Hilary Term
[2022] UKPC 6
Privy Council Appeal No 0033 of 2020

JUDGMENT

Chantelle Day and another (Appellants) *v* The Governor of the Cayman Islands and another (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lady Arden
Lord Sales
Dame Victoria Sharp

JUDGMENT GIVEN ON
14 March 2022

Heard on 23 and 24 February 2021

Appellants
Edward Fitzgerald QC
Ben Tonner QC
Peter Laverack
(Instructed by Simons Muirhead & Burton LLP)

Respondents
Sir Jeffrey Jowell QC
Dinah Rose QC
Timothy Parker
Reshma Sharma
Celia Middleton
(Instructed by Attorney General's Chambers (Cayman Islands))

LORD SALES:

1. The appellants, Ms Chantelle Day and Ms Vickie Bodden Bush, are in a committed relationship and wish to enter into a same-sex marriage recognised in law in the Cayman Islands. When they applied for the appropriate licence at the Cayman Islands General Registry in April 2018 the Deputy Registrar refused to grant a licence on the grounds that section 2 of the Marriage Law (2010 Revision) ("the Marriage Law") defines marriage as "the union between a man and a woman as husband and wife". Ms Day and Ms Bush claim that the Bill of Rights, Freedoms and Responsibilities ("the Bill of Rights"), which forms Part 1 of the Cayman Islands Constitution ("the Constitution") set out in the Cayman Islands Constitution Order 2009 ("the 2009 Order"), confers on them a constitutional right to legal recognition of such a marriage and that the Marriage Law should be read in such a way as to reflect that right. Their claim was successful in the Grand Court (Chief Justice Smellie), but an appeal by the Government of the Cayman Islands was allowed by the Court of Appeal (Sir John Goldring P, Field and Morrison JJA). The Court of Appeal held that, on its proper interpretation, the Bill of Rights does not confer a right on same-sex couples to marry and have their marriage recognised in law. Ms Day and Ms Bush now appeal to the Board.

2. It was common ground in the Court of Appeal and is common ground before the Board that under section 9(1) of the Bill of Rights (right to respect for family and private life) the Legislative Assembly of the Cayman Islands was required to provide the appellants with a legal status functionally equivalent to marriage, such as civil partnership. The Government and Legislative Assembly were in breach of this obligation, so the Court of Appeal made a declaration to that effect. The Government does not appeal against that declaration. This obligation has now been complied with, by the promulgation of the Civil Partnership Law 2020.

The introduction of the Constitution in 2009

3. The United Kingdom is responsible for the international relations of the Cayman Islands. Pursuant to article 56 of the European Convention on Human Rights ("the ECHR") the United Kingdom has declared that the ECHR shall apply in relation to the Cayman Islands. Accordingly, the United Kingdom is concerned to ensure that local law in the Cayman Islands should be compatible with the obligations of the United Kingdom under the ECHR in respect of the Cayman Islands. The Foreign and Commonwealth Office proposed the introduction of a new constitution for the Cayman Islands which would reflect the provisions of the ECHR and scheduled formal negotiations on that constitution with local representatives to commence on 29 September 2008.

4. Shortly before the negotiations began, a proposal to change the law in relation to marriage to make it clear that it did not apply in relation to same-sex relationships was before the Legislative Assembly, on 5 September 2008. The Marriage (Amendment) Law 2008 was passed, to come into effect on 27 October 2008. The introduction to that Law stated that it was promulgated "to expressly provide that a marriage is a union between a man and a woman". It amended the Marriage Law (2007 Revision) by inserting into the definition section, section 2, the statement that "'marriage' means the union between a man and a woman as husband and wife". That definition has been retained in the 2010 Revision of the Marriage Law.

5. The negotiations on the constitution between the United Kingdom Government and local representatives were chaired by Mr Ian Hendry of the Foreign and Commonwealth Office. The Cayman Islands delegation comprised the Governor, the Attorney General, five representatives of the elected government, four backbenchers of the governing party, five representatives of the official opposition, two church representatives, three members of the Chamber of Commerce and two members of the Cayman Islands Human Rights Committee. The ambit of the right to marry to be included in the Bill of Rights was the subject of debate in the negotiations. Various representatives of the Cayman Islands wished to have it made clear that the proposed right to marry should apply only to marriage between a man and a woman. The provision which became section 14 of the Bill of Rights was drafted to meet this concern. In the third and final round of negotiations, on 3 February 2009, Mr Hendry stated that the boundaries of the provision had been made clear in that "marriage is so defined in this text without peradventure that marriage can only be between an unmarried man and an unmarried woman, it can't be anything else". The transcript of the negotiations, from which this statement is taken, was not published. The draft constitution was approved to be put to a referendum.

