COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2017/PUB/con/00014

BETWEEN

SHANNON TYRECK ROLLE (1)

LAVAUGHN SHAWN ROLE (2)

(By his next friend Shannon Tyreck Rolle)

CASSHONYA PASHA ROLLE(3)

(By her next friend Shannon Tyreck Rolle)

Applicants

AND

THE ATTORNEY-GENERAL

Respondent

Public Law Division

2019/PUB/con/00021

BETWEEN

MAYSON JUNO PIERRE (1)

(By his next friend Julna Pierre)

NIKEY PIERRE (2)

(By his next friend Julna Pierre)

Applicants

AND

THE ATTORNEY-GENERAL

Defendant

Before the Hon. Mr. Justice Ian R. Winder

Appearances: Wayne Munroe QC with Bridget Ward for the Applicants

Keith Cargill and Kirkland Mackey for the Respondent

3 December 2019

DECISION

WINDER J

These are separate applications for declarations as to the true construction of article 6 of the Constitution of the Commonwealth of The Bahamas ("the Constitution"). As the two actions deal with the same legal issue it was agreed that they would be heard together.

Background to the First Action

1. In the first action, Shawn Michael Rolle (a Bahamian national and holder of passport #ER0184084) is said to have fathered three children Shannon Tyreck Rolle, Lavaughn Shawn Rolle and Casshonya Pasha Rolle with Sonya Tawanna Smith (a Jamaican national). The children were all born out of wedlock.

2. A Bahamian birth certificate was issued in the name of Shannon Tyreck Rolle with a date of birth of 3 July 1998. The name of the mother on the birth certificate is indicated as Sonya Smith and the name of the father is indicated as Shawn Michael Rolle.

3. Lavaughn Shawn Rolle (born 8 August 1999) and Casshonya Pasha Rolle (born 15 September 2000) do not have registered birth certificates. Affidavits of birth were executed by Shawn Rolle and Sonya Smith which indicate that they are the father and mother of Lavaughn Shawn Rolle and Casshonya Pasha Rolle who were born at the Princess Margaret Hospital in Nassau, Bahamas on 8 August 1999 and 15 September 2000 respectively.

4. The affidavit in respect of Lavaughn Shawn Rolle was executed on 24 May 2001 but was not lodged for record until 6 November 2013. The affidavit is recorded in the Registry of Records in Volume 119 at pages 91-93.

5. The affidavit in respect of Casshonya Pasha Rolle was executed on 13 November 2002 but also not lodged for record until 6 November 2013. The affidavit is recorded in the Registry of Records in Volume 119 at pages 94-96.

6. The reason indicated in both of the affidavits of birth of Lavaughn Shawn Rolle and Casshonya Pasha Rolle, for the failure to record the birth of both of the children, was that “the father was not available at the time”.

Background to the Second Action

7. In the second action, Nexon Pierre (a Bahamian national and holder of Bahamian Voters card #03833) is said to have fathered two children, Mayson Juno Pierre and Junior Niky Pierre (identified in the Originating Notice of Motion as Nikey Pierre) with Julna Pierre (a Haitian national). The children were all born out of wedlock.

8. A Bahamian birth certificate was issued in the name of Mayson Juno Pierre with a date of birth of 4 November 2006. The name of the mother on the birth certificate is identified as Julna Pierre however no father is identified on the birth certificate.

9. Junior Niky Pierre does not have a registered birth certificate. An affidavit of birth executed by Julna Pierre and a person called James Minnis (who describes himself as a family acquaintance) indicates that Junior Niky Pierre was born at the Princess Margaret Hospital, Nassau Bahamas, on 16 December 2012. No father is referred to in the affidavit of birth and Nexon Pierre is not a party to the affidavit. The affidavit is executed on 4 January 2016, lodged for record in the Registry of Records on 20 January 2017 and recorded in Volume 12705 at pages 489-491.

10. In this decision, the applicants to both actions are collectively referred to as “the Applicants”. Similarly, the reference to “the Respondent” is a reference to the Attorney-General in both actions.

