borne in mind that the Constitution is based to a large extent upon, and draws its inspiration from, the United Kingdom where although there is no written Constitution, none would deny that fundamental rights and freedoms do exist. The acquisition of status of a citizen of the United Kingdom and Colonies is provided for in the British Nationality Act, 1948. An applicant may make application on behalf of himself and any of his minor children, provided, however, that these children are legitimate (by virtue of the definition in S.32(2)). Learned Counsel for the Applicants suggested that the reason for such definition in the British Nationality Act is the desire to exclude large numbers of illegitimate applicants from former colonies; and that we in Bermuda would not countenance such a policy.

Had it been contended that the Constitution makes a distinction between native-born Bermudian children who are legitimate and those

who are illegitimate, this Court would have found such a distinction difficult to comprehend. For the legitimacy or illegitimacy of a native-born Bermudian is regarded as irrelevant in determining certain rights and obligations, that may be considered as basic e.g. to vote or to report for military service. Nevertheless the Court would have upheld it, if it could clearly be shown to exist, because policy is determined by the Legislature not by the Court. But no such distinction was, indeed, suggested by the Solicitor-General. Any person born here possesses status, whether legitimate or illegitimate, by virtue of S.18(1) of the Immigration Act, provided at least one of his parents at the time of his birth possessed Bermudian status and both of his parents were domiciled in these Islands. All persons who possess Bermudian status must be deemed to "belong" here; so must the wives of such persons as long as they live together in accordance with S.11(5)(c) of the Constitution.

It is eminently a humane and reasonable policy that families be kept together and this must be the rationale for the provision in S.11(5)(d) that the stepchildren and adopted children of persons possessing Bermudian status must be deemed to "belong to Bermuda". Such adopted children must be deemed to "belong to Bermuda" even if they are only the adopted children of a wife of a person possessing Bermudian status. Is it harsh and unreasonable to require that, if they are the children or stepchildren of persons possessing Bermudian status or of the wives, they should be born legitimate? It is said that Canada possesses no such requirement and by its Constitution ignores the question of illegitimacy in respect of the children of persons applying for the status of citizenship. Be that as it may, this Court is bound to give to the words used in the Constitution the construction which they would ordinarily bear, unless there is some other construction that is indicated.

I have been referred to the Shorter Oxford

Dictionary (1947) which defines "step-son" and "stepdaughter" as a son or daughter "by a former marriage of one's husband or wife."

I have also noted the following definitions in the Brittanica World Language Edition of Funk & Wagnalls Standard Dictionary:

> "Child: 1. An offspring of either sex of human parents; a son or daughter. 2. A young person of either sex at any age less than maturity, but most commonly one between infancy and youth ..... 7 . Law. A legitimate son or daughter."
>
> "Step- : combining form. Related through the previous marriage of a parent or spouse but not by blood: stepchild."

The latter Dictionary is apparently an American publication of 1960. Although its authenticity and relevance may perhaps be less in these Islands, it does, I think, recognize and reflect a generally accepted distinction between the biological and legal definitions of the word "child".

I would wholeheartedly concur with learned Counsel for the Applicants that the trend of opinion in most sphere of life is towards narrowing or ignoring the distinction between legitimacy and illegitimacy of birth.

With great respect, however, I have come to the conclusion that the proper construction of the word "stepchild" in S.16(4)(e) of the Immigration Act is that given in the above-mentioned Dictionaries. Nor can I find any indication that the words "child" and "stepchild" in S.11(5) of the Constitution were intended to have any meaning except that which they ordinarily bear in legal language, i.e. they do not include persons who are illegitimate. Accordingly I find that the four children who are the subject of the present case are not deemed to possess and enjoy Bermudian status

nor are they deemed to belong to Bermuda.

The Respondents must pay to the Applicants one half of their costs of the hearing of these motions in this Court.

(Sgd) E.E.Seaton

6/1/77 E.E. SEATON

In the Supreme Court

No.4
Judgment of the Hon. Mr. Justice Seaton

6th January 1977 (cont'd)

No. 5

NOTICE OF APPEAL

In the Court of Appeal

No.5
Notice of Appeal

26th January 1977

IN THE COURT OF APPEAL

Civil Appeal No.2 of 1977

B E T W E E N :

EUNICE CARMETA FISHER (claiming as mother and next friend of CHERYL ANGELA MORGAN VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT)

Appellant

- and -

THE MINISTER OF LABOUR AND IMMIGRATION

Respondent

TAKE NOTICE that the Applicant being dissatisfied with those parts of the decision of the Supreme Court more particularly stated in paragraph 2, of the Supreme

Court contained in the judgment of the Supreme Court, dated the 6th day of January, 1977, doth hereby appeal to the Court of Appeal upon the ground set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

AND the Appellant further states that the names and addresses of the persons directly affected by the Appeal are those set out in paragraph 5.

2. PARTS OF DECISION OF THE SUPREME COURT COMPLAINED OF :-

(a) That part of the decision in which the learned judge held that CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT (hereinafter referred to as the "said Children") are not "deemed to possess and enjoy Bermudian Status" within the meaning of the Bermuda Immigration and Protection Act, 1956;

(b) That part of the decision in which the learned judge held that the said children do not "belong to Bermuda" within the meaning of s.11(5) of the Bermuda Constitution Order, 1968.

3. GROUNDS OF APPEAL :-

(1) That the learned judge erred in holding that the said Children are not the "stepchildren" of COLLINS MACDONALD FISHER within the meaning of s.16(4)(e) of the Bermuda Immigration and Protection Act, 1956

(2) That the learned judge erred in holding that the said children are not the "stepchildren" of COLLINS MACDONALD FISHER within the meaning of s.11(5) of the Bermuda Constitution Order, 1968.

(3) Further, or in the alternative to (1) and (2) above, that the learned judge erred in holding that the word "stepchild" does not include persons who are illegitimate.