6. On 20 May 2009 there was a referendum in the Cayman Islands in which 62% of those who voted approved the draft constitution. On 10 June 2009 the 2009 Order adopting the Constitution was promulgated by the Queen in Council. On 6 November 2009 it came into force, except for the Bill of Rights. That came into force later, on 6 November 2012.

The Constitution and the Bill of Rights

7. The Constitution is set out in Schedule 2 to the 2009 Order, entitled "The Constitution of the Cayman Islands". It includes a preamble which states, in material part:

"The people of the Cayman Islands ...

Affirm their intention to be -

> A God-fearing country based on traditional Christian values, tolerant of other religions and beliefs …
>
> A country in which religion finds its expression in moral living and social justice.
>
> A caring community based on mutual respect for all individuals and their basic human rights.
>
> A country committed to the democratic values of human dignity, equality and freedom ...
>
> A community protective of traditional Caymanian heritage and the family unit ..."

8. Section 5 of the 2009 Order has the heading, "Existing laws". It provides:

> "(1) Subject to this section, the existing laws shall have effect on and after the appointed day 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 into conformity with the Constitution.
>
> ...
>
> (3) In this section 'existing laws' means laws and instruments ... having effect as part of the law of the Cayman Islands immediately before the appointed day [6 November 2009]."

9. The Bill of Rights is headed "Guarantee of Rights, Freedoms and Responsibilities" and has a preamble as follows:

> "Whereas all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law."

10. Section 1 of the Bill of Rights states:

> "(1) This Bill of Rights ... is a cornerstone of democracy in the Cayman Islands.
>
> (2) This part of the Constitution -
>
> > (a) recognises the distinct history, culture [and] Christian values ... of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom;
> >
> > (b) confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and
> >
> > (c) does not affect ... rights against anyone other than the government ...
>
> (3) In this Part 'government' shall include public officials (as defined in section 28) and the Legislature, but shall not include the courts (…)."

11. The Bill of Rights is based on the ECHR. The form and content of the rights contained in the Bill of Rights substantially follow the Convention rights. The appellants seek to rely on sections 9, 10, 14 and 16 of the Bill of Rights. Section 9 of the Bill of

Rights ("Private and family life") corresponds with article 8 of the ECHR (right to respect for private and family life); section 10 ("Conscience and religion") corresponds with article 9 (freedom of thought, conscience and religion); section 14 ("Marriage") corresponds with article 12 (right to marry); and section 16 ("Non-discrimination") corresponds with article 14 (prohibition of discrimination).

12. Section 14 of the Bill of Rights, headed "Marriage", is the only provision in the Bill of Rights which refers specifically to marriage. This is the provision which is of most significance in the appeal. So far as relevant it states:

> "(1) Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.
>
> (2) No person shall be compelled to marry without his or her free and full consent.
>
> (3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that the law makes provision that is reasonably justifiable in a democratic society - (a) in the interests of public order, public morality or public health; (b) for regulating, in the public interest, the procedures and modalities of marriage; or (c) for protecting the rights and freedoms of others.
>
> ..."

13. Although section 14 occupies the same position in the scheme of the Bill of Rights as article 12 in the scheme of the ECHR, the drafting of section 14 is more specific than article 12, which provides:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

14. Section 9 of the Bill of Rights provides in relevant part as follows:

"(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.

…

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society [for various defined purposes]."

15. Article 8 of the ECHR provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. Section 10 of the Bill of Rights provides in relevant part as follows:

"(1) No person shall be hindered by government in the enjoyment of his or her freedom of conscience.