Analysis and Discussion

11. The actions were each brought by Originating Notice of Motion, seeking relief in similar terms, as follows:

1. A declaration that on a true construction of article 6 of the Constitution any person born to either Bahamian parent after July 9, 1973 is a citizen at birth;
2. A declaration that the Applicants are persons born to a Bahamian father and entitled to citizenship pursuant to article 6 of the Constitution;
3. A declaration that the wording of article 14 does not affect the rights given under article 6 in that article 14 only applies where the word "father" is mentioned in the relevant chapter and does not affect the wording of either parent as set out in article 6.

12. This decision calls for an interpretation of article 6 of the Constitution. Specifically, it must be determined whether the reference in article 14(1) of the Constitution to "father" is to be applied to the interpretation of article 6 of the Constitution.

13. Article 14(1) of the Constitution (article 14(1)) provides:

> 14. (1) Any reference in this Chapter to the father of a person shall, in relation to any person born out of wedlock other than a person legitimated before 10th July 1973, be construed as a reference to the mother of that person.

Article 6 of the Constitution (article 6) provides:

> 6. Every person born in The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date either of his parents is a citizen of The Bahamas.

14. The Applicants contend that article 14(1) does not apply to Article 6, in which case, as the children of an unwed Bahamian father and having been born in The Bahamas, they are citizens of The Bahamas. The Respondent says simply that the clear interpretation of article 14(1) of the Constitution is that it applies to any provision which is capable of including the father.

15. The Respondent relies on the decision of ***Hall CJ*** in ***K v. The Minister of Foreign Affairs and Others [2007] 2 BHS No. 12.***

16. In ***K v. The Minister of Foreign Affairs and Others [2007] 2 BHS No. 12,*** K, who was born in Nassau to an unmarried Bahamian father, H, applied for judicial review of the decision of the Chief Passport Officer declining to entertain her application for a passport. ***Hall CJ*** found that K was not entitled to citizenship in accordance with Article 6. According to ***Hall CJ***:

> **8** The plinth on which the submissions of counsel for the respondent is erected is that Article 14(1) clearly establishes that the Constitution intends a differentiation as between legitimate and illegitimate children. The Constitution of The Bahamas stands in contrast to the Constitution of Bermuda, the comparable provision of which was the subject of the oft cited decision of the Judicial Committee of Her Majesty's Privy Council in *Minister of Home Affairs v Fisher* [1991] 44 WIR 107 where their Lordships held that the word "child" must be interpreted as including an illegitimate child. Mr Higgins submits that Article 14(1) of the Constitution of The Bahamas provides an interpretation for Chapter II, a provision absent from the Bermuda Constitution, which absence compelled the Privy Council to enunciate rules for the interpretation of the peculiar provisions of constitutional instruments. Whereas the issue in *Fisher* was whether a statute subordinate to the Constitution could limit the words of the Constitution, here the question is the interpretation of the Constitution itself.
>
> **9** Mr Munroe counters that, if the common law rule that illegitimate children had no father were still the law in 1973 (when the Constitution come into effect) Article 14(1) would not be necessary, nor would the recent provisions of the Status of Children Act, enacted in 2002, which in section 3(2) reverses the rule of construction that "words of relationship signify only legitimate relationships" but excluded its applicant (sic) from any rule of law relating to citizenship (section 3(3)(b)).
>
> **10** While there is no evidence placed before the Court as to the citizenship of the applicant's mother, I can only assume that the applicant here is not engaged in an academic exercise of Constitutional interpretation and that her mother is not, in fact, a citizen of The Bahamas.
>
> **11** I am of the view that that the only interpretation possible of the word "parents" in Article 6 is the ordinary grammatical meaning of "father or mother" and I am not persuaded that the absence of "parents" anywhere else in Chapter II (save for Article 7(1) which deals with persons born in The Bahamas "neither of whose parents is a citizen") has any significance other than the economical use of language by the draftsman of the Constitution. I am unable to see how any other interpretation of the word "parent" is possible, nor am I able to accept the reliance on the provisions of the Births and Deaths Registration Act.
>
> **12** The effect of Article 6 is that a person born in The Bahamas after Independence inherits the Bahamian citizenship of either his mother or father subject, however,

to the clear words of Article 14(1) that, if that person is born out of wedlock, he can only inherit citizenship through his mother.

13 It, therefore, follows that, unless the applicant can establish that her mother is a citizen of The Bahamas, she is not entitled to any of the reliefs claimed. The application is, accordingly refused.

