Privy Council Appeal No. 4 of 1978

The Minister of Home Affairs and
The Minister of Education – – – – – *Appellants*

v.

Collins MacDonald Fisher and
Eunice Carmeta Fisher– – – – – – *Respondents*

FROM

THE COURT OF APPEAL FOR BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH MAY 1979

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SALMON
LORD FRASER OF TULLYBELTON
SIR WILLIAM DOUGLAS

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a judgment of the Court of Appeal for Bermuda, which by a majority (Duffus J.A. and Georges J.A., Hogan P. dissenting) allowed the appeal of the respondents from a judgment of the Supreme Court of Bermuda (Seaton J.) dated 6 January 1977.

The proceedings relate to the status in Bermuda of four illegitimate children of Mrs. Eunice Carmeta Fisher, all under the age of 18. They were born in Jamaica, as was Mrs. Fisher herself. In May 1972 Mrs. Fisher (then Robinson) married Mr. Collins MacDonald Fisher who possessed Bermudian status. As from the date of the marriage Mr. Fisher has accepted all four children as children of his family. On 31 July 1975 Mrs. Fisher came with the four children to take up residence with Mr. Fisher in Bermuda; they were admitted by the immigration authorities, and soon afterwards were placed in State schools. Following a routine check carried out in the school year 1976–7 Mr. Fisher was informed that the Ministry of Labour and Immigration had refused permission for two of the children to remain at school, and on 22 October 1976 the Ministry informed Mrs. Fisher that she and the four children must leave Bermuda by 30 October 1976.

Separate legal proceedings (later consolidated) were then started by both Mr. Fisher and Mrs. Fisher seeking to establish (i) under the Bermuda Immigration and Protection Act 1956 s.16(4) that the four children are " deemed to possess and enjoy Bermudian status " and (ii) under s.11(5)(*d*) of the Constitution of Bermuda that they " belong to

Bermuda"—the procedural details of these proceedings are no longer material. At the hearing the Minister of Education gave an undertaking to reinstate the children in recognised schools in Bermuda, and this undertaking has been honoured.

It was decided by Seaton J. in the Supreme Court that:

(i) the children were not entitled to Bermudian status because, although s.16(4) of the Act of 1956 applied to stepchildren of persons enjoying Bermudian status, and Mr. Fisher, whose stepchildren they were, enjoyed that status, the word "stepchild" did not include an illegitimate child;

(ii) that they did not "belong to Bermuda" because the words "child" and "stepchild" in s.11(5) of the Constitution did not include persons who were illegitimate.

On appeal, the Court of Appeal unanimously upheld the decision of Seaton J. on point (i)—namely that the children were not deemed to enjoy Bermudian status. On point (ii) the majority held, reversing Seaton J., that the children belonged to Bermuda. There is no appeal against the decision on point (i), and the only question left is whether the four children "belong to Bermuda" within the meaning of s.11 of the Constitution. The appellants have undertaken in any event to treat the children as if, under s.100(c) (as renumbered in 1971) of the 1956 Act, they enjoyed immunity from deportation. The question therefore for decision is whether the word "child" in s.11(5)(*d*) of the Constitution includes an illegitimate child. The clause must first be placed in its context.

The Bermuda Constitution was brought into existence by the Bermuda Constitution Order 1968 (S.I. 1968/182) made under the Bermuda Constitution Act 1967 of the United Kingdom. It opens with Chapter I headed "Protection of Fundamental Rights and Freedoms of the Individual". S.1 reads as follows:—

"1. Whereas every person in Bermuda is entitled to 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".

S.11 deals with freedom of movement; the following subsections are relevant:—

(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;

. . . . .

(*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 recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies ".

Thus fundamental rights and freedoms are stated as the right of every individual, and s.11 is a provision intended to afford protection to these rights and freedoms, subject to proper limitations. S.11 states the general rule of freedom of movement, which is to include the right to enter and to reside in any part of Bermuda, but it allows, as a permissible derogation from this right, restrictions in the case of any person who does not " belong to Bermuda ". S.11(5) then defines the classes of persons who " belong to Bermuda ". Among these is " the child . . . of a person to whom any of the foregoing paragraphs of this subsection applies." One such person is the wife of a person who possesses Bermudian status. What is meant, in this context, by the word " child "?