(2) Freedom of conscience includes freedom of thought and of religion or religious denomination; freedom to change his or her religion, religious denomination or belief; and freedom, either alone or in community with others, both in public and in private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship …

(6) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is

reasonably justifiable in a democratic society [for various defined purposes]

…"

17. Article 9 of the ECHR provides:

"(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

18. Section 16 of the Bill of Rights provides in relevant part as follows:

"(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.

(2) In this section, 'discriminatory' means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.

(3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the

> interests of defence, public safety, public order, public morality or public health.
>
> …
>
> (7) Subsection (1) is without prejudice to any restriction on the rights and freedoms guaranteed by section 9, 10, 11, 12, 13 or 14 if that restriction would, in accordance with that section, be a restriction authorised for the purposes of that section on the ground that - (a) the provision by or under which it is imposed is reasonably required in the interests of a matter, or for the purpose, specified in that section; and (b) the provision and the restriction imposed under it are reasonably justifiable in a democratic society."

19. Article 14 of the ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Factual background and the decisions of the Grand Court and Court of Appeal

20. Ms Day is a Caymanian, born and brought up in the Cayman Islands. Ms Bush is a dual citizen of the United Kingdom and Honduras, whose family has deep roots in the Cayman Islands. She has lived and worked in the Cayman Islands for long periods.

21. In 2013 the appellants formed a relationship and began living together as a couple in the Cayman Islands. Due to the absence of legal recognition available there for same-sex couples and the precarious nature of Ms Bush's immigration status, between September 2014 and August 2018 they moved away and lived together in Ireland and then the United Kingdom.

22. In 2016 the appellants began acting as de facto guardians for a young girl, A, by agreement with her mother. In June 2018 their application to adopt A was granted by a court in England. In September 2017 the appellants became engaged to be married.

In 2018 they returned to the Cayman Islands with a view to residing there to raise A within their community of family and friends.

23. On 12 April 2018 the appellants applied at the General Registry for a special licence to marry as required under section 22 of the Marriage Law (2010 Revision). On 13 April 2018 the Deputy Registrar, who is the first respondent to this appeal, refused to grant the licence, on the grounds that the definition of marriage in the Marriage Law did not allow for same-sex marriage. At this time, Caymanian law did not include provision for civil partnerships.

24. On 19 June 2018 the appellants commenced judicial review proceedings in the Grand Court against the Governor of the Cayman Islands, the Deputy Registrar and the Attorney General (representing the Government), who is the second respondent to this appeal, in which they sought declarations that the Marriage Law infringed their rights under sections 9, 10, 14 and 16 of the Bill of Rights and a declaration that the Marriage Law should be interpreted so as to be in conformity with their constitutional rights. Their primary claim was that they had a right under the Constitution to marry and have their marriage recognised in law; in the alternative, they sought a declaration that provision should be made for them to be able to enter into a civil partnership. On 28 September 2018 Ms Day and Ms Bush also filed a constitutional petition pursuant to section 26 of the Bill of Rights relying on the same grounds of challenge and seeking similar relief.

25. The two sets of proceedings were heard together by the Chief Justice in the Grand Court. On 29 March 2019 the Chief Justice handed down a judgment in which he held that the fact that section 14(1) of the Bill of Rights enshrines the right to marry for opposite-sex couples does not exclude a similar right existing for same-sex couples under section 9 of the Bill of Rights as an aspect of the right to family and private life and under section 10 of the Bill of Rights as an aspect of the right to freedom of conscience and freedom to manifest their belief in marriage by being allowed to enter into that institution. Further, the refusal to license the marriage of the appellants constituted unjustified discriminatory treatment contrary to their rights under section 16 of the Bill of Rights. The Chief Justice invoked section 5 of the 2009 Order to bring the Marriage Law into conformity with the rights in sections 9, 10 and 16 of the Bill of Rights by amending the definition of “marriage” in section 2 of the Marriage Law so that it means “the union between two people as one another’s spouses”, and hence includes same-sex marriage, and by making consequential amendments to the marriage declaration set out in section 27 of the Marriage Law. The Chief Justice also indicated that the appellants were entitled to apply for damages for violation of their constitutional rights.