17. Respectfully, I do not share the view of ***Hall CJ***, that this is the only interpretation possible of the word "parents" in article 6 or that the use of the word does not have "any significance other than the economical use of language by the draftsman. In fact, the use of "father or mother" would have resulted in the same amount of words being used, as the words "either of" would become redundant. This is demonstrated clearly below:

> 6. Every person born in The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date ~~either of his parents~~ his father or mother is a citizen of The Bahamas.

There is no economy here. " Whilst father or mother may be the ordinary grammatical meaning for parents, the draftsman of the Constitution did not use "father or mother" but chose to use the word parents. The choice of the word parents instead of "father or mother" is intentional. It must mean that, by this use of different words, the draftsman clearly intended to convey a different meaning, the biological father or mother of the child and unaffected by the artificial construct envisioned by article 14(1).

18. Ultimately however, this is not a question of counting words but of meaning. Regrettably, ***Hall CJ*** does not proffer a basis for his view that the use of the parents was merely economical use of language. The interpretation advanced by ***Hall CJ*** and the Respondent also does not account for the deliberate shift in language and ignores the presumption that different words in a legislative enactment carry different meanings. The learned authors of ***Bennion on Statutory Interpretation*** provides a very useful analysis on this issue. At section 21.3 of ***Bennion***, it is stated:

> ***Section 21.3: Same words, same meaning; different words, different meaning*** **[21.3]**
>
> Same words, same meaning; different words, different meaning

(1) There is a presumption that where the same words are used more than once in an Act they have the same meaning.
(2) There is a presumption that where different words are used in an Act they have different meanings.

Comment

Legislation is generally assumed to be put together carefully with a view to producing a coherent legislative text. It follows that the reader can reasonably assume that the same words are intended to mean the same thing and that different words mean different things. Like all linguistic canons of construction this is no more than a starting point. These presumptions may be rebutted expressly or by implication. The presumption that different words have different meanings will generally be easiest to rebut since 'the use of the same expression is more likely to be deliberate'.[1]

…

Presumption that different words have different meanings

The reverse presumption: different words or phrases are used to denote a different meaning unless the context otherwise requires. It is generally presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning.

Example

In *Trustee Solutions Ltd v Dubery [2006] EWHC 1426 (Ch)*, *[2007] 1 All ER 308* at [34] Lewison J considering the phrases 'notice under hand' and 'notice in writing' held that the former phrase meant a signed notice and said:

> "One would naturally expect the two different phrases to have different meanings'.'

In *Hadley v Perks (1866) LR 1 QB 444* at 457 Blackburn J said:

> "It has been a general rule for drawing legal documents from the earliest times, one which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning …"

At the same place Blackburn J recognised the possibility of elegant variation when he said that the legislature 'to improve the graces of the style and to avoid using the same words over and over again' may employ different words without any intention to change the meaning. However, elegant variation is not a practice that would be adopted by a modern legislative drafter – it is worth noting that that case pre-dates the foundation of the Parliamentary Counsel Office in 1869.

Here are some examples of cases where the use of different words influenced the outcome.

Example

In *R v Crown Court at Knightsbridge, ex p Dunne [1994] 1 WLR 296* it was alleged that 'type' as used in the Dangerous Dogs Act 1991, s 1(1) (which refers to 'any dog of the type known as the pit bull terrier') had a meaning equivalent to 'breed' rather than any wider meaning. Glidewell LJ, holding that a wider meaning was intended, pointed out that s 2(4) of the Act said that in determining whether to make an order 'in relation to dogs of any type' the Secretary of State should consult 'a body concerned with breeds of dogs', adding that here 'the two words are being used in contradistinction to each other'.

Example

In *R (on the application of M) v Gateshead Council [2007] 1 All ER 1262* at [19] Dyson LJ said of provisions in the Children Act 1989:

> "… it is striking that the duties in ss 17, 18, and 20 are all owed by local authorities to children “within their area”, but that this qualifying phrase is absent from s 21. It would be striking if this omission were not deliberate."

This helped to show in relation to the s 21 duty (where those words were absent) that the duty applied to all children.

