

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 209

BETWEEN:

1. S, a minor

2. B, a minor

By their next friend, EQUAL OPPORTUNITIES IN SPORT

Plaintiff

-and-

BERMUDA AMATEUR SWIMMING ASSOCIATION

Defendant

Before: Chief Justice Hargun

Appearances: Mr. Peter Sanderson, Benedek Lewin Limited, for the Plaintiff

Date/s of Hearing: 31 October 2018

Date of Judgment: 7 December 2018

JUDGMENT

Whether “a person belonging to Bermuda” under the Bermuda Constitution is akin to a “citizen” or “national” of Bermuda; differences between Bermuda status and belonging to Bermuda

Introductory

1. By these proceedings the Plaintiffs seek a declaration that for the purposes of a sporting competition (the rules of which specify or otherwise require that for a person to be eligible to compete in or win such a competition he/she must be a “citizen” and/or “national” of Bermuda), any person “deemed to belong to Bermuda” for the purposes of section 11(5) of the Bermuda Constitution Order

1968 is considered as equivalent to a citizen and/or national under Bermuda law for such purposes.

Background

2. These proceedings relate to the eligibility of Bermuda athletes to compete in events organised by the Central American and Caribbean Amateur Swimming Federation (“CCCAN”). The issue raised has wider implications for Bermuda athletes to compete in events organised by international sporting bodies. International sporting bodies generally require that as a qualification for participation and winning the competition, the athlete must be a citizen or national of the participating countries. The issue for determination is who qualifies as a “citizen” or “national” of Bermuda for these purposes and in particular whether a person who is deemed to belong to Bermuda within the meaning of section 11(5) of the Bermuda Constitution is to be considered a “citizen” or “national” of Bermuda for these purposes.
3. The Plaintiffs are two children who belong to Bermuda pursuant to section 11(5)(d) of the Bermuda Constitution by virtue of being the children of naturalised British Overseas Territories Citizens. Bermuda Amateur Swimming Association is the Bermuda affiliate of CCCAN, a regional sports organisation responsible for organising aquatic sports events in Central America and the Caribbean. The Defendant is responsible for selecting and entering Bermuda athletes in CCCAN events. In these proceedings the Defendant has taken a neutral position. Ms. Charmaine Smith, a director of the defendant, attended the hearing of this matter without making any submissions in relation to the issues raised in these proceedings.
4. Article 7 of the Central American and Caribbean Amateur Swimming Confederation Constitution (2015) provides that CCCAN is committed to accept the eligibility rules established by the Federation Internationale De Natation (“FINA”) and to act in accordance with the rules in force at the time of an application of the rules.
5. Rule 1.1 of FINA General Rules provides that all competitors shall be registered with their National Federation to be eligible to compete. Rule 2.5 provides that

when a competitor represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalisation, of the nation he/she represents, provided that a naturalised person shall live in that country for at least one year prior to that competition. Rule 2.5 further provides that competitors, who have more than one nationality according to the laws of the respective nations must choose one “Sport Nationality”.

6. Rule 2.5 of FINA Rules indicates that for the purposes of determining the “citizenship” or “nationality” one must look to the internal law of the participating country. This is confirmed by an arbitration award in the Court of Arbitration for Sport, Arbitration CAS 94/132 Puerto Rico Amateur Baseball Federation and USA Baseball, award of 15 March 1996. In that case the arbitration tribunal held that “*each country has the right to determine its own rules as to nationality. No other country may dispute such right. The Panel expressly does not decide that there would be no exceptions to this principle which might result from the application of internationally accepted norms*”. Accordingly, international sporting bodies would ordinarily accept the determination of citizenship and/or nationality by the domestic tribunals of the participating country in accordance with the laws and rules of that participating country unless such laws or rules exceed internationally accepted norms.