The meaning to be given to the word " child " in Acts of Parliament has been the subject of consideration in many reported cases. One finds in them a number of general statements—

> " The law does not contemplate illegitimacy. The proper description of a legitimate child is ' child '." *R. v. Totley* (*Inhabitants*) (1845) 7 Q.B. 596, 600 per Lord Denman C.J.
>
> ". . . the word ' child ' in the Act means legitimate child ". *Dickinson v. North Eastern Railway Co.* (1863) 33 L.J.Ex.91 per Pollock C.B. similarly in 2 H. & C. 304–5).

Then, as society and social legislation become more varied, qualifications come to be made:

> " 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." *Woolwich Union v. Fulham Union* [1906] 2 K.B. 240, 246–7 per Vaughan Williams L.J.
>
> " I do not think it necessary to refer to the authorities which establish 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." *Galloway v. Galloway* [1956] A.C. 299, 323 per Lord Tucker.

Founding on these statements, learned Counsel for the appellants took as his starting point the compound proposition: (a) that we are here concerned with the interpretation of an Act of Parliament; (b) that in all Acts of Parliament the word " child " *prima facie* means " legitimate child "; (c) that departure from this meaning is only possible upon the basis indicated in the words used by Vaughan Williams L.J. or upon that indicated in other words by Lord Tucker. Thus they invited their Lordships to consider the merits of the two formulae, to prefer that of Lord Tucker, and in any event to say that the preferred test, or, in the last resort, either alternative test, was not satisfied as regards the Constitution of Bermuda.

Their Lordships approach this line of argument in two stages. In the first place they consider that it involves too great a degree of rigidity to place all Acts of Parliament in one single class or upon the same level. Acts of Parliament, particularly those involving the use of the word " child " or " children ", differ greatly in their nature and subject matter. Leaving aside those Acts which use the word " child " apart from any relationship to anyone (in which cases " child " means simply a young person) there is a great difference between Acts concerned with succession to property, with settlement for the purposes of the Poor Law, with nationality, or with family matters, such as custody of children.

In cases concerned with the administration of the Poor Law, recognition is given to the existence of illegitimate children and to their dependence upon their mother. To this extent their Lordships respectfully think that Viscount Simonds may have gone too far when he described the common law of England as not contemplating illegitimacy and shutting its eyes to the facts of life (*Galloway v. Galloway loc.cit.* pp.310–11). Matrimonial law in England has increasingly diminished the separation of illegitimate from legitimate children by adoption of the concept " child of the family ". Indeed the Matrimonial Causes Act 1974 (Bermuda—1974 No. 74), as well as recognising the " child of the family ", contains a definition of " child ", in relation to one or both of the parties to a marriage, as including " an illegitimate or adopted child of that party or, as the case may be, of both parties " (s.1(1)). This is, it is true, by way of express statutory enactment, but the fact that the separation is, for many purposes, less sharp than it was in the last century enables and requires the courts to consider, in each context in which the distinction between legitimate and illegitimate is sought to be made, whether, in that context, policy requires its recognition.

In matters of succession, and the same applies to the interpretation of wills and trust instruments—see *Sydall v. Castings Ltd.* [1967] 1 Q.B. 302 per Diplock L.J.—, the rule that " child " means legitmate child is firmly rooted in the common law and in the sources of the laws of property, so it has always been insisted that clear words are needed if illegitimate, or adopted, children are to be treated in the same way as legitimate children. Instances of such clear words are becoming more frequent in modern legislation. But even without such clear words in a statute, a movement towards a biological interpretation of the word " child," even in this context, is appearing (see *Brule v. Plummer,* Supreme Court of Canada 23 January 1979).

In nationality Acts, which provide for acquisition of nationality by descent, the assumption is a strong one that " child " means legitimate child: the fact that such Acts often contain a definition to this effect, and provide expressly for exceptions, for example in favouring legitimated, or illegitimate, children, does not detract from the strength of this rule. In Bermuda, the Immigration and Protection Act 1956 proceeds on this basis, referring in certain places (s.16(4), 100(c)) to legitimated or illegitimate children; and it was the existence of these express exceptions,

coupled with the general rule, that led both courts below to conclude that " stepchild," in s.16(4)(b), did not include the illegitimate child of a Bermudian man's wife.