Example

In *R v Sally Lane and John Letts [2018] UKSC 36* the Supreme Court considered the mental element in respect of an offence under the Terrorism Act 2000, s 17. The differences between the wording of that section and the wording of other sections creating offences under that Act were an important factor in interpreting s 17. Lord Hughes said:

> "20. That inevitable conclusion is reinforced by the presence in the 2000 Act of section 19 … The offence is committed, according to section 19, where a person “believes or suspects …”
>
> Thus the 2000 Act, here in question, demonstrates the currency, in the context of terrorist offences, of a reference to actual suspicion, at the same time as turning its back on such a reference section 17, with which this court is now concerned. The contrast is clearly a relevant pointer to the meaning of section 17.
>
> 21. Similarly, section 18 of the same Act creates an offence of money laundering in relation to terrorist property. The offence contains no requirement of a mental element as a definition of the offence. Rather, by subsection (2), it provides that it is a defence for a person charged to prove that “he did not know and had no reasonable cause to suspect” that he was dealing with terrorist property…This section also compellingly reinforces the construction of section 17 arrived at by the judge and the Court of Appeal…"

Example

In *Brown v Hyndburn Borough Council [2018] EWCA Civ 242* the Court of Appeal considered whether the power in Housing Act 2004, s 90(1), to impose conditions

on landlords 'for regulating the management, use or occupation of the house concerned' enabled a local authority to impose conditions requiring a landlord to provide facilities (eg a carbon monoxide detector) or to upgrade the premises (eg to ensure the premises were covered by a valid Electrical Installation Condition Report, and to carry out works if the report indicated an installation was unsatisfactory). The court below had held that such conditions could be imposed as they regulated the 'management' of the premises. The Court of Appeal held that Parts 1 to 3 of the Act drew a distinction between conditions regulating the management, use and occupation of the house concerned, and conditions regulating its condition and contents. The conditions in question related to the condition and contents of the premises, and accordingly could not be imposed under s 90(1).

Weight of presumptions depends on context

The weight to be given to the presumptions may depend on whether it appears that the provisions were produced by one or more drafters working together to produce consistency. As Pearce and Geddes *Statutory Interpretation in Australia* (6th edn, 2006) at para 4.7 says:

> "The issue will ultimately turn on the view the court forms of the care exercised by the drafter in the choice of words. If it should be shown that a word has been used with different meanings in an Act, then the argument for consistent interpretation cannot stand. If, on the other hand, it is clear that a word is used throughout an Act to convey one meaning, then the burden of showing that there was an inconsistent use should be regarded as difficult to discharge."

The several examples, identified in ***Bennion*** above, aptly demonstrated the due regard with which the presumption, that different words have different meanings, ought to be given in the interpretation process. Presuming, as we must, that the drafters of the Constitution did not indulge in elegant variation but kept to the use of the word father, when wishing to convey the meaning imposed by article 14(1), it is difficult to accept ***Hall CJ***'s assessment that this was economical use of language.

19. As the words, “father” and “mother” are used independently throughout in Chapter II it would be wrong to ignore the decisive and deliberate shift in language used from “father” and “mother” to “parents. The natural expectation, as stated by ***Lewison J*** in ***Trustee Solutions Ltd v Dubery,*** is for “the two different phrases to have different meanings”. This must signal that the drafters of the Constitution did not intend the application of article 14(1), which could have been actuated if “father or mother” was used instead of parents. Borrowing the observation of ***Dryson LJ*** in ***R (on the***

application of M) v Gateshead Council*,* "it would be striking if this [change in language] were not deliberate".

20. If there were no direct references to the father of a person in Chapter II of the Constitution, I would readily accept that the argument for applying article 14(1) to Article 6 would have been more persuasive. This however is not the case here as there are clear references, to the father of a person, in article 3(2) and article 8 of the Constitution. These articles provide:

> 3(2) Every person who, having been born outside the former Colony of the Bahama Islands, is on 9th July 1973 a citizen of the United Kingdom and Colonies shall, if ***his father*** becomes or would but for his death have become a citizen of The Bahamas in accordance with the provisions of the preceding paragraph, become a citizen of The Bahamas on 10th July 1973.
>
> …
>
> 8. A person born outside The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date ***his father*** is a citizen of The Bahamas otherwise than by virtue of this Article or Article 3(2) of this Constitution.