Discussion

7. The starting point of any discussion in relation to the concepts of “citizenship” or “nationality” in the context of Bermuda is that Bermuda is a British Overseas Territory and not an independent state. Given that Bermuda is a British Overseas Territory, strictly speaking there is no such thing as Bermudian nationality as such or Bermudian citizenship as such. On the international plane Bermudians are British citizens. This is made clear by the Privy Council judgment in *Thompson v Bermuda Dental Board* [2009] 2 LRC 310 at [36] per Lord Neuberger. The search is for who should be considered as the equivalent to a “citizen” or “national” of Bermuda for the specific purposes of international sporting bodies.
8. Historically all persons who possess Bermuda status under the Bermuda Immigration and Protection Act 1956 have been considered as nationals of Bermuda by the local and international sporting bodies. Thus, the Defendant has

always treated all persons who possess Bermuda status as nationals of Bermuda for the purposes of participating in CCCAN events and CCCAN has accepted that designation.

9. The concept of a person possessing Bermuda status comes from the Bermuda Immigration and Protection Act 1956. Part III of that Act deals with acquisition and enjoyment of Bermuda status. Section 17 deals with acquisition of Bermudian status by persons domiciled for purposes of Immigration Act 1937, section 18 deals with acquisition of Bermudian status by birth, section 18AA deals with acquisition of Bermudian status by adoption, section 19 deals with right of persons with Bermudian connection to Bermudian status, section 20A deals with the right of certain long-term residents Bermuda status, section 20D deals with right of siblings of Bermudians to Bermuda status and section 20E deals with the right of parents of Bermudians to Bermuda status.

10. The Bermuda Constitution uses a different but related concept of “belonging to Bermuda”. Section 11 (5) provides that 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 the person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person under a decree of the court or deed of separation; or
- (d) is under the age of 18 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.

11. The concept of “belonger status” used in the Bermuda constitution is a concept adopted by other overseas territories which are not independent countries. It is granted to those who are regarded as having connections with a territory close enough to “belong” to the territory. As explained in *British Overseas Territories law*, second edition (2018), chapter 11:

“By contrast, in most overseas territories there is also a local status, which is commonly called “belonger status” or “belongership”, which is determined by the Constitution or ordinary legislation of the territory concerned and not by Act of Parliament [of the United Kingdom]

It is important to distinguish belonger status from nationality or citizenship; no overseas territory has its own nationality or citizenship. But belonger status can fairly be described as the equivalent of a local “citizenship” of an overseas territory, in the sense that it is granted to those who are regarded as having connections with the territory close enough to “belong” to the territory.

There is no uniformity in the various provisions of territories that define who is, or who may become, a “belonger”. The general pattern is that belongers fall into two broad categories: (1) those who are regarded as sufficiently indigenous to the territory and are thus belongers by operation of law of the relevant legislation; and (2) those who have been granted belonger status by means of a process and machine established by the legislation”.

12. It will be seen from the definition of a person belonging to Bermuda in section 11(5) of the Constitution that the concept of belonging to Bermuda is wider than the concept of Bermudian status. However, Chapter 1 of the Constitution dealing with Protection of Fundamental Rights and Freedoms of the Individual seeks to extend to a person belonging to Bermuda substantially the same rights as enjoyed by a person possessing Bermudian status. Thus, section 11, dealing with protection of freedom of movement, provides that 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. Section 11(2)(d) allows the imposition of restrictions on the movement or residence within Bermuda of any person “who does not belong to Bermuda”. In

other words, the fundamental right of freedom of movement enshrined in section 11(5) may not be restricted in relation to a person who belongs to Bermuda.

13. Likewise section 12(1) of the Constitution provides for the fundamental right dealing with protection from discrimination on the grounds of race, place of origin, political opinions, colour or creed. Subsection (1) provides that subject to the provisions of subsections (4), (5) and (8) of that section, no law shall make any provision which is discriminatory either of itself or in its effect. Subsection (4)(b) provides that subsection (1) shall not apply to any law so far as that the law makes provision with respect to the entry into or exclusion from any employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not belong to Bermuda for the purposes of section 11 of the Constitution. In other words, the fundamental right of protection from discrimination enshrined in section 12(1) may not be restricted in relation to a person who belongs to Bermuda.