(4) That the learned judge erred in holding that the said children are not, each of them, a "child" of the Appellant within the meaning of s.11(5)(d) of the Bermuda Constitution Order, 1968

(5) Further, or in the alternative to (4) above, that the learned judge erred in holding that the word "child" does not include persons who are illegitimate

4. RELIEF SOUGHT FROM THE COURT OF APPEAL:-

(a) An Order reversing and quashing the Order of the Minister of Labour and Immigration dated 22nd October 1976, that the said children do leave Bermuda

(b) A declaration that the said children, each and all of them, are deemed to possess and enjoy Bermudian Status within the meaning of the Bermuda Immigration and Protection Act, 1956

(c) A declaration that the said children, each and all of them "belong to Bermuda" within the meaning of s.11 of the Bermuda Constitution Order, 1968

5. PERSONS DIRECTLY AFFECTED BY THE APPEAL :-

(1) Eunice Carmeta Fisher
c/o Cox and Wilkinson
Barristers and Attorneys,
Hamilton 5, Bermuda

(2) The Minister of Labour and Immigration,
c/o The Attorney General,
Hamilton 5, Bermuda

DATED this 26th day of January 1977

In the Court of Appeal

No.5
Notice of Appeal
26th January 1977
(cont'd)

(Sgd) Julian E.S.Hall

Julian E.S.Hall
of Counsel to the Appellant

SERVED by Messrs. Cox and Wilkinson of Milner House, Parliament Street, Hamilton 5, Bermuda, Attorneys for the Appellant

In the Court of Appeal

No.6
Judgment of the Hon. Mr.Justice Hogan, P
15th July 1977

No. 6

JUDGMENT OF THE HONOURABLE MR. JUSTICE HOGAN, P.

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL NO: 2 of 1977

IN THE MATTER of The Bermuda Immigration and Protection Act, 1956 and
IN THE MATTER of an Appeal against a decision of the Minister of Labour and Immigration on a question as to the residence of CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT and
IN THE MATTER of The Supreme Court Act 1905 and the Bermuda Constitution Order, 1968

Between

EUNICE CARMETA FISHER
(claiming as mother and next friend of CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT)

Appellant

and

THE MINISTER OF LABOUR AND IMMIGRATION

Respondent

CIVIL APPEAL NO: 3 of 1977

IN THE MATTER of an Application by COLLINS MACDONALD FISHER and EUNICE CARMETA FISHER for Leave to Apply for Prerogative Orders of Certiorari and Mandamus and
IN THE MATTER of Orders dated the 22nd October, 1976, made by the Minister of Labour and Immigration and of Education in Bermuda, and
IN THE MATTER of the Bermuda Immigration and Protection Act, 1956 and the Education Act, 1954, and
IN THE MATTER of The Bermuda Constitution Order, 1968

Between

COLLINS MACDONALD FISHER and EUNICE CARMETA FISHER (Claiming as mother and next friend of CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT)

Appellant

and

THE MINISTER OF LABOUR AND IMMIGRATION

Respondent

and

THE MINISTER OF EDUCATION

CIVIL APPEAL NO: 5 of 1977

THE MINISTER OF LABOUR AND IMMIGRATION and THE MINISTER OF EDUCATION Appellants

and

COLLINS MACDONALD FISHER and EUNICE CARMETA FISHER (claiming as mother and next friend of CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT) Respondent

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J U D G M E N T of Hogan, P.

In these consolidated appeals, Eunice Carmeta Fisher as mother and next friend and Collins MacDonald Fisher as next friend

(hereinafter jointly called "the appellants") sued on behalf of four illegitimate children of Mrs. Fisher claiming that they had Bermudian status and belonged to Bermuda. The respondent to appeals numbers 2 and 3 and appellant to appeal number 5 is the Minister of Labour and Immigration.

The salient facts are not in dispute. Collins MacDonald Fisher was born in Bermuda on the 11th October, 1945, and has Bermudian status. Eunice Carmeta Fisher was born on the 20th May, 1946, in Jamaica. She was a citizen of Jamaica and a British subject. They were married on the 6th May, 1972, and have been living in Bermuda since the 30th July, 1975. At the time of the marriage Mrs. Fisher had the four illegitimate children already mentioned, all of whom took the names of their putative fathers and all of whom are British subjects under the age of eighteen.

Although the matters at issue are of considerable importance the arguments on this appeal have been confined within a narrow compass. They were directed to the proper construction of the word "stepchild" in s.16(4) of the Bermuda Immigration and Protection Act and of the words "child" and "stepchild" in s.11(5) of the Constitution.

The learned judge held in the court below that these words in the two provisions have the meaning normally attached to them in legal language and do not include persons of illegitimate birth. Against that decision the appellants have appealed, whilst the respondent has appealed against an order that he should pay half the appellants' costs.

The core of counsel's argument on behalf of the appellants is that society now takes a more permissive and less censorious attitude to illegitimacy and this approach should be adopted in construing the Immigration Act which was enacted in 1956 and the Constitution Order which followed some twelve years later.

On the other side, the tradition seems very firmly established that in legislation "child" means legitimate child unless the contrary is

indicated.

> "The law does not contemplate illegitimacy. The proper description of a legitimate child is 'child'". R. v. Totley (Inhabitants) (1845) 7 Q.B. Lord Denman C.J. at p.600

The same view was expressed by Pollock C.B. in Dickinson v. North Eastern Railway 33 L.J. Ex.91 when he said :-

> "The word 'child' in an Act of Parliament always applies exclusively to a legitimate child".

But in Woolwich v. Fulham (1906) 2 K.B. 246, 247, Vaughan Williams L.J. said :-

> "That is only a prima facie meaning, and in the case of each statute a wider meaning may be given, which would include illegitimate children if the effect is more consonant with the object of the statute."

This passage came under observation in the House of Lords in the more recent case of Galloway v. Galloway (1955) 3 A.E.R. 429, where Viscount Simonds said (p.432) :-

> "This is not, I think, an entirely happy phrase, for it appears to suggest that the court begins its consideration of the statute with an impartial mind towards either meaning. It is, moreoever, capable of leading and, I think, has led the court to find the policy of the Act in its own predilections of a later age rather than in the provisions of the Act itself."

Viscount Simonds was in the minority on the matter for decision but not, it would seem, in his reservations on the passage. Viscount Radcliffe, who was amongst the majority, said (p.436) :-

> "I take leave to doubt whether the test which meaning is 'more consonant' with the object of the statute is in all

respects a satisfactory guide to decision, for I think it a very vague one."

Probably the test is best expressed in the words of Lord Tucker, also amongst the majority, (p.439) :-

> "....I do not think it necessary to refer to the authorities which established beyond question that, prima facie, the words 'child' or 'children' in an Act of Parliament mean a legitimate child or legitimate children, and that illegitimate children can only be included by express words or necessary implication from the context."

The word "stepchild" has not received the same weight of judicial attention and we have not been referred to any case which has pronounced on whether normally it would extend only to stepchildren who were legitimate at birth. Logically this would appear to be the correct approach as otherwise one would be drawing into the category of stepchildren classes who would be excluded from that of children because they were illegitimate.