As there are direct references to the "father of a person", the making of indirect reference, in my view, is an overreach. This is especially so in circumstances where the impact is the disentitlement of the fundamental and automatic right to citizenship of an entire class of persons, born out of wedlock in The Bahamas to Bahamian men.

21. The construction advanced by the Respondent requires, in relation to a person born out of wedlock, that in construing article 6 the word "parents" be first replaced with "father or mother" and then "father" in this phrase is replaced with "mother". The end result would then be to read parents into Article 6 as "mother or mother". The use of the word parent(s), elsewhere in Chapter II, demonstrate that the artificial construct, created by article 14(1), was not intended by the drafter of the Constitution to be applied indirectly to his choice of the word "parents". "Parent(s)" is found in two other places beside Article 6. It is used in the Proviso to article 5(6) and in article 7(1).

> 5. (6) Any application for registration under this Article shall be made in such manner as may be prescribed as respects that application: Provided that such an application may not be made by a person who has not attained the age of eighteen

years and is not a woman who is or has been married, but shall be made on behalf of that person by ***a parent*** or guardian of that person.

…

7. (1) A person born in The Bahamas after 9th July 1973 neither of whose ***parents*** is a citizen of The Bahamas shall be entitled, upon making application on his attaining the age of eighteen years or within twelve months thereafter in such manner as may be prescribed, to be registered as a citizen of The Bahamas.

The proviso to article 5(6) permits the parent or even the guardian to make an application for registration on behalf of a minor. Article 7(1) permits the application for registration as a citizen of persons born to non-citizen parents. Even the most cursory examination of these articles, exposes that, the legitimacy of the person concerned, is wholly irrelevant to the construction. It is therefore evident that article 14(1) was not meant to apply outside the strict application of where the word father is specifically referred to in articles 3(2) and 8.

22. In my view, it is simply just wrong to seek to apply article 14(1) to article 6 as the words *father and mother* do not appear in it. It seems clear that in every place where it was intended by Parliament to refer to father and mother in their legal sense, it did so. Father is used in the Constitution in its common law meaning of a legal (and not putative) father, and this must explain why it was not possible for the drafters of the Constitution to use *father and mother* in article 6 in place of *parents*. Parliament must have intended "parents" in article 6 to have the ordinary grammatical meaning of biological parents.

23. There is absolutely no context which ought to displace the operation of the usual interpretive presumption, that different words have different meanings. Instead, the context in which the terms *father* and *parents* are used, in the various places in the Constitution other than article 6, confirms the validity of the presumption. As seen in the previous paragraphs, the respective use of the terms *father* and *parents* clearly demonstrate the different meanings being utilized. Whilst the context in which the use of the terms *father* and *parent* in the Constitution differ from each other, when each of these terms are used, that use is entirely consistent throughout.

24. In the ***Report of the Constitutional Commission into a Review of The Bahamas Constitution*** dated 13 July 2013, article 6 of the Constitution is considered. At paragraphs 14.14 – 14.15 of the Report it was stated:

> Article 6: Children born in The Bahamas where either parent is Bahamian
>
> 14.14 The Commission is of the view that this provision is not discriminatory. It adopts a hybrid position between acquisition of citizenship based on birth in territory and descent, and the combination of each grants automatic entitlement at birth. However, it seems to have been susceptible to an interpretation that it is discriminatory in its effects. This results from what the Commission considers—and with the greatest of respect for the Courts—to be the erroneous interpretation of the word "parents" in this provision to include an unmarried Bahamian mother but not an unmarried Bahamian father.
>
> 14.15 In several cases, the courts have construed the reference to "parents" in art. [6] to be caught by the definition of "father" in Article 14(1), and therefore the potential benefit of this article to a child born out of wedlock in The Bahamas to a Bahamian male is removed. However, it seems fairly clear that the intention of article 6 is to grant automatic citizenship to a child born in The Bahamas (an objective condition) where at least one parent is Bahamian (another condition that is capable of being objectively determined). The only difference in the case of a male parent is that the common law—eminently rooted in common sense—has always required proof of paternity before those other rights can attach, as it is not readily clear who the father is. Automatic transmission of citizenship through patrilineal descent could produce absurd results. But an unmarried Bahamian man whose paternity of a child has been legally established or acknowledged should be fully able to transmit his citizenship to his offspring.
>
> (emphasis added)