26. The Deputy Registrar and the Government appealed to the Court of Appeal of the Cayman Islands. The appeal was allowed. The court held that in the scheme of the Bill of Rights section 14 is the provision which governs the right to marriage as a lex specialis, or provision specifically focused on that issue; it does not cover same-sex marriage; and the general rights in sections 9, 10 and 16 could not be interpreted to include a right for people of the same sex to marry for which the lex specialis in section 14 did not provide. The court rejected the submission of Mr Edward Fitzgerald QC for the appellants that section 14(1) should be read merely as confirming a right of marriage for opposite-sex couples, which did not preclude the possibility of deriving from sections 9, 10 and 16 an equivalent right for same-sex couples to marry. The court followed the judgments of the European Court of Human Rights ("ECtHR") in the leading cases of *Schalk and Kopf v Austria* (2011) 53 EHRR 20 ("*Schalk and Kopf*") and *Hämäläinen v Finland* (2014) 37 BHRC 55, Grand Chamber ("*Hämäläinen*"), which held that in the scheme of the ECHR article 12 is the lex specialis provision governing the right to marry, that it does not create a right for same-sex couples to marry, and that in consequence articles 8 and 14 of the ECHR (corresponding with sections 9 and 16 of the Bill of Rights, respectively) cannot be read as including such a right. This same reasoning applies in relation to section 10 of the Bill of Rights. Therefore, no question arose of amendment of the Marriage Law pursuant to section 5 of the 2009 Order. The Court of Appeal observed that their interpretation of the Bill of Rights did not prevent the Legislative Assembly from passing legislation to create a right for same-sex couples to marry, but there was nothing in the Bill of Rights which obliged it to do so.

27. As noted above, the Court of Appeal also held that, as was conceded by the Government, the failure of the Government and Legislative Assembly to provide for a regime of civil partnerships for same-sex partners, with functional equivalence to marriage, was in breach of the rights of the appellants under section 9 of the Bill of Rights (family and private life) and made a declaration accordingly. The Board notes that this matches the position under article 8 of the ECHR, as determined by the ECtHR in *Oliari v Italy* (2017) 65 EHRR 26. In view of the declaration made by the Court of Appeal, the Civil Partnership Law 2020 was passed. This law allows both opposite-sex and same-sex couples to enter into a civil partnership, and amends existing laws (other than the Marriage Law) so that civil partnership has equivalent effect to marriage. It is not necessary to say anything further about this.

The appeal to the Board

28. Ms Day and Ms Bush now appeal to the Board. The principal issue in the appeal is whether the Bill of Rights provides a right for the appellants to marry. If it does, a further issue arises as to whether the Chief Justice was right to amend the Marriage Law pursuant to section 5 of the 2009 Order.

29. Mr Fitzgerald, for the appellants, repeats the submissions made to the Court of Appeal and seeks to uphold the reasoning of the Chief Justice. Mr Fitzgerald accepts that section 14(1) of the Bill of Rights cannot be read to include a right to marry for same-sex couples, but submits that it does not prevent such a right from arising under other provisions of the Bill of Rights, namely sections 9, 10 and 16. The principal focus of his submissions was on sections 9 and 16. As with the British North America Act in relation to Canada, the Constitution is a "living tree capable of growth and expansion within its natural limits" and "subject to development through usage and convention": *Edwards v Attorney General for Canada* [1930] AC 124, 136. Accordingly, the interpretation of the rights it sets out is capable of changing in line with developing social standards. In accordance with established principle in relation to the interpretation of constitutional rights in the jurisprudence of the Board, the Bill of Rights should be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to": *Minister of Home Affairs v Fisher* [1980] AC 319, 328. The right to respect for private and family life under section 9 includes the right to enter into same-sex relationships and have them recognised in law, as has been accepted in the jurisprudence of the ECtHR. There is no reason why this right should not extend to include a right to marry. Further, the right to freedom of conscience in section 10 includes the right to freedom of religious or conscientious belief and practice and to be free from restraint or coercion in the manifestation of such belief, and since the appellants have a conscientious belief in the institution of marriage and wish to marry their right under section 10 is engaged and there are no good grounds to justify interference with that right by the state refusing the right to marry for same-sex couples. In addition, by being denied the right to marry, the appellants are being treated in a discriminatory manner in respect of these rights of theirs without any justification, contrary to their right under section 16(1). In support of this submission, Mr Fitzgerald relies on section 16(7) and maintains that the limitation in section 14(1) of the right to marry to opposite-sex couples is a "restriction" on the right to marry in that provision which is not "reasonably justifiable in a democratic society" under section 16(7)(b); hence it cannot be relied upon as an answer to the claim of the appellants based on their right under section 16(1) to be protected against discriminatory treatment.