Moreover, the dictionary definitions to which we have been referred confine the expression to children of a former marriage and none has been mentioned that would extend it more widely. In fact counsel has said that he could find none.

It seems, therefore, that we should look to the context to see if there is anything that would displace the ordinary meaning. Section 16(4) of the Immigration Act reads :-

> "16. (4) Any person -
>
> (a) who is a British subject; and
>
> (b) is a legitimate or legitimated child, or a step-child or child adopted in a manner recognized by law, of a person who has Bermudian status; and

(c) who is under the age of twenty-one years,

shall, for the purposes of this Act, be deemed to possess and enjoy Bermudian status."

The appearance of the word "legitimate" is explained by the presence of the word "legitimated" and the appearance of the latter indicates that the legislature did not think the use of the word "child" alone, without any accompanying expression, would have included an illegitimate child. This would appear to negative any argument that the legislature in 1956 was adopting a more "permissive" view of what the word "child" in a statute should be taken to mean. It also makes it extremely unlikely that, having adopted this traditional and more restrictive view of the word child, it should then, in almost the same breath, use the word stepchild in a new and more expansive sense which would extend to illegitimate stepchildren privileges that are denied to illegitimate children. I cannot think this was the intention. Indeed, far from the immediate context requiring a departure from the traditional meaning, it appears to require adherence to it and I see nothing in the wider context of the Act inconsistent with that view.

The absence from the 1956 Act of the definitions introduced into the 1937 Immigration Act by a 1938 amendment does not appear to carry the matter any further. The definition declared "for the removal of doubt" that the expression "child" and "stepchild" in a specified paragraph of the 1937 Act did not include those who were illegitimate. It is the type of provision which, whilst allaying doubt in one area, tends to create it in another. Its absence from the later Act would appear to indicate that the legislature thought the later Act left no room for doubt and, in this, I would be disposed to agree.

I turn then to s.11 of the Constitution

which, so far as relevant, reads :-

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

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

.....

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

.....

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

(a) possesses Bermudian status;

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

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

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

The provision is not identical in form with that of s.16(4) of the Immigration Act and the argument based on the words "legitimate or legitimated" does not apply to it. But the remaining arguments are no less cogent here and are not weakened by the decision of the authors of the Constitution not to spell out the position of legitimated children.

If, as Lord Tucker said in Galloway (supra) in 1955, it is established beyond question that in an Act of Parliament the word "child" means a legitimate child and illegitimate children can only be included by express words or necessary implication from the context, the same approach should be adopted to the Constitution which is enacted under the authority of an Act of Parliament of the United Kingdom.

There are certainly no express words and no where in the Constitution can I see anything which would require a departure from the meaning normally attached to the word "child" or "stepchild" in legislation of this kind.

Moreover, I would question the construction of s.11(1) which says that the subsection does not merely prohibit interference with the rights to which it refers but actually creates those rights as well.

This does not seem to me to follow from the terms of the section and I would contrast the language with that, say, of the European Convention on Human Rights. The latter deals with this subject in the Fourth Protocol, Article 2 of which, in so far as relevant, reads as follows :-

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country including his own.

3. No restrictions shall be placed on the exercise of those rights otherwise than....."

I must confess that I recoil almost instinctively from a construction of s.11(1) which says that it gives to everyone in the world the right to enter Bermuda subject only to the limitations imposed by other legislation which is restricted in scope.

In the view which I take of the meaning of the words "child" and "stepchild" it is not necessary to pronounce any concluded view on the matter but, as at present advised, I would have thought that what s.11(1) does is to prohibit, except within prescribed limits, any interference with freedom of movement, defining this expression as the totality of the rights conferred, aliunde, to move freely throughout Bermuda, to enter it etc.

For the reasons indicated I would hold that in this section also the words "child" and "stepchild" do not include an illegitimate child or stepchild.

Consequently I would dismiss the appeals, numbers 2 and 3 of 1976, lodged by the appellants against the judgment in the court below.

The respondent in his cross-appeal complains that, having been successful in the lower court, he was wrongly ordered to pay one half of the appellants' costs. No reason was given for that order and I can see none. It seems to me that the ordinary practice of the costs following the event should have been observed. However, the respondent has indicated that he would be satisfied if no order was made as to costs in the court below and he was simply given the costs of the appeals. Although this appears to be less than he is entitled to get, since he asks for no more I would order accordingly and direct that there will be no order as to costs in the court below but that the appellants will pay the respondent's costs of the appeals and the cross-appeal.

(Sgd) Michael Hogan

MICHAEL HOGAN, P.

DATED: 15th July, 1977

No. 7

JUDGMENT OF THE HONOURABLE
MR. JUSTICE GEORGES, J.A.

In the Court of Appeal

No.7
Judgment of the Hon. Mr. Justice Georges, J.A.
15th July 1977

IN THE COURT OF APPEAL FOR BERMUDA

J U D G M E N T of Georges, J.A.

The issue in these appeals is whether the four illegitimate children of Eunice Carmeta Fisher possess and enjoy Bermudian status or can be said to belong to Bermuda so that the Minister of Labour and Immigration has no power to order them to leave this country.

The facts are not contested and need only the briefest review. Mrs. Fisher, née Robinson, is a Jamaican national. On May 6, 1972, she married the appellant, Collins McDonald Fisher, at the Registrar General's office in Hamilton. Mr. Fisher is born in Bermuda and has Bermudian status. At the date of her marriage Mrs. Fisher had four illegitimate children -none of them by Mr. Fisher. They were born in Jamaica and are Jamaican nationals. It would appear that they lived in Jamaica until July, 1975, when the appellant, Eunice Carmeta Fisher, brought them to Bermuda. They were admitted as residents, their departure date being stated to be open.

As a result of a check on non-Bermudians at a school attended by one of the children their status and right to remain in Bermuda came under question and proceedings were commenced. Collins Fisher applied by way of motion for orders of certiorari and mandamus directed to the Ministers of Education and of Labour and Immigration and requiring that their orders that the children be removed from schools and that they be refused permission to live in Bermuda be brought into court to be quashed. Eunice Carmeta Fisher, claiming as mother and next friend of the four children,

filed an originating motion asking for a rescission of the order made by the Minister of Labour that the children leave Bermuda and declarations that the children possessed and enjoyed Bermudian status by virtue of the provisions of the Bermuda Immigration and Protection Act (referred to herein as "the Act") 1956 and that they belonged to Bermuda by virtue of the Bermudian Constitution Order 1968.