In the footnote to paragraph 14.15 (footnote 45) it was stated:

> 45 See, K (By her Next Friend, H, her father) and The Minister of Foreign Affairs et. al. 2005/PUB/jrv/00005; and Deveaux v. A-G 1998/CLE/gen/FP/112 (14 March 2006), Supreme Court, unreported). In this context, it is suggested that the word "parent" can only mean the biological parent of the child, not any legal construct used to denote the marital status of the parent. This view is supported by the use of the word parent in A.6, as distinct from father or mother used in other articles (and see Minister of Home Affairs v. Fisher [1980], where the Privy Council held that the world 'child' in the context of the Bermuda constitution had to be construed liberally to mean biological child).

25. As seen from the Report of the Constitutional Commission there is clearly another possible interpretation other than the one advanced by the Respondent, and endorsed by ***Hall CJ***. Article 6 may be interpreted taking into account its natural and real meaning, of biological parents, unaffected by any artificial construction which could be imposed by article 14(1). It cannot be disputed that the Respondent's interpretation leads to an anomalous or otherwise absurd result, whilst this natural interpretation does not. I adopt, in its entirety, the views of the Constitutional Commission that absurd consequences will result from such a restrictive interpretation as contended for by the Respondent.

    (i) Firstly, the obvious effect is that the child of an unmarried Bahamian mother born in The Bahamas has an entitlement to automatic citizenship whilst the child of an unmarried Bahamian father, also born in The Bahamas, has no such entitlement. He passes his blood and DNA but not his citizenship.

    (ii) Secondly, the expressed intention of article 6 is frustrated. Article 6 was intended to provide for the grant of automatic citizenship to a child born in The Bahamas where at least one parent is Bahamian. The intent is frustrated in the case of the unwed Bahamian father as his child is able to access citizenship only through the mother, and if the mother is foreign there is no entitlement to citizenship.

    (iii) Thirdly, the child of a Bahamian father where the mother is a non-citizen, is in the same category as a child whose parents are both non-citizens and must wait to access citizenship, by an application for registration at age 18 under article 7. This too could not have been the intended result of the constitutional framers of article 6.

26. In ***Minister of Home Affairs v. Fisher [1980] AC 319*** the Privy Council had to interpret Section 11(5) of the constitution of Bermuda. Section 11(5) of the Bermuda constitution provided:

> (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…; 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."

27. The applicant in ***Fisher***, the Jamaican mother of four illegitimate children all born in Jamaica, married a Bermudian in 1972. Fisher and the children took up residence with the husband in Bermuda in 1975. At all material times the children were under 18. In 1976 the Immigration Minister ordered the children to leave Bermuda. Fisher and her husband applied to the Supreme Court to quash the order and for a declaration that the children were to be deemed to belong to Bermuda. The Supreme Court refused a declaration on the ground that the children were illegitimate. On appeal, the Court of Appeal allowed the appeal finding that the children were to be deemed to belong to Bermuda. The Privy Council dismissed the appeal finding that "child", in a constitutional context means, biological child and includes an illegitimate child. ***Lord Wilberforce,*** on behalf of the Board, stated at page 329:

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 Bermuda Immigration and Protection Act 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.

(Emphasis added)

28. The principles in ***Fisher,*** requiring the Constitution to be given a broad and purposive construction have been followed in a number of cases across the Commonwealth. ***Hall CJ*** sought to distinguish the import of ***Fisher*** on the basis that the issue in ***Fisher*** was whether a statute subordinate to the Constitution could limit the words of the Constitution. ***Hall CJ*** determined that the question for him in ***K.*** was different as he was considering an interpretation of the Constitution itself. In the Mauritius case of ***C Panjanadum v The Prime Minister of Mauritius, 1995 SCJ 248, 1995 MR 93***, the Supreme Court of Mauritius, did apply ***Fisher*** in interpreting the provisions of its Constitution. In that case, a judicial review application, the applicant was a citizen of Mauritius who had a child out of wedlock with Schmitt, a French national. Prior to the birth of the child both the applicant and Schmitt had made a declaration before a notary recognising the child. In June 1994, the Secretary for Home Affairs denied an application for registration of the minor child as a citizen of Mauritius.

