

4 OF 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL FOR BERMUDA

B E T W E E N :

THE MINISTER OF HOME AFFAIRS

and

THE MINISTER OF EDUCATION

Appellants

- and -

COLLINS MACDONALD FISHER

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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

CASE FOR THE RESPONDENT

Record

pp. 29-62

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1. This is an Appeal from the Judgment of the Court of Appeal for Bermuda (Duffus, J.A., Georges, J.A., and Hogan, P., dissenting), dated 15th July 1977 which allowed the Appeal of Collins MacDonald Fisher (hereinafter called "Mr. Fisher"), and Eunice Carmeta Fisher (hereinafter called "Mrs. Fisher"), the Respondents, from a Judgment of the Supreme Court of Bermuda (Seaton, J.) dated 6th January 1977 and declared that Cheryl Angela Morgan, Valentine Denver Morgan, Fitzroy O'Neil Stuart and Samuel Isaiah Tait, the illegitimate children of Mrs. Fisher born in Jamaica and now living in Bermuda, "belong to Bermuda" within the

pp. 7-25

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meaning of Section 11 (5) of the Constitution of Bermuda (hereinafter called "the Constitution") with the consequence that the said children are entitled to reside in Bermuda by virtue of Section 11 (1) of the Constitution.

2. The said Judgment of the Court of Appeal for Bermuda at the same time refused the specific request on an Appeal (consolidated with the Appeal referred to above) by Mrs. Fisher from a Judgment of Seaton J. refusing a declaration that the said children are "deemed to possess and enjoy Bermudian status" by virtue of Section 16(4) of the Bermuda Immigration and Protection Act 1956 (hereinafter called "the 1956 Act"). While Mrs. Fisher does not appeal to Her Majesty in Council from the said refusal by the Court of Appeal for Bermuda of the said declaration the provisions of the 1956 Act are, it is submitted, relevant for the purposes of the instant Appeal.

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3. The principal issue which arises on this Appeal is as to the true construction of Section 11 of the Constitution and in particular whether the word "child" in Section 11 (5) (d) of the Constitution, on its true meaning, includes the said illegitimate children of Mrs. Fisher. If it does not the said children cannot lawfully remain in Bermuda, although their mother and step-father both enjoy Bermudian status.

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4. The more important of the relevant statutory provisions are as follows :

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(i) Section 16 of the 1956 Act provides :-

" 16. (2) Any woman -

(a) who is a British subject; and

(b) who is the wife of a person who possesses Bermudian status; and

(c) who is not living apart from her husband under a decree of a competent court or under a deed of separation,

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

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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 recognised by law, of a person who has Bermudian status; and

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

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

(ii) Section 25 of the 1956 Act provides :-

" 25. Without prejudice to any of the succeeding provisions of this Part, or to any other provisions of any other Part, it is hereby declared that it is unlawful for any person other than a person -

(a) who possesses Bermudian status;

or (b) ...

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(c) ...

to land in, or having landed, to remain in, these Islands...

(iii) Section 100 of the 1956 Act provides :-

" 100. Nothing in this part shall apply or have effect so as to authorise or empower - the Governor to make a deportation order in respect of a person -

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(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 the wife who is not living apart from her husband under a decree

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of a competent court or a deed of separation; or

(c) who, although not deemed to possess or enjoy Bermudian status, is the child (including, in the case of a woman, her illegitimate child) or a 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 ... "

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(iv) Paragraph 5 (1) of the Bermuda Constitution Order provides :-

" 5. (1). subject to the provisions of this section, the existing laws shall have effect on and after the appointed day (21st February 1968) as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them in conformity with the Constitution".

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(v) Section 1 of the Constitution provides:-

" 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 the respect for rights and freedoms of others and for the public interest, to each and all of the following, namely -

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(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,

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10 the subsequent provisions of this Chapter shall have effect for this 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."

(vi) Section 11 of the Constitution, which is contained in Chapter 1 thereof entitled "Protection of Fundamental Rights and Freedoms of the Individual" provides :-

20 " 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 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 -

.....

30 (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 of 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) ;

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(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 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".