These proceedings were heard together and this is an appeal from the order of Seaton J. refusing the remedies. The appeals were argued before us together but no issue now arises as regards placing the children in schools since the children are, in fact, in schools and they have not been obstructed from attending. There is also an appeal by the Attorney General from the learned judge's decision on costs.

S.16(4) of the Act provides -

"(4) Any person -

(a) who is a British subject; and

(b) is a legitimate or legitimated child or step-child or child adopted in a manner recognised by law of a person who has Bermudian status; and

(c) who is under the age of twenty-one years,

shall for the purposes of this Act, be deemed to possess and enjoy Bermudian status." .

The children as nationals of Jamaica are British subjects and they are clearly under 21. It has been argued that though born out of wedlock the children can be said to be step-children of Collins McDonald Fisher. It is conceded that the dictionary meaning of the word "step-child" is the child of a spouse by a former marriage but it is urged that the court should have regard to the realities of the Bermudian situation in which a large

percentage of children are born out of wedlock and define the word as meaning the child of a spouse whether born in or out of wedlock. In the context of the section I find the argument unacceptable. The draftsman has specifically qualified the word "child" with the adjective "legitimate". This makes it abundantly clear that the relationship with which he is concerned are legitimate relationships. Although, gramatically, the adjective "legitimate" does not qualify the word "step-child" because of the interposition of the word "a", the intention of the draftsman to include only legitimate relationships remains clear. Any other interpretation would create manifest absurdities. For example, if each spouse to a marriage had illegitimate children prior to the marriage, the children of each spouse, on the interpretation contended for by the appellant, could qualify for status as step-children of the spouse who was not their natural parent but could not qualify as children of their natural parent. The introduction of the word "step-child" would thus have become a devious method of making ineffective the adjective "legitimate" qualifying "child": this could not have been intended. The children, therefore, do not qualify for status as step-children of Collins McDonald Fisher.

The alternative claim of "belonging to Bermuda" by virtue of the Bermuda Constitution Order 1968 must now be considered.

The Constitution of Bermuda which is Schedule 2 to the Bermuda Constitution Order contains a chapter providing for the Protection of Fundamental Rights and Freedoms of the Individual. Among the rights protected is that of Freedom of Movement. S.11 states -

> "11 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout

Bermuda, the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion therefrom."

Subsection 11(2)(c) however permits the making of laws making provisions -

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

Subsection 5 reads -

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

(a) possesses Bermudian status;

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

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

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

It should be noted at once that the category of persons who are "deemed to belong to Bermuda" under the Constitution is wider than the category of persons who have Bermudian status. Bermuda is not yet independent and cannot have a citizenship of its own. Bermudian status in that sense is akin to citizenship of an independent country. Apart from citizenship

arising from place of birth, citizenship is usually transmitted to legitimate children through their father (though increasingly in the interest of non-discrimination mothers are permitted to pass on their citizenship to their legitimate children) and in the case of illegitimate children through their mother. Similar provisions for the acquisition of Bermudian status by birth are set out in s.18 of the Act. The significant differences between the concepts of "status" and of "belonging to" would, in my view, justify a difference of approach in the interpretations of the section. The draftsman did not intend that the right of freedom of movement should be protected only for those enjoying and possessing status. It would have been the simplest thing to say so had he intended this.

It is against this background that one comes to consider the meaning of the word "child" in subsection (5) quoted above. Counsel for the appellant contended that the word "child" should be given what he termed its natural meaning to include all children. There is much support for this view in the robust dissenting judgment of Lord Denning M.R. in Sydall v. Castings Limited at p.772 where he states -

> "We are pressed by counsel, however, to give the word an extraordinary meaning. 'Relations', it is said, includes only legitimate relations; and 'descendant' means only legitimate descendant. For this purpose reliance is placed on a passage in Jarman on Wills (8th Ed.) p.1783. If this contention be correct, it means that because Yvette is illegitimate, she is to be excluded from any benefit. She is in this view no 'relation' of her father; nor is she 'descended' from him. In the eye of the law she is the daughter of nobody. She is related to nobody. She is an outcast and is to be shut out from any part of her father's insurance benefit.
>
> I have no doubt that such an argument would have been acceptable in the nineteenth

century. The judges in those days used to think that, if they allowed illegitimate children to take a benefit, they were encouraging immorality. They laid down narrow pedantic rules such as that stated by Lord Chelmsford in Hill v. Crook (1873) L.R. 6 H.L. 265 at p.268: 'No gift, however express, to unborn illegitimate persons is allowed by law.....' In laying down such rules, they acted in accordance with the then contemporary morality. Even the Victorian fathers thought that they were doing right when they turned their erring daughters out of the house. They visited the sins of the fathers on the children - with a vengeance. I think that we should throw over these harsh rules of the past. They are not rules of law. They are merely guides to the interpretation of documents. They are quite out of date. We no longer penalise the illegitimate child. We should replace these old rules with a more rational approach. If they are wide enough to include an illegitimate child, we should so interpret them."

With respect, I find this an admirable approach and particularly suited to countries in which illegitimacy cannot be said to be the comparatively rare exception to the rule.

It is, however, enough to rely on the far more conservative formulation of Vaughan Williams L.J. in Woolwich Union v. Fulham Union (1906) 2. K.B. 240 at p.246 :-

"He relied for the purpose of that argument upon the technical rule of law that the words 'child' or 'children' means a legitimate child or children, and that meaning must prima facie be given to the word whenever it occurs in a statute. It is, of course, true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes be given to it, so as to include an illegitimate child or illegitimate children, where that meaning

is more consonant with the objects of the statute."

With respect, I wholeheartedly agree with the description of the rule as a "technical rule of law". As such there should be no straining to make it applicable in circumstances where it is not clear that it should be. One of the most dominant rules of interpretation is that the purpose and objects of the Act should be pervasive in the interpretion of its language.

I am aware that in Galloway v. Galloway (1955) 3 A.E.R., 429, Lord Radcliffe was inclined to be critical of the formulation propounded by Vaughan Williams L.J. He found it (at p.436) "very vague". He preferred to say that the context must require a broader interpretation. Lord Tucker appeared to prefer a similar test stating that "illegitimate children can only be included by express words or necessary implication from the context". In the particular case either formulation would result in the inclusion of an illegitimate child born before the marriage which could not be legitimated because one of the spouses was not free to marry at the date of its birth. For that reason the formulation of the test is not essentially part of the ratio dicedendi. Having regard to the gradual erasure of distinctions between legitimate and illegitimate children in the United Kingdom, the formulationby Vaughan Williams L.J. seems to me preferable.