So far the discussion has been related to Acts of Parliament concerned with specific subjects. Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 (U.K.), but established by a self-contained document set out in Schedule 2 to (U.K.) Statutory Instrument 1968/182. It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter I is headed " Protection of Fundamental Rights and Freedoms of the Individual ". It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention on Human Rights. That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called " the austerity of tabulated legalism ", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. 3. S.11 of the Constitution forms part of Chapter I. It is thus to " have effect for the purpose of affording protection to the aforesaid rights and freedoms " subject only to such limitations contained in it " being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice . . . the public interest."

When therefore it becomes necessary to interpret " the subsequent provisions of " Chapter I—in this case s.11—the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that " child " means " legitimate child " but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the

principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences. In their Lordships' opinion this must mean approaching the question what is meant by " child " with an open mind.

Prima facie, the stated rights and freedoms are those of " every person in Bermuda ". This generality underlies the whole of Chapter I which, by contrast with the Act of 1956, contains no reference to legitimacy, or illegitimacy, anywhere in its provisions. When one is considering the permissible limitations upon those rights in the public interest, the right question to ask is whether there is any reason to suppose that in this context, exceptionally, matters of birth, in the particular society of which Bermuda consists, are regarded as relevant.

S.11 opens with a general declaration of the right of freedom of movement, including that of residence, entry and immunity from expulsion. These rights may be limited (s.11.2(*d*)) in the case of persons " not belonging to Bermuda "—a test not identical with that of citizenship, but a social test. Then, among those deemed to belong to Bermuda are (s.11(5)) a person who

(*a*) possesses Bermudian status;

. . . .

(*c*) is the wife of [such a person]; or

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

In their Lordships' opinion, para. (*d*) in its context amounts to a clear recognition of the unity of the family as a group and acceptance of the principle that young children should not be separated from a group which as a whole belongs to Bermuda.

This would be fully in line with Article 8 of the European Convention on Human Rights (respect for family life), decisions on which have recognised the family unit and the right to protection of illegitimate children. Moreover the draftsman of the Constitution must have had in mind (a) the United Nations' Declaration of the Rights of the Child adopted by Resolution on 20 November 1959 which contains the words in principle 6:

> " [the child] shall, wherever possible, grow up in the care and under the responsibility of his parents . . . .; a child of tender years shall not, save in exceptional circumstances, be separated from his mother "

and (b) Article 24 of the Covenant on Civil and Political Rights 1966 which guarantees protection to every child without any discrimination as to birth. Though these instruments at the date of the Constitution had no legal force, they can certainly not be disregarded as influences upon legislative policy.

Their Lordships consider that the force of these arguments, based purely upon the Constitution itself, is such as to compel the conclusion that " child " bears an unrestricted meaning. In theory, the Constitution might contain express words forcing a contrary conclusion, though given the manner in which Constitutions of this style were enacted and adopted, the possibility seems remote. But, in fact, their Lordships consider it most unlikely that the draftsman being aware, as he must have been, of the provisions of the Act of 1956, could have intended a limitation of the word " child " to legitimate children. In the first place, if he had intended this limitation, he must surely, following the example of the Act of 1956, have felt it necessary to spell it out. In the second

place the concept of "belonging" of itself suggests the inclusion of a wider class: yet if the appellants are right, those described under s.11(5)(*d*) of the Constitution would largely coincide with persons having, or deemed to have, Bermudian status. Thirdly, under s.100 of the Act of 1956, these illegitimate children would enjoy immunity from deportation until they were 21. It seems most unlikely that such children should not be treated as "belonging to Bermuda" or that a stricter test—in respect of their right to freedom of movement—should be imposed on such children under s.11 of the Constitution than is imposed under the earlier Act. Their Lordships fully agree with the majority of the Court of Appeal in regarding these points as significant although they prefer to base their judgment on wider grounds.

Their Lordships are therefore of opinion that the judgments of the majority of the Court of Appeal are right and accordingly they will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the respondents' costs of the appeal.

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In the Privy Council

THE MINISTER OF HOME AFFAIRS
AND
THE MINISTER OF EDUCATION

v.

COLLINS MACDONALD FISHER AND
EUNICE CARMETA FISHER

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