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5. The facts relevant to this Appeal are :-

p.10
lines 8-11

(i) Mr. Fisher, of Parsons Road, Pembroke Parish in the Islands of Bermuda was born in Bermuda of a Bermudian mother on the 11th October, 1945 (and by virtue of Section 17 of the 1956 Act possesses Bermudian status).

p.10
lines 14-24

(ii) Mrs. Fisher was born in St. Thomas, Jamaica, West Indies, on the 20th May, 1944 (and by virtue of the British Nationality Act 1948 is a British Subject).

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p.10
lines 25-29

(iii) Mrs. Fisher is the mother of the following illegitimate children namely :-

(a) Cheryl Angela Morgan, aged 13, born in St. Thomas, Jamaica, West Indies, on the 3rd day of August, 1964;

(b) Valentine Denver Morgan ; aged 13, born in St. Thomas, Jamaica, West Indies, on the 3rd day of August 1964;

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(c) Fitzroy O'Neil Stuart, aged 10, born in St. Thomas, Jamaica, West Indies, on the 7th day of May 1967.

(d) Samuel Isaiah Tait, aged 7, born in St. Thomas, Jamaica, West Indies, on the 12th day of August 1970.

p.10
lines 29-32

The aforesaid children assumed as from their respective dates of birth the surnames of their putative fathers.

(iv) On the 6th May, 1972, Mr. Fisher married Mrs. Fisher, nee Robinson, at the Registrar

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General's Office in the City of Hamilton,
Bermuda.

p.10
lines 17-20

(v) On the 22nd September, 1972, Mrs.
Fisher gave birth to a legitimate child
named Collins MacDonald Fisher, now aged 5,
in St. Thomas, Jamaica, West Indies.

p.10
lines 32-36

(vi) As from the date of marriage Mr. Fisher
has accepted all of the aforesaid children as
children of the family.

10 (vii) On the 31st July 1975, the aforesaid
children arrived with Mrs. Fisher in Bermuda
to take up residence with Mr. Fisher. All
the children and Mrs. Fisher were admitted
by the Immigration Authorities as residents
of Bermuda.

p. 10
lines 42-48
p. 11
lines 1-7

20 (viii) Soon after their arrival in Bermuda
all the said children were placed in State
schools, until the school year 1976 - 77,
when the Principal of the secondary school
which the two elder children were attending,
informed Mr. Fisher that the Ministry of
Immigration and Labour had instructed him to
refuse permission for the children to remain
at school. Thereupon Mr. and Mrs. Fisher
withdrew all of them from the school and took
the matter up with the said Minister by a
letter written in the earlier part of August
1976.

p. 11
lines 13-35

30 (ix) By a letter dated 22nd October 1976,
the Minister of Labour and Immigration,
informed Mrs. Fisher that the said five
children must leave Bermuda by 30th October,
1976.

p. 12
lines 6-24

40 (x) As a result of the aforesaid letter of
22nd October, 1976, Mr. Fisher in Civil
Action Number 248 of 1976, moved by way of
Motion for Writs of Certiorari and Mandamus
to quash the said order of the Minister of
Labour and Immigration and the Minister of
Education. It was argued on his behalf that:

pp.1-2
pp.3-4

(a) the said children are "deemed to
possess and enjoy Bermudian status" by
virtue of Section 16(4) of the 1956 Act,
and

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(b) the said children "belong to Bermuda"
under the provisions of Section 11 (5)
(d) of the Constitution,

and that as a consequence of (a) the Minister of Labour and Immigration had no authority to restrict entry and/or residence and as a consequence of (b) the Constitutional right to protection of freedom of movement was being infringed by the said Minister.

p. 10
lines 36-41

(xi) After the Notice of Motion was issued, the Solicitor General on behalf of the Minister of Labour and Immigration conceded that the child Collins MacDonald Fisher, the legitimate son of the Respondents, is entitled to reside in Bermuda without any restrictions. 10