As has been mentioned, the Bermuda Constitution seeks to protect Fundamental Rights and Freedoms of the Individual. In the interpretation of the provisions of that chapter technical rules of law should not be invoked to exclude persons from their protection. I accept the appellant's argument that underlying the protection afforded to belongers is the concept that parent should not be separated from child during the child's minority even though status cannot be transmitted.

The draftsman of the Constitution must

have had in mind the provisions of the Act when drafting the section on freedom of movement. He was dealing specifically with the subject of status. Yet he omitted to qualify the word "child" with the word "legitimate" as it is qualified in that Act. I consider the omission significant.

There is yet another indication that the word "child" in the Constitution was not intended to be restricted to legitimate child. Section 100 of the Act provided that nothing in it was to be held to authorise the Governor to make a deportation order in respect of a person -

> "(a) who possesses and enjoys Bermudian status; or
>
> (b) who, although not deemed to possess and enjoy Bermudian status, is the wife of a person who both possesses Bermudian status and is ordinarily resident in these Islands, being a wife who is not living apart from her husband under a decree of a competent court or a deed of separation; or
>
> (c) who, although not deemed to possess and enjoy Bermudian status is the child (including in the case of a woman, her illegitimate child) or step-child, or adopted child, under the age of twenty one years of a person who both possesses Bermudian status and is ordinarily resident in these Islands."

The close similarity between the provisions of this section and section 11(5) of the Constitution is apparent. Subsection (a) and (b) of s.100 of the Act are for all practical purposes identical with subsections (a) and (c) of section 11(5) of the Constitution. The significant difference between s.100(c) of the Act and s.11(5) (d) of the Constitution is that the former contains a specific reference to the illegitimate child of a woman while the latter does not. It would appear that s.11(5) of the Constitution elevates what formerly was a

mere immunity from deportation into an immunity against any restriction from freedom of movement as defined in s.11(1) of the Constitution. This, for example, includes the right to enter Bermuda. There is no reason to think that the draftsman intended to exclude from the category of persons whose rights were being enhanced one particular category - the illegitimate child of a woman. It seems far more probable that the intention was to enhance the right of all the categories mentioned in s.100(c) of the Act and that the draftsman effected this by using "child" which in the context of fundamental rights and freedoms would not have occurred to him to have been liable to a restrictive and discriminatory interpretation because of a technical rule of English law.

Acknowledgedly this interpretation does widen somewhat the categories of persons who "belong to Bermuda" when compared with the categories of persons who were immune from deportation. An illegitimate child of a male with Bermudian status would now be included. Having regard to the necessary restrictions in the way of acquiring Bermudian status, this does not seem alarming and standing by itself could not appear to be sufficient reason for applying the technical rule and excluding the illegitimate child of a woman who has Bermudian status.

It is properly conceded that the mother of the four children, Eunice Carmeta Fisher, enjoys and possesses Bahamian status. The four children are her children and on the view which I take of section 11(5)(d) of the Constitution they are deemed to belong to Bermuda, and accordingly I would allow the appeal and so declare.

On this view the Attorney General's appeal against costs in the court below is deprived of its basis since the appellants should have substantially succeeded in the court below and should have awarded their costs there as well.

Even if the appellants had failed, however, I would have hesitated to interfere with the

discretion of the trial judge on the issue of costs. As was mentioned in Jackson v. Jackson the practice in Bermuda in civil cases is that costs should follow the event. In this case there was a threat of a deportation order from the Minister of Labour and Immigration. The Act did not permit deportation and it is now agreed that it could not be ordered. The filing of the actions were no doubt effective in establishing the position that the children could not be deported from this country. The trial judge may well have thought that where serious issues requiring the determination of fundamental rights were involved and where, in practical terms, the claimants had succeeded in their aim of forestalling a deportation, an order for payment of half their costs was not improper. While this would not necessarily have been my view I would hesitate to say that it was an improper exercise of discretion. I would have dismissed that appeal.

In the result I would allow the appeal with costs here and below and declare that the four children, Cheryl Angela Morgan, Valentine Denver Morgan, Fitzroy O'Neil Stuart and Samuel Isaiah Tait, belong to Bermuda within the meaning of s.11(5) of the Constitution.

(Sgd) T. Georges

TELFORD GEORGES, J.A.

DATED: 15th July, 1977

No. 8

JUDGMENT OF THE HONOURABLE MR. JUSTICE DUFFUS, J.A.

FISHER AND FISHER

v.

MINISTER OF IMMIGRATION

J U D G M E N T
Duffus J.A.

These appeals concern the status of four young children who had the misfortune to be born out of lawful wedlock. One of the Appellants Eunice Carmeta Fisher was born a British subject in Jamaica in 1944 :- whilst still a single lady, Mrs. Fisher had four illegitimate children, the first two were twins Cheryl and Valentine, born in 1964, then followed Fitzroy born in 1967 and Samuel born in 1970. All these children were born in Jamaica.

Then on the 6th May, 1972, Mrs. Fisher married the other Appellant Collins MacDonald Fisher in Bermuda. Mr. Fisher is admittedly of Bermudian status having been born in Bermuda of a Bermudian mother on the 20th May 1944. Mr. and Mrs. Fisher had their own child Colin who was born in Jamaica in 1972. Colin was originally included in these proceedings but the Attorney-General conceded that he had Bermudian status.

When these proceedings were brought, Mr. and Mrs. Fisher were resident in Bermuda, together with all five children. Mr. Fisher is working in Bermuda. Mrs. Fisher arrived in Bermuda by air from Jamaica on the 31st July 1975, with all five children. The children were admitted into Bermuda by the Immigration Authorities and the purpose for the entry of the children was described on the Bermuda Immigration arrival cards as "residence". The family appeared to settle

down in Bermuda and the children placed in schools, until the school year 1976-1977, when the principal of the Secondary School, where the two elder children were attending, informed Mr. Fisher that the Minister of Immigration and Labour had instructed him to refuse permission for the children to remain at school. The Fishers then withdrew all the children from school and took up the matter with the Minister and other authorities including a petition to His Excellency the Governor. The result of the Appellants application was the following letter from the Chief Immigration Officer, dated the 22nd October 1976 -

" MINISTRY OF LABOUR AND IMMIGRATION
P.O. Box 1364
HAMILTON 5, BERMUDA

22nd October, 1976

Mrs. Eunice Fisher
Parson's Road
Pembroke 5

Dear Madam,

I am directed to acknowledge the receipt of your undated letter wherein you request permission for your mother, Gwendolyn Robinson and children Angela Morgan, Valentine Morgan, Fitzroy Stewart, and Samuel Tate and Colin Fisher, Jr. to reside here and have to inform you that the Minister of Labour and Immigration regrets that he is unable to grant your request.