30. Ms Dinah Rose QC, for the Government, relies on the reasons given by the Court of Appeal. She submits that, in providing for a specific right to marry under certain conditions, section 14(1) is a lex specialis which has the effect that no right to enter into same-sex marriage can be found to exist in any of the other provisions of the Bill of Rights. The other provisions are general in their terms and cannot be taken to displace or circumvent the way in which the drafters of the Constitution have specified the express right to marry as incorporated in the Bill of Rights. The Bill of Rights must be interpreted as a coherent whole. This means that the principle of interpretation encapsulated in the Latin maxims "lex specialis derogat legi generali" (the specific law

prevails over the general) and "generalia specialibus non derogant" (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case), which is a principle of coherent interpretation of legal instruments of any character, is applicable. Section 14(1) is the specific provision in the Bill of Rights which deals with the right to marry; the right is defined in limited terms which do not cover same-sex couples; and that limitation cannot be circumvented by seeking to rely on other, general rights which do not address the topic of marriage directly. Mr Fitzgerald's attempt to rely on section 16(7) is misplaced: section 14(1) defines the right to marry, and the limits it specifies are limits to that right, not a "restriction authorised for the purpose of that section" within the meaning of section 16(7). Section 16(7) does not authorise a court to subject the scope of the right in section 14(1) to a test of justification. Ms Rose submitted that the interpretation of the Bill of Rights is clear without any need of recourse to the travaux préparatoires in the form of what had been said during the negotiation of the Constitution, but if necessary she relied on Mr Hendry's statement during the negotiations in support of her submissions. Also, should the issue arise, Ms Rose submitted that the Chief Justice had misapplied section 5 of the Constitution in amending the Marriage Law as he did.

31. The Board was referred to a range of international instruments and constitutions from around the world and a large number of authorities from various jurisdictions dealing with the topic of same-sex marriage. However, these were of limited assistance.

32. The Board's view is that the Court of Appeal was correct in its approach to the interpretation of the Bill of Rights and in the construction which it gave it. In the context of the Bill of Rights, section 14(1) is a lex specialis dealing with the right to marry. That right is confined to opposite-sex couples. Sections 9, 10 and 16 have to be interpreted in the light of that lex specialis, so none of them can be construed as including a right for a same-sex couple to marry.

Constitutional interpretation and the lex specialis principle

33. The issue for the Board is one of interpretation of the Bill of Rights which constitutes Part 1 of the Constitution of the Cayman Islands. The Bill of Rights is a specific legal instrument which falls to be interpreted in its particular context and as a coherent, internally consistent whole. The Court of Appeal referred to relevant authority and correctly directed itself regarding the principles of construction applicable in relation to the Constitution and the Bill of Rights.

34. In *Matadeen v Pointu* [1999] 1 AC 98 an issue arose regarding the interpretation of section 3 of the constitution of Mauritius. Lord Hoffmann, for the Board, addressed the subject of constitutional interpretation at p 108:

> "Their Lordships consider that this fundamental question [sc regarding the relationship between the courts and the legislature of Mauritius] is whether section 3, properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma*, 1995 (4) BCLR 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'"

Lord Hoffmann added (p 114):

> "Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments. Again, their Lordships accept that such international conventions are a proper part of the background against which section 3 must be construed …"

In the present case, the ECHR is a treaty which is applicable in relation to the Cayman Islands and which forms part of the background against which the Constitution was promulgated. However, as noted by the Court of Appeal and as appears below, the ECHR does not include a right for same-sex couples to marry, so the latter principle identified by Lord Hoffmann does not assist the appellants in this case.