14. The significance of the fundamental right set out in section 12(1) was demonstrated in the Court of Appeal decision in *Minister of Home affairs v Williams* (Civil Appeal No. 15 of 2015). In that case Mr Williams, a person belonging to Bermuda, sought a declaration that he had a right to engage in employment and business without discrimination pursuant to section 12 of the Constitution, and that he did not require the specific permission of the Minister to engage in employment or business. In upholding the submission, the Court of Appeal stated at [29]:

“Whilst “place of origin” and “national origins” are different, in our judgment nothing turns on this distinction in the present case. The respondent was indirectly discriminated against because his place of origin is Jamaica. The section 12 (4) (b) exclusion from the general section 12 (1) protection from discrimination applies to those who do not belong to Bermuda. The respondent is a person who belongs to Bermuda by virtue of section 11 (5) (b) but does not possess Bermudian status within the meaning of the 1956 Act and requires a work permit in order to engage in gainful employment. As was stated by the Chief Justice the effect of the

constitutional legislation had been to create two categories of “belongers”: those belongers who possess Bermuda status and are able to work without the requirement of a work permit and other belongers who do not require a work permit to do so. As a matter of common sense as noted by Lord Neuberger in Thompson, the proportion of persons whose place of origin is not Bermuda who have Bermudian status is considerably smaller than the proportion of persons whose place of origin is Bermuda. As a result, the statutory requirement that those belongers who do not possess Bermudian status must have a work permit in order to engage in gainful employment has a disproportionately prejudicial effect on belongers whose place of origin is not Bermuda. This requirement is indirectly discriminatory and there is no reason why belongers should be treated differently based upon the distinction as to whether their place of origin is Bermuda or place other than Bermuda. No case has been advanced on the basis of justification”.

15. The effect of section 11(1) and section 12(1) of the Constitution, as interpreted in *Williams*, is that a person belonging to Bermuda enjoys the same rights in relation to freedom of movement (including the right to live in Bermuda) and with respect to employment, engaging in any business or profession in Bermuda as a person who possesses Bermudian status. These are fundamental rights which are ordinarily enjoyed, without any special permission, by a citizen or national of a country.
16. There continue to be certain limited provisions within the Constitution which continue to specify “Bermuda status” as the relevant qualification for eligibility for certain limited purposes. Thus, section 55(1) provides that a person shall be qualified to be registered as an elector for the purposes of elections in a constituency if he, inter alia, possesses Bermudian status. Likewise section 29 provides that a person shall be qualified to be appointed as a Senator or elected as a member of the House of Assembly if he, inter alia, possesses Bermudian status.

17. The real issue here is whether the differences in rights attaching to the concept of Bermuda status and the rights attaching to the concept of belonging to Bermuda are material for the purposes of considering who is a “national” or “citizen” of Bermuda in order to qualify to compete in international sporting events. In my judgment Bermuda law affords a large measure of equality to the concepts of Bermuda status and belonging to Bermuda. The differences I have noted and outlined in this judgment between the concepts of Bermuda status and belonging to Bermuda are not material for this particular purpose. As noted in Chapter 11 of the *British Overseas Territories Law, 2nd edition (2018)*, longer status in overseas territories which are not independent states can fairly be described as equivalent of a local “citizenship” of that overseas territory. It follows that all persons who either possess Bermudian status or are deemed to belong to Bermuda are to be considered as equivalent of “nationals” or “citizens” of Bermuda for the purposes of eligibility to compete in international sporting events.

18. In the circumstances the Court declares that for the purposes of a sporting competition (the rules of which specify or otherwise require that for a person to be eligible to compete in or win such competition he/she must be a “citizen” and/or “national” of Bermuda), any person “deemed to belong to Bermuda” for the purposes of section 11(5) of the Bermuda Constitution Order is considered equivalent to a citizen and/or national under Bermuda law for such purposes.

Dated this 7 December 2018

NARINDER K HARGUN, CHIEF JUSTICE