



PRESS SUMMARY

14 March 2022

Attorney General for Bermuda (Appellant) v Roderick Ferguson and others (Respondents) (Bermuda)

[2022] UKPC 5

On appeal from the Court of Appeal for Bermuda

JUSTICES: Lord Reed, Lord Hodge, Lady Arden, Lord Sales, Dame Victoria Sharp

BACKGROUND TO THE APPEAL

This appeal is about whether the law of Bermuda recognises same-sex marriage.

Section 53 of the Domestic Partnership Act 2018 of Bermuda (“the DPA”) confines marriage to a union between a man and a woman. The terms of the DPA state that its provisions are to take effect notwithstanding anything to the contrary in the Human Rights Act 1981 of Bermuda (“the HRA”). The protections of the HRA are therefore not available in support of same-sex marriage.

The Bermudian Constitution (“the Constitution”) sets out fundamental rights and freedoms in Chapter 1. The Constitution does not expressly confer any right to marry. Sections 8 and 12 of the Constitution guarantee freedom of conscience and protection from particular forms of discrimination, including creed-based discrimination, respectively. Furthermore, the European Convention on Human Rights (“the Convention”) applies to Bermuda as a matter of international law and is relevant to the interpretation of its constitutional rights.

The validity of section 53 of the DPA is challenged by the respondents on three grounds: (1) it was passed primarily or mainly for a religious purpose contrary to the secular nature of the Constitution; (2) it hinders the enjoyment of the respondents’ belief in same sex marriage as an institution recognised by law contrary to section 8 of the Constitution; and (3) it affords different treatment to the respondents and others attributable to their description by creed contrary to section 12 of the Constitution.

The respondents, who are a gay Bermudian, a lesbian Bermudian, a Bermudian LGBTQ charity, and three Bermudians associated with two Bermudian churches, succeeded in the courts below. The Attorney General of Bermuda now appeals to the Board.

JUDGMENT

The Board allows the appeal. Lord Hodge and Lady Arden give the judgment of the Board, with which Lord Reed and Dame Victoria Sharp agree. Lord Sales gives a dissenting judgment.

REASONS FOR THE JUDGMENT

Ground one: religiously motivated legislation

The Board holds that there is no provision in the Constitution nullifying legislation on the ground that it is enacted for a religious purpose [44-46]. Constitutional validity is not determined by the purpose of legislation but by its effect [48-51, 55]. Judgments from courts in jurisdictions which have held that the enactment of legislation for a religious purpose is unconstitutional do not provide a template for other common law jurisdictions, including Bermuda, in which society has developed differently [53-54]. In any event, the DPA was not passed for a religious purpose [58]. It was passed as a compromise between different opinions in Bermuda as well as to fulfil an electoral promise [56, 58].

Ground two: freedom of conscience

The Board records that, as the Chief Justice of Bermuda found at first instance, the respondents seek protection for their belief in same-sex marriage as an institution recognised by law [33, 70-71].

Section 8 of the Constitution prohibits the state from hindering a person's enjoyment of freedom of conscience, including both the person's private thoughts and beliefs and their manifestation and propagation of such thoughts or beliefs [62]. Section 8 does not, however, impose on the state an obligation to give legal recognition to same-sex marriage [64]. There are two alternative ways of analysing the matter, drawing from case law on the Convention, both of which lead to the same result [65].

On the first approach, the respondents' belief falls within the scope of section 8, but that belief is not interfered with by the state failing to legally recognise same-sex marriage. Changing social attitudes internationally in the last 60 years mean the respondents' belief meets the requirements for protection under the Convention as laid down by the European Court of Human Rights ("the Strasbourg Court") [67-69]. However, neither the Bermudian government nor legislature has interfered with the respondents' belief that Bermuda should give legal recognition to same-sex marriage or their ability to manifest and propagate such beliefs [71-75]. The respondents are free to argue forcefully in favour of such recognition, and churches or other religious bodies may carry out marriage ceremonies for same-sex couples and recognise those unions as a matter of religious practice [76-77]. Section 8 does not however extend to imposing a positive obligation on the state to make the law comply with the respondents' belief [78].

On the second approach, the respondents' belief in the legal recognition of marriage is not an expression of conscience and section 8 cannot be interpreted as requiring the state to give such legal recognition, which would be inconsistent with the absence of any protection in the Constitution against discrimination on the ground of sexual orientation and the ability of the legislature expressly to disapply the operation of the HRA [82]. The Strasbourg Court has repeatedly rejected arguments that article 9 of the Convention requires a contracting state to give legal recognition to a marriage contracted in a form which the law did not recognise [83]. The DPA therefore involves no breach by the United Kingdom of obligations on the international plane arising from adherence to the Convention [83-87].

The Board recognises that marriage is an institution with profound religious, ethical and cultural significance, that the historical background is one of the stigmatisation, denigration and victimisation of gay people, and that the restriction of marriage to opposite-sex couples may create among gay people a sense of exclusion and stigma [89]. There is force in the policy

argument in favour of the recognition of same-sex marriage on the ground that it would accommodate diversity within society [89]. However, international instruments and other countries' constitutions cannot be used to read into the Constitution a right to the legal recognition of same-sex marriage [90-94].

Ground three: discrimination according to creed

Section 12 of the Constitution prohibits discrimination according to creed. The Board holds that section 12 applies to discrimination against a person on the grounds of their system of beliefs, not a single belief [96]. Furthermore, the exclusion of same-sex couples from the institution of marriage is attributable not to their or their supporters' description by creed but because they are of the same sex [95-97].

Lord Sales' dissenting opinion

Lord Sales dissents on ground two. The fundamental difference between his view and the majority's is his analysis of the nature of the respondents' belief [100, 110]. The majority characterise the respondents' belief as a "political belief" that same-sex unions should be legally recognised as marriage whereas, in Lord Sales' opinion, the respondents' beliefs are more fundamental, being concerned with how they themselves should live [119]. The respondents believe, as a deeply held matter of personal conscience, that if they wish to be in an intimate and committed relationship they have a religious or moral obligation to enter into marriage with their partner [100, 118]. Their complaint concerns an impermissible hindrance in the manifestation of their beliefs as to their own personal religious or ethical obligations, not a political belief about how the state should act [100-104, 117-118].

The state has a duty to be neutral between different religious and conscientious beliefs which individuals have, in order to afford them equal respect as citizens, ensure they are free to exercise their own ethical independence and so as to avoid the civic disparagement of vulnerable minorities, such as gay people [105]. Although the Strasbourg Court has concluded that the right to marriage in the Convention does not extend to same-sex couples, that is explained by the specific terms of the relevant provision of the Convention (which, in technical legal terminology, constitutes a governing "lex specialis" on the issue of marriage which refers to marriage between a man and a woman) [146-158]. The issue in the appeal is the interpretation of the Constitution. It does not contain an equivalent "lex specialis" on marriage, so the issue of marriage has to be addressed under the general terms of section 8. A range of courts in other jurisdictions which, like Bermuda, have constitutions which do not contain a "lex specialis" governing marriage but have general provisions protecting individual rights have concluded that same-sex couples in modern society have a fundamental right to marriage equivalent to those of opposite-sex couples [159-165]. In Lord Sales' view, the refusal by the state to allow or recognise same-sex marriage is contrary to the protection provided by section 8 of the Constitution, as it interferes with the ability of same-sex couples to act in accordance with their conscience and breaches the state's duty of neutrality between different conscientious or religious beliefs [175, 182, 186-195]. In his view a right to marry for everyone is implicit in section 8 and, given the general language of section 8, that right cannot be interpreted as confined to opposite-sex couples [196-199].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html