35. In *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235, concerning the constitution of Belize, in another important statement, Lord Bingham of Cornhill said this at para 26:

> "When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases, *Weems v United States* (1910) 217 US 349, 373, *Trop v Dulles* (1958) 356 US 86, 100-101, *Minister of Home Affairs v Fisher* [1980] AC 319, 328, *Union of Campement Site Owners and Lessees v Government of Mauritius* [1984] MR 100, 107, *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700-701, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 331, *S v Zuma* 1995 (2) SA 642, *S v Makwanyane* 1995 (3) SA 391 and *Matadeen v Pointu* [1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional

> interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see *Trop v Dulles* 356 US 86, 101. …"

36. In relation to the interpretation of the Constitution of the Cayman Islands, the Board agrees with the approach stated by the Chief Justice in *Hewitt v Rivers* [2013] (2) CILR 262, para 37, as cited by the Court of Appeal:

> "In summary, I consider that my approach to the interpretation of the Constitutional provisions at issue on this petition must seek to give effect to the real meaning of the provisions and, where that meaning is not plain, to apply a purposive interpretation. In that sense, the context will be most important as it also reflects the aspirations of the Caymanian society which the Constitution embodies."

37. The "living tree" principle in the *Edwards* case and the principles in the *Fisher* case are important, but they are applicable in the context of the interpretation of constitutional instruments and are not freestanding. They are only capable of extending meaning in line with changing practices and understandings so far as the language used in the relevant constitutional provisions can reasonably be said to bear a particular meaning.

38. The Board regards it as trite law that the Constitution should be read as a coherent whole: see, eg, *Cooper v Director of Personnel Administration* [2006] UKPC 37; [2007] 1 WLR 101, para 21; *Meerabux v Attorney General of Belize* [2005] UKPC 12; [2005] 2 AC 513, para 33. As Ms Rose submits, the approach to interpretation of an instrument which includes a provision which constitutes a lex specialis in relation to a particular subject matter is not a technical rule of treaty interpretation, as suggested by Mr Fitzgerald. Rather, like the maxim generalia specialibus non derogant, it is a consequence of the principle that an instrument should be interpreted as a coherent whole and "represents simple common sense and ordinary usage": see *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, 627 per Lord Cooke of

Thorndon; also see *Minister of Energy and Energy Affairs v Maharaj* [2020] UKPC 13, para 56.

39. The right to marry in section 14(1) of the Bill of Rights has been drafted in highly specific terms to make it clear that it is a right "freely to marry a person of the opposite sex …". Comparing section 14(1) with article 12 of the ECHR, which was the model for it, it is obvious that this language has been used to emphasise the limited ambit of the right and to ensure that it could not be read as capable of covering same-sex marriage. The reference to "traditional Christian values" in the preamble to the Constitution and the reference to "the distinct history, culture [and] Christian values" in section 1(2)(a) of the Bill of Rights reinforce the point by referring to the cultural and religious values which led to this emphasis being given to opposite-sex marriage in section 14(1).

40. In the Board's judgment, it is clear that within the scheme of the Bill of Rights section 14(1) constitutes a lex specialis in relation to the right to marry. Therefore, the interpretation of the other general provisions in sections 9, 10 and 16, which do not stipulate for a right to marry, must take account of this and cannot be developed to circumvent the express limits on the right to marry in section 14(1). They cannot establish indirectly by implication a right to marry which is not directly set out in the relevant express provision in the Bill of Rights. Interpreting them in that way, as Mr Fitzgerald urges us to do, would have the effect of making the right in section 14(1) redundant, which would clearly be contrary to the intention of the drafters of the Bill of Rights.

41. Mr Fitzgerald's reliance on the "living tree" principle in the *Edwards* case is misplaced. In the Board's view, the drafting of section 14(1), in focusing the right to marry on opposite-sex couples, is so precise and specific that it is difficult to conceive of any development in the understanding in society of the concepts employed in the provision which could allow it to be interpreted as including a right for same-sex couples to marry. Mr Fitzgerald pointed out that the ECtHR in *Schalk and Kopf* (paras 54-63) recognised that the wording of article 12 might potentially lend itself to being interpreted so as not to exclude the marriage between two men or two women and that it was possible that social changes might lead to such an interpretation being adopted in future, but he accepted that the language of section 14(1) was more specific and that it ruled out that possibility. He sought to make this into a building block for his submissions, by arguing that this feature of section 14(1) meant that the other rights in sections 9, 10 and 16 should be interpreted more broadly so as to found a right to marry which could never be recognised under the precise drafting of section 14(1). The Board cannot accept this argument. For the reasons given above, sections 9, 10 and 16 cannot be given a different and more extensive interpretation pursuant to the "living tree" principle to include a right to same-sex marriage, since that would

circumvent the intended effect of section 14(1) and thereby undermine the coherence of the Bill of Rights. Contrary to Mr Fitzgerald's contention, the highly specific terms in which section 14(1) is drafted reinforce the inference that it was intended to operate as a lex specialis which should not be by-passed by unduly generous interpretation of other, general provisions in the Bill of Rights.