I have also been instructed to inform you that the above named persons must leave these Islands on or before the 30th October, 1976.

Yours faithfully,

A/A Chief Immigration Officer "

This letter also refused permission for

Mrs. Fisher's Mother Gwendolyn Robinson and for the child Colin to reside in Bermuda, but there is no dispute as to these two persons. The Mother Gwendolyn Robinson has already left Bermuda and the Government has conceded that the child Colin, the lawful issue of the Fisher marriage, has Bermudian status. The refusal to allow the other four children to reside in Bermuda is the subject of these proceedings.

Two separate proceedings were brought before the Supreme Court. I would first mention Supreme Court Civil Action 251 of 1976. This was an Originating Motion seeking to quash and reverse the Ministers order contained in the letter (supra) of the 22nd October 1976 ordering the four children to leave Bermuda and at the same time seeking declarations that the four children "possess Bermudian status" under the Bermuda Immigration and Protection Act and further "do belong to Bermuda" by virtue of the Constitution of Bermuda - This appeal by originating Motion was apparently brought by virtue of the provisions of Sub-section(6) of Section 122 of the Bermuda Immigration and Protection Act 1956. The learned trial Judge's refusal to grant the relief sought is the subject of the Civil Appeal No.2 of 1977 now before us. These proceedings by way of appeal to the Supreme Court appeared to have been misconceived. Mr. Hall, who appears for the Appellants in this Court, conceded that there is no express right of Appeal in the Immigration and Protection Act to the Supreme Court, and as I understood him abandoned this appeal.

Civil Appeal, No.3 of 1977 is against the decision of the Supreme Court refusing to grant reliefs for the issue of the Prerogative Orders of Certiorari and Mandamus. The application sought the issue of the two orders to quash

(a) The order of the Minister of Labour and Immigration contained in the letter of the 22nd October 1976 (supra) refusing the four children permission to reside in Bermuda.

(b) To quash the order of the Minister of Education and the Minister of Labour and Immigration which would prevent the children being educated in Bermuda.

It was agreed that Order (b) above was not necessary and that the children would be entitled to be educated if they resided in Bermuda.

The Appellants application also further sought a declaration that the four children are deemed to possess and enjoy Bermudian status. Here again both Counsel for the Appellants and the Solicitor General for the Government agree that this Court need only concern itself with the Declarations - the Solicitor General on behalf of the Attorney-General undertakes that if the Court declares that the children are children within the meaning of the Immigration Act or of the Constitution that effect will be given to the ruling of the Court.

Civil Appeal No.5 of 1977 is an appeal by the Attorney-General on costs - I will consider this appeal at the end of this judgment.

The claim to Bermudian status is based on two alternative statutory provisions. First under the Bermuda Immigration and Protection Act, 1956 (Law No.30 of 1956) and in particular under Section 16(4) which states -

"16 (4) Any person -

(a) who is a British subject; and

(b) is a legitimate or legitimated child, or a step-child or child adopted in a manner recognized by law, of a person who has Bermudian status; and

(c) who is under the age of twenty-one years,

shall, for the purposes of this Act, be deemed to possess and enjoy Bermudian status."

The other alternative claim is based on Section II of the Bermuda Constitution Order, 1968, made by Her Majesty in Council under the Bermuda Constitution Act, 1967, of the United Kingdom.. The relevant portion of this Section states -

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

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

(a) for the imposition of restrictions on the movement or residence in Bermuda or on the right to leave Bermuda of persons generally or any class of persons that are reasonably required - .....

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

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

(a) possesses Bermudian status;

(b) is a citizen of the United Kingdom and Colonies by virtue of the grant by the Governor of a certificate of naturalization under the British Nationality and Status of Aliens Act 1914 or the British Nationality Act 1948;

(c) is the wife of a person to whom either

of the foregoing paragraphs of this subsection applies not living apart from such person under a decree of a court or a deed of separation; or

(d) is under the age of eighteen years and is the child, step-child or child adopted in a manner recognized by law of a person to whom any of the foregoing paragraphs of this sub-section applies. ..... "

I would first consider the interpretation of Section 16(4) of the Bermuda Immigration and Protection Act, 1956.

This sub-section requires three pre-requisites. Admittedly these four children fulfill the requirements of (a) and (c). They are all British subjects having been born in Jamaica of a British mother, and they are all under the age of twenty-one. Sub-section (b) is the difficulty - to qualify under (b) the child has to be either "a legitimate or legitimated child" or a "step-child" or "a child adopted in a manner recognized by law", of a person who has "Bermudian status".

These four children are not legitimate or legitimated, nor have they been adopted in a manner recognized by law, but the Appellants claim that they are the "step-children" of the husband Collins MacDonald Fisher. There is no legal definition in the Bermuda Immigration and Protection Act either of the word "child" or of a "step-child". The learned trial Judge held that "step-child" meant the son or daughter by a former marriage of one's husband or wife, and did not therefore include the previous illegitimate children of the wife.

The word "child" in its ordinary meaning would denote the "offspring", or "the son or daughter of a human", but in law the word in its prima facie meaning would denote a "legitimate" child as opposed to an illegitimate child. The interpretation of the word "child" has been the subject of many English decisions but the matter was fully considered by the House of Lords in Galloway v. Galloway (1955 3 A.E.R.429).

This was a decision on the Matrimonial Causes Act, 1950, but the various decisions were fully discussed and considered. I would refer first to the following extract from the judgment of Viscount Simonds where he said -

"First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament, that "child" prima facie means lawful child, and "parent" lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as "filius nullius". This prima facie meaning may, in certain circumstances, be displaced and a wider meaning given to the words, and it is said that those circumstances are present if the wider meaning is more consonant with the policy of the statute in which the words are found; see per VAUGHAN WILLIAMS, L.J., in Woolwich Union v. Fulham Union((1906) 2 K.B. at p.246). This is not, I think, an entirely happy phrase, for it appears to suggest that the court begins its consideration of the statute with an impartial mind towards either meaning. It is, moreover, capable of leading and, I think has led the court to find the policy of the Act in its own predilections of a later age rather than in the provisions of the Act itself.