29. Sections 23 and 27(2) of the Constitution of Mauritius provided:

> 23 - A person born outside Mauritius after 11 March 1968 shall become a citizen of Mauritius at the date of his birth if at that date his father is a citizen of Mauritius.
> 27 (2) - Any reference in this Chapter to the father of a person shall, in relation to a person born out of wedlock, be construed as a reference to the mother of that person.

The State's case was that since the child was born out of wedlock the citizenship of the father was of no consequence. They argued that had the mother been a Mauritian national, the child would by operation of Section 27(2) have become a Mauritian

national. Since the mother was not a Mauritian national the child was also excluded from Mauritian citizenship. According to the Court:

> We agree that S 23 of the Constitution must be read in the light of S 27 (2) but we find that the interpretation, which Counsel submits we should arrive at, contains a fallacy. We do not think that S 27 (2) of the Constitution was meant to be read in such a way that it would override S 23. Nor do we think that S 23 should be restricted to legitimate children. Our opinion is reinforced by the analogy we make of our Section 23 with Section 11 of the Constitution of Bermuda which was considered by the Privy Council in Minister of Home Affairs & another v. Fisher [l97l] 2 WLR 889. It was held in that case that <u>although the manner of interpretation of a constitutional instrument should give effect to the language used, recognition should also be given to the character and origins of the instrument and that provisions dealing with the fundamental rights and freedoms of an individual which include the unity of the family as a group should not be interpreted restrictively</u>.
>
> Furthermore, it would offend the spirit of our Constitution which is permeated with clauses supporting phallocratic autocracy to deny Mauritian citizenship to the natural child of a Mauritian father born from his union with a foreign mother whilst granting citizenship to the natural child of a Mauritian mother born of her union with a foreign father. … <u>We are of the opinion that S 27 (2) of the Constitution should be read as adding to what has been provided in S 23 and not as excluding those provisions so that a child born from the relations of a Mauritian father with a foreign mother does not lose his Mauritian citizenship.</u> <u>We feel that this is the only sensible and reasonable interpretation we can give to those two Sections of the Constitution, having regard to the provisions of our Constitution dealing with fundamental rights and freedoms of the individual.</u> (emphasis added)

What is striking about this case is that section 23 of the Mauritian Constitution made a direct reference to father in a similar manner as our article 8. This is quite unlike the case of our article 6 where the reference, being argued for, is indirect. Under their section 23, a person acquires citizenship at the date of his birth "*if at that date his <u>father</u> is a citizen of Mauritius*". The Mauritius Court nonetheless, in applying ***Fisher,***

interpreted the constitutional provision so as to give effect to the language used, recognizing the character and origins of the constitutional instrument. They found that section 23 of the Mauritius Constitution ought to be read as adding to rather than excluding the rights available and thus the section did not deprive a child born out of wedlock to a Mauritian father of Mauritian citizenship where the mother was a foreigner.

30. The incorporation of article 14(1) is in recognition of the existence of the common law *filius nullius* rule (child of no one) which did not recognize a child born out of wedlock. As all Commonwealth Caribbean constitutions derive from the same Westminster Parliament it is not surprising that this provision is not unique to The Bahamian Constitution. It is not a clause drafted exclusively for the Bahamian Constitution. A provision similar to article 14(1) is to be found in the first six independent Caribbean constitutions. The provision however is notably absent from the later constitutions, perhaps due to the then emerging international intolerance with the concept of an *illegitimate child*. The counterpart to our article 14(1) is to be found in the:
    (1) Jamaica (Constitution) Order in Council 1962 –Section 12(2);
    (2) Trinidad and Tobago (Constitution) Order in Council 1962 – Section 18(2);
    (3) Guyana Independence Order 1966 (as amended 1970) – Article 29(2);
    (4) Barbados Independence Order 1966 – Section 10(2); and,
    (5) Grenada Constitution Order 1973 – Section 100(2).