(xii) In the Civil Action No. 248 of 1976, Seaton J. issued orders nisi on 3rd December 1976 to the Minister of Labour and Immigration and the Minister of Education to show cause why the proceedings in re the said children should not be removed into the Supreme Court of Bermuda and why the said children should not be permitted to receive suitable education at recognised schools in Bermuda. 20

p. 5-6

(xiii) Mrs. Fisher instituted further proceedings by way of originating motion (Civil Action No. 251 of 1976) seeking (a) an order reversing the said order of the Minister of Labour and Immigration; (b) a declaration that the said four children are deemed to possess and enjoy Bermudian status by virtue of the 1956 Act; and (c) a declaration (which the Court of Appeal granted and which forms the subject matter of the instant appeal) that the said four children belong to Bermuda by virtue of the Constitution. 30

p. 9

(xiv) On 20th December 1976 the aforesaid two actions (Civil Action Nos. 248 and 251 of 1976) were consolidated with the consent of all the parties. 40

p. 9
lines 44-48

(xv) Upon the commencement of the hearing an undertaking to reinstate the said children in recognised schools in Bermuda was given on behalf of the Minister of Education and that undertaking has to date been honoured.

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(xvi) Upon hearing the case the Supreme Court of Bermuda (Seaton, J.) in a Judgment dated 6th January 1977, held :

pp.7-25

(a) On its proper construction the word "step-child" in Section 16 (4) (b) does not include an illegitimate child; and

p.24
lines 32-36

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(b) On their proper construction the words "child" and "step-child" in section 11 (5) of the Constitution do not include persons who are illegitimate; and

p. 24
lines 36-41

(c) As a consequence of (a) above the said children did not possess Bermudian status and as a consequence of (b) above the said children did not belong to Bermuda.

p. 24
lines 42-44
p. 25
line 1

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(xvii) The Respondents appealed to the Court of Appeal for Bermuda on grounds that the learned Judge had erred in law in so construing Section 16 (4) (b) of the 1956 Act and Section 11 (5) of the Constitution.

pp.25-28

(xviii) The Court of Appeal for Bermuda (Hogan P., Georges and Duffus, JJ.A.) held that

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(a) on its true construction the word "stepchild" in Section 16 (4) (b) does not include an illegitimate child of a spouse and therefore the said children do not possess Bermudian status.

pp.33, 39
p. 58

(b) (Hogan, P., dissenting). On the true construction of Section 11(5) of the Constitution the words "child" and "stepchild" included illegitimate children of the spouse and therefore the said children belonged to Bermuda within the meaning of the Constitution.

pp.45, 61

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6. In his judgment for allowing the Appeal on the question under Section 11 of the Constitution Georges J. emphasised that the category of persons "deemed to belong to Bermuda" is wider than the category of persons who have Bermudian

p. 40
lines 36-43

Record

- p. 41
lines 9-19
- p. 41
lines 19-47
- p.42
lines 1-27
- p.42
lines 28-31
7. Georges J. continued :
- p. 42
lines 32-47
- p.43
lines 1-2
- p.43
lines 2-11
- status. The significant differences between the concept of "status" and "belonging to" would in his view justify a difference of approach in interpreting Section 11 (5) of the Constitution. The draftsman did not intend that the right of freedom of movement (under the Constitution) should be protected only for those enjoying status (under the 1956 Act). It would have been the simplest thing to say so had he intended this. Referring to the contention that the word "child" in Section 11 (5) should be given its natural meaning to include all children, a contention supported by a passage from the dissenting judgment of Lord Denning M.R. in Sydall v. Castings Limited [1967] 1 Q. B. 30, at p. 311, the learned Judge found 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 word "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 this 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 the 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 in the interpretation of its language".

.....

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10 "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".

p.43
lines 36-47

8. Georges J. accepted that underlying the protection afforded to belongers was the concept that parent should not be separated from child during the child's minority even though status could not be transmitted.

p. 43
lines 42-47

20 The draftsman of the Constitution must have had the 1956 Act in mind when drafting S.11, yet he omitted to qualify the word "child" with the word "legitimate" as it is qualified in the 1956 Act.

p.43
Line 48:
p.44
lines 1-7

30 Another indication that the word "child" in the Constitution was not intended to be restricted to legitimate child was to be found in a comparison between Section 100 of the 1956 Act, and section 11 (5) of the Constitution. While section 100 (c) of the 1956 Act contained a specific reference to the illegitimate child of a woman section 11 (5) (d) of the Constitution did not. The latter section elevated what formerly was a mere immunity from deportation into an immunity against any restriction from freedom of movement, including, for example, the right to enter Bermuda. There was no reason to think that the draftsman intended to exclude from the category of persons whose rights were enhanced one particular category, the illegitimate child of a woman.