A safer approach to the question of construction, and one that has the authority of this House, is to say that "children" means "legitimate children" unless some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention would result from so interpreting the word: see, e.g., per LORD SELBORNE in Dorin v. Dorin (1875) (L.R. 7 H.L. at p.577). LORD SELBORNE was there dealing with the use of the word "children" in a will, but the principle is the same.

Examples of it could be multiplied. I will only refer to what EVE, J., said in Re Taylor ((1925) Ch. at p.743), viz., that no other meaning than lawful child can be given to the word unless there is clear evidence in the will itself of an intention to establish another application of the word, and finally express my entire concurrence in the judgment of HARMAN, J., in Re Makein (decd) ((1955) 1 All E.R.57). I do not think that his examination of this branch of the law can be improved on.

I turn now to the context of the Act, and I do not find one word in it which suggests that illegitimate children were the concern of the legislature unless it is to be found in the words under discussion; on the contrary, if they were, it would be remarkable that, being provided for by s.35, they have not been provided for by other sections of the Act, as admittedly they have not. In effect, it appears to me that the argument, which found favour with SINGLETON, L.J., that it is more consonant with the object of the statute to include illegitimate children in s.35 than to exclude them from it, is based, not on any policy which is to be found in the statute as a whole, but on a conviction that the legislature ought to have provided for illegitimate children and the consequent attribution of the wider but unnatural meaning to that word."

I would also like to refer to the following extract from the judgment of Lord Radcliffe where he said -

"The foundation of the case for the respondent rests in the principle that, in the construction of an Act of Parliament, words such as "child" or "children" are to be understood, prima facie, as referring to a legitimate child or legitimate children only. The rule is a rule of construction, and no one suggests, of course, that it is absolute in its requirements. Various phrases have been used to

define the conditions under which this prima facie meaning is displaced. For instance, in Woolwich Union v. Fulham Union ((1906) 2 K.B. at p.246) VAUGHAN WILLIAMS, L.J., said:

> "It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

I take leave to doubt whether the test which meaning is "more consonant" with the object of the statute is in all respects a satisfactory guide to decision, for I think it a very vague one; but, on the other hand, it seems to me uncontroversial to say that the prima facie meaning will be displaced if the context in which the word "child" appears evidently requires it to embrace a wider category than that of legitimate children. And that is the case here."

"Prima facie" then it does appear that child must mean a 'legitimate' child, except the statute itself requires a different interpretation: this especially applies to the consideration of the Constitution as it is inconceivable that the Constitution of a newly emerging country in these days would fail to provide for all "children" whether born within lawful wedlock or not.

The first difficulty lies though in the interpretation of "stepchild". The ordinary meaning of "stepchild" is the son or daughter of a person's spouse in a previous marriage, and it does appear that this does not include the illegitimate children of the spouse.

The interpretation of sub-section (4)(b) of Section 16 is, however, by no means clear and simple. The sub-section deals with three different types of a child. First there is

the "legitimate or legitimated child"; "child" in this instance clearly does not include the illegitimate child but the legislature found it necessary to restrict the ordinary meaning of "child" by adding the words "legitimate or legitimated" before "child". The second type is the "stepchild". There is no restriction to the meaning of "stepchild" here. I would here refer to the previous Immigration Act, 1937, which was replaced by the 1956 Act Section 5(d) which referred to persons deemed to be domiciled in the Island referred to a person -

> "(e) who is a child or a stepchild or an adopted child having been adopted in a manner recognized by law...."

The legislature found it necessary to amend this definition by the Immigration Amendment Act of 1958 - and Section 1 of this amendment Act reads -

> "1. - (1) For the removal of doubt it is hereby declared -
>
> (a) that the expression "child" in paragraph (e) of subsection (1) of section five of the Immigration Act, 1937, does not include an illegitimate child; and
>
> (b) that the expression "step-child" in that paragraph is to be construed accordingly.
>
> (2) The interpretation declared in the foregoing subsection shall be deemed to have effect as from the commencement of the Immigration Act, 1937. "

In the existing Section 16(4) the Legislature have still found it necessary to restrict the meaning of the word "child" but have not found it necessary to restrict the word "stepchild". The 1938 Amendment dealing with the meaning of the word "child" and "stepchild" is of interest and does show some doubt on the legislature of that time in the interpretation

of these words, but in my view, the interpretation of "stepchild" must depend on the meaning to be placed on those words having regard to the Statute as a whole. The third category of "child" as dealt with in subsection (4) is an adopted child - child in this context must mean any child whether illegitimate or legitimate, and it could be argued that "stepchild" should also have this wider meaning.

There are other sections of the 1956 Act which do have some bearing on the interpretation of sub-section 16(4). Thus the status of an illegitimate child is dealt with by Section 18(3) which states :-

> "Notwithstanding anything in the foregoing provision of this section, those provisions shall, in relation to an illegitimate child have effect subject to the following modifications, that is to say -
>
> (a) where the child has not been subsequently legitimated by the operation of the Legitimacy Act, 1933, the status, or domicile of the putative father, or of any person holding himself out as the father of the child, shall not be taken into account, and the status or domicile of the mother shall alone be regarded;"

Then there are the provisions of Section 100 which states -

> "Nothing in this Part shall apply or have effect so as to authorize or empower the Governor to make a deportation order in respect of a person -
>
> (a) who possesses and enjoys Bermudian status; or
>
> (b) who, although not deemed to possess and enjoy Bermudian status, is the wife of a person who both possesses Bermudian status and is ordinarily

resident in these Islands, being a wife who is not living apart from her husband under a decree of a competent court or a deed of separation; or

(c) who, although not deemed to possess and enjoy Bermudian status, is the child (including, in the case of a woman, her illegitimate child) or step-child, or adopted child, under the age of twenty-one years of a person who both possesses Bermudian status and is ordinarily resident in these Islands,

and the succeeding provisions of this Part shall, as respects British subjects be construed accordingly."

Section 100 is relevant to the interpretation of Section 16(4). Here again we have the three classes of children, first the word "child" with no restrictions but the law goes on to provide that child here includes in the case of a woman her illegitimate children. Here again there is the second category of a "stepchild" and then the "adopted child".

The legislature in the 1956 Act have correctly set out the usual and accepted law that an illegitimate child is linked with its Mother and not with its putative father. Section 16(4) directly precludes an illegitimate child from benefiting under the Section from its Mother and it appears highly improbable that the Legislature would have intended to benefit the illegitimate child under the guise of a "stepchild".