31. In each of these constitutions, cited above, the counterpart provision is clearly and unequivocally directed only to children born outside of the country or to children born in the country to diplomats and/or enemies of that country. The Bahamas Constitution has no references to children born to diplomats and/or enemies of The Bahamas. As all of these constitutions emanate from the same Westminster Parliament, it is again no surprise that the only direct references to the *father of a person* in The Bahamas Constitution occurs in two places in Chapter II (article 3(2) and article 8), both of which relate to the entitlement of citizenship of persons born outside of The Bahamas. In my considered view, these (article 3(2) and article 8) were the only places where article

14(1), was intended to have effect, in keeping with the trend across the region. Article 6 was never intended to be affected by article 14(1).

32. Article 6 was clearly intended to be expansive, as reflected in the opening words, "[*e*]*very person".* Article 6 was intended to afford an automatic right to citizenship in circumstances where one parent was a Bahamian citizen. The application (or misapplication) of article 14(1) to article 6 would take away that opportunity from the child born out of wedlock, to access citizenship where one of his parents may be Bahamian. If article 14(1) applied, his right to automatic citizenship is based upon the nationality of his mother alone. Article 6 must therefore be given the broad generous and purposive interpretation called for in ***Fisher***.

33. Basic tenets of the Bahamian Constitution involve the promotion and protection of the fundamental rights and freedoms of the individual. ***Fisher*** demands that any interpretation imposing limitations on the rights afforded under article 6 must be carefully construed. It is undeniable that the interpretation advanced by the Respondent is restrictive and offends the basic tenets of the Constitution. In a Constitution which advances fundamental rights and equality, an interpretation which avoids inconsistency with these rights must be preferred. If the establishment of such an anomalous and unfair regime was intended, one would have expected clear direct words to that effect, not the artificial and strained interpretation contended for by the Respondent. In keeping with the principles outlined in ***Fisher***, I prefer the interpretation which gives full recognition and effect to those fundamental rights and freedoms espoused by the Constitution. It is also my view that, had the Parliament intended this denial of fundamental rights, an indirect reference could not suffice.

34. In this case, the only proper interpretation, having regard to the language used and giving effect to the provisions of the Bahamian Constitution dealing with the fundamental rights and freedoms of an individual, is to preclude any application of article 14(1) by indirect reference. Further, as the Constitution is sui generis, calling for principles of interpretation of its own, the interpretation of parents in article 6 as a

reference to the natural parents, is the only interpretation suitable to the character, and spirit of the Constitution.

35. I am cognizant of the impact of a decision to find that article 14(1) does not apply to article 6. In ***K***, the judgment records the Chief Passport Officer as indicting, in 2006, that the policy position of his department was that article 14(1) applied. As ***Hall CJ*** quite correctly indicated, such a policy cannot affect the true legal position. That legal position, however, in my view, must be, that every person born in The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date either of his parents is a citizen of The Bahamas, irrespective of the marital status of the parents at the time of birth.

36. Entitlement to citizenship is entirely different from proving that entitlement. In this vein, I recognize, as did the Constitutional Commission, the common law position which has always required proof of paternity before those other rights can attach. In reality, unlike the mother, it is not readily clear who the father is. In some cases, the father's belief (and I dare say occasionally the mother's) as to his paternity is mistaken. It is also a notorious fact, of which I take judicial notice, that immigration fraud takes place in our country and regrettably some of our citizens have been prepared to trade their birthright in return for consideration.

37. This matter was heard on affidavits only and there was no cross examination on those affidavits. Reservations had been raised, by the Respondent, albeit only orally, in respect of proof of paternity. I readily acknowledge the importance of this matter to the Applicants and to the Respondent, as it could affect status. Whilst I accept that there was some indicia of proof of paternity, I am not as yet prepared to make a final order.

38. In the absence of legislation, the court is left to rely principally on witness testimony to settle so important an issue. Fortunately, today, science is able to provide assistance and the best evidence available to independently assist the court in settling issues of paternity.

39. In the circumstances therefore, having established the legal position, rather than conclude the application with a decision which may be adverse to either side, who may wish to make further representations, in light of my legal finding, I will adjourn this matter and give directions as to how further representations may be made and/or evidence may be adduced, if necessary, prior to a final determination on the evidence.

40. The matter is adjourned to 29 July 2020 at 10:00 a.m.

Dated the 25th day of May 2020

Ian R. Winder
Justice