p.44
lines 7-46
p.45
lines 1-18

40 9. Duffus J. also allowing the Appeal, held that child must, prima facie, mean a legitimate child unless the statute requires a different interpretation. It was 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.

p. 59
lines 25-34

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Duffus, J., after considering and rejecting the point taken under Section 16 of the 1956 Act as to Bermudian status, turned to consider Section 11 of the Constitution. The sole question was whether the children came within the meaning of the word "child" in section 11 (5) (d). It was necessary to consider the Constitution as a whole to see whether "the context in which the word 'child' appears evidently requires it to embrace a wider category than that of legitimate children" (see : Galloway .v. Galloway (1956) A.C. 299 at p.318 per Lord Radcliffe).

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p.59
lines 35-44

The first argument in favour of the wider meaning of the word "child" was that the provisions being interpreted appeared in the Constitution and not in a statute dealing with a specific subject. The provisions also appeared in the Chapter setting out the Fundamental Rights of the Individual and dealt with all persons in Bermuda.

p.60
lines 35-44;
p.61
lines 1-25

Another argument was that section 11 (5) (d) only refers to persons under the age of 18. Section 11 (5) was designed to protect children from being deported or having their movement restricted if they are the children of a person possessing Bermudian status. Unlike the Immigration Acts there was no qualification to the word "child". The Constitution made no (express) provisions for an illegitimate child nor any differentiation between a legitimate and illegitimate child. It would be a denial of human rights if an illegitimate child was treated differently from a legitimate child and this was one of the very evils that the Constitution set out to prevent or remedy, namely, to safeguard "the life liberty and security of the person". It would be inhumane to separate the children from their mother who had the right and duty to live with her husband in Bermuda and also to carry out her parental responsibilities to her young children.

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p.61
lines 37-42

The wider interpretation of the word "child" was consistent with Section 100 of the 1956 Act.

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10. Hogan P. agreed with the majority in dismissing the Appeal as to Bermudian status and turned to consider Section 11 of the Constitution.

p.35
lines 10-19

If, as was established beyond question, in an Act of Parliament the word "child" means

10 legitimate child and illegitimate children could only be included by express words or necessary implication from the context, the same approach should be adopted to the Constitution. There were no express words and Hogan P. could find nothing in the Constitution to require a departure from the meaning normally to be attached to the word "child" in legislation of this kind. He questioned the construction of section 11 (1) which said that subsection does not merely prohibit interference with the rights to which it refers but actually creates those rights as well; he recoiled from a construction of section 11 (1) which would allow anyone in the world to enter Bermuda subject only to the limitations imposed by other legislation which was restricted in scope.

p. 35
lines 26-31

p.36
lines 4-9

Hogan P. would hold that in section 11 of the Constitution "child" and "step-child" did not include an illegitimate child or step-child.

p.36
lines 20-24

20 11. It is submitted that the judgments of the majority in the Court of Appeal were correct for the reasons which they give. The context in which the word "child" appears in section 11 (5) of the Constitution evidently requires it to embrace a wider category than that of legitimate children. The purpose of section 11 (5) is to preserve the right, during minority, of children who might otherwise be excluded from Bermuda to remain in parental care. In this context the narrower construction which would discriminate against a category of children no less in need of parental care than legitimate children is manifestly inappropriate.

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12. Further, it is submitted that the narrower construction would hinder the "freedom of movement" of Mrs. Fisher who might well feel constrained to care for the four children in a place ex hypothesi outside Bermuda. This in turn would hinder the "freedom of movement" of Mr. Fisher and their legitimate son.

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13. The Respondents humbly submit that the decision of the Court of Appeal for Bermuda was correct and should be affirmed and that this Appeal ought to be dismissed for the following among other -

R E A S O N S

- (i) BECAUSE upon the true construction of Section 11 (5) of the Constitution the illegitimate children of the spouse are entitled to freedom of movement as defined in the said Section 11.
- (ii) BECAUSE the judgment of the Court of Appeal for Bermuda was correct and ought to be affirmed.

CHRISTOPHER FRENCH, Q.C. 10

JULIAN E.S.P. HALL

NARINDER HARGUN

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