The word "stepchild" must, in my view, have its ordinary English meaning and that is "the son or daughter of one's spouse in a previous marriage" and this could not refer to the illegitimate children of a spouse.

I would now consider the provisions of the Constitution. The four children claim to be a person deemed to belong to Bermuda, within the meaning of Section 11(5)(d) of the Bermuda

Constitution Order, 1968. I have already set out the relevant provisions of Section 11. There are three requirements under sub-section (5)(d) and these are :-

"1. That the person is under the age of 18 and is

2. "The child, stepchild or child adopted in a manner recognized in law" of

3. "a person to whom any of the foregoing paragraphs of this subsection applies". "

The four children in this case are all under 18 years of age and are the children of the Appellant Eunice Carmeta Fisher who possesses Bermuda Status by virtue of Section 16(2) of the Bermuda Immigration and Protection Act, 1956 and is also the wife of a person possessing Bermudian Status not living apart from such person under a decree of Court or a deed of separation. The question here is whether the four children come within the meaning of the word "child" as used in sub-section (5)(d).

'Prima facie' according to the English Authorities, the word "child" by itself means in legal phraseology a "legitimate child", but it is necessary to consider the constitution as a whole, to see whether as Lord Radcliffe said in the Galloway case (supra) "the prima facie" meaning will be displaced if the context in which the word "child" appears require it to embrace a wider category than that of "legitimate children".

The first argument in favour of the wider meaning of the word "child" is that the provisions being interpreted appear in the Constitution of Bermuda and not in a Statute dealing with a specific subject. The provisions also appear in the chapter setting out the fundamental rights and freedoms of the individual and deals with all persons in Bermuda. The first Section of the Constitution provides -

"1. Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Then again Section 11 (supra) applies to all persons in Bermuda, but there is power in sub-section (2)(d) to impose restrictions or to expel persons from the Island who do not belong to Bermuda.

Another argument in favour of the four children being included in sub-section (5)(d) is that this sub-section only refers to persons under the age of 18. It is really a section to protect children from being deported or having their movements restricted if they are the children of a person possessing Bermudian status. In the sub-section itself, there are no qualifications to the word "child" as appears for instance in the Immigration Acts. There is

also the fact that there is no provision in the Constitution for an illegitimate child or any differentiation between a legitimate and illegitimate child. It could also be argued that it would be a denial of human rights if an illegitimate child was to be treated differently from a legitimate child and this is one of the very evils that the Constitution sets out to prevent or remedy, that is to safeguard "the life, liberty and security of the person". The four young illegitimate children with their mother formed a small family unit. The Mother married a Bermudian and thus obtained Bermudian status, and she became entitled to and indeed it was her duty to live with her husband in Bermuda. It would be inhumane to now separate the children from their Mother and to prevent the mother from carrying out her parental responsibilities and duties to her young children; the Mother has the legal guardianship and right to keep these children. If this is not the position then these four children may be left completely adrift?

meaning and not the narrower legal interpretation, and so would include the illegitimate children under the age of 18 of a woman who is of Bermudian status and who lives with her children in Bermuda.

This would afford the protection of Section 11 to those children up to the age of 18, and would mean that the order of the Minister requiring the four children to leave Bermuda is ultra vires the Constitution. This interpretation would also conform with the provisions of Section 100(c) which would, inter alia, prevent the deportation of the illegitimate children of a woman possessing Bermudian status and ordinarily resident in Bermuda.

I would, therefore, allow the Appeal (in Civil Appeal No.3 of 1977) and have issued a declaration that the children belong to Bermuda within the meaning of Section 11 of the Bermuda Constitution Order, 1968. I

set in this wider field, it does appear to me that the word "child" as

set out in sub-section (5)(d) of Section 11 must be given its full and natural

would grant the Appellants the costs of these proceedings, both in this Court and in the Court below.

The Appeal (Civil Appeal No.2/1977) against the decision of the Supreme Court against the Minister's Order should be dismissed, and the Respondent should have any costs occasioned by this Appeal to this Court.

There remains the Minister's appeal against the order for costs in the Court below. I can find no authority or justification for the learned Judge's order that the successful Respondent should pay a half of the unsuccessful Plaintiffs' costs. In any event the Respondent should succeed in this appeal (Civil Appeal No.5/1977) and be awarded his costs in this Court. I understood from the Solicitor General that the Respondent is not asking for any costs in the lower Court.

Dated this 15th July, 1977.

Sgd. Illegible
Justice of Appeal
Rd. by Blair-Kerr J.A.
15/7/77.

No. 9

ORDER ON AN APPLICATION FOR LEAVE TO APPEAL

In the Court of Appeal

No.9
Order on an Application for Leave to Appeal

15th December 1977

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL JURISDICTION

CIVIL APPEALS NOS. 2, 3 & 5 OF 1977

BETWEEN

THE MINISTER OF HOME AFFAIRS
and THE MINISTER OF EDUCATION

Appellants

AND

COLLINS MACDONALD FISHER and EUNICE CARMETA FISHER (claiming as mother and next friend of CHERYL ANGELA MORGAN, VALENTINE DENVER MORGAN, FITZROY O'NEIL STUART and SAMUEL ISAIAH TAIT)

Respondents

UPON THE APPLICATION of Her Majesty's Attorney General on behalf of the Appellants for an order pursuant to section 2(c) of the Appeals Act 1911 and the Court being of the opinion that questions of great general and public importance are involved, the Appellants are granted leave to appeal to Her Majesty in Council upon the following conditions:

(a) that the Appellants within three months of the 13th day of December 1977, being the date of the hearing of the aforesaid application, enter into good and sufficient security to the satisfaction of the Registrar in the sum of $2,400 for the due prosecution of their said appeal and for the other eventualities mentioned in section 4(a) of the Court of Appeal Act 1911; and

(b) that the Appellants shall take within three months of the aforesaid date of hearing the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England.

Dated the 15th day of December, 1977

Michael Hogan
MICHAEL HOGAN, P.

William Duffus
WILLIAM DUFFUS, J.A.

Alastair Blair-Kerr
ALASTAIR BLAIR-KERR, J.A.

IN THE PRIVY COUNCIL No. 4 of 1978

ON APPEAL

FROM THE COURT OF APPEAL OF BERMUDA

BETWEEN:

THE MINISTER OF HOME AFFAIRS and
MINISTER OF EDUCATION — Appellants

- and -

COLLINS MACDONALD FISHER and
EUNICE CARMETA FISHER — Respondents

RECORD OF PROCEEDINGS

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