42. Mr Fitzgerald points out that section 14(1) refers to the right to found a family and that the right to respect for private and family life is also covered by section 9(1). He submits that this indicates that section 14(1) was not intended to operate as a lex specialis so as to exclude the potential collateral effect of section 9 or the other provisions relied on by the appellants (sections 10 and 16) in relation to the subject matter falling within section 14(1).

43. The Board does not agree. Section 14(1) creates a right to marry for opposite-sex couples and, consequent on the exercise of that right, a right to found a family within marriage as so defined. This is separate from the distinct right in section 9(1), which would support the founding of a family outside marriage as so defined and protects family life generally, in all its manifestations. As explained above, and as the Court of Appeal held, section 14(1) is clearly a lex specialis so far as the right to marry is concerned.

44. The Board considers that the reasons given above, focusing on the interpretation of the Constitution and the Bill of Rights as a self-contained legal instrument drafted in terms specifically chosen as appropriate for the Cayman Islands, are sufficient to determine the case in the Government's favour and to dismiss the appeal. However, the Board also finds support for its interpretation of the Constitution and the Bill of Rights in the case law of the ECtHR regarding the interpretation of the ECHR.

The jurisprudence of the European Court of Human Rights

45. *Schalk and Kopf* concerned a same-sex couple living in Austria, who complained that the Austrian Civil Code only recognised and made provision for marriage between "persons of the opposite sex". On their application to the ECtHR they submitted, first, that article 12 of the ECHR imposed an obligation on the state to grant them access to the institution of marriage; secondly, in the alternative, that article 14 in conjunction with article 8 imposed such an obligation; and thirdly, if they were unsuccessful in their first two submissions, that article 14 read with article 8 imposed an obligation on the state to provide an alternative form of legal recognition for same-sex relationships. By the time the ECtHR gave judgment, the third point had been covered by the

introduction of legislation in Austria to allow for such recognition (the Registered Partnership Act 2010).

46. In its judgment, the ECtHR referred to its previous case law in which article 12 had been held to enshrine the traditional concept of marriage as being between a man and a woman. The ECtHR held that it did not impose an obligation on the state to grant a same-sex couple access to marriage (paras 54-64). The ECtHR then considered the submission that such an obligation arose by virtue of article 14 read with article 8. It held that the complaint related to the private life and family life of the applicants so that article 14 was applicable (paras 92-95). The applicants' argument (para 100) was that "they were discriminated against as a same-sex couple, firstly, in that they did not have access to marriage and, secondly, in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act". It is the first limb of this argument which is relevant for present purposes. The ECtHR dismissed this complaint for these reasons (para 101, omitting footnote):

> "Insofar as the applicants appear to contend that, if not included in article 12, the right to marry might be derived from article 14 taken in conjunction with article 8, the court is unable to share their view. It reiterates that the Convention is to be read as a whole and its articles should therefore be construed in harmony with one another. Having regard to the conclusion reached above, namely that article 12 does not impose an obligation on contracting states to grant same-sex couples access to marriage, article 14 taken in conjunction with article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."

In other words, in the scheme of the ECHR, article 12 was the lex specialis dealing with the right to marry and the more general provisions in article 8 and article 14 had to be read and given effect in the light of that.

47. In *Hämäläinen* a man who was married to a woman underwent a gender change and, relying on articles 8, 12 and 14 of the ECHR, complained that national law did not include provision for continued recognition of their marriage as a same-sex couple, so that full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership. A chamber of the ECtHR dismissed her complaint, reiterating "that, according to the court's case law, article 12 of the convention did not impose an obligation on contracting states to grant same-sex

couples access to marriage. Nor could article 8, a provision of more general purpose and scope, be interpreted as imposing such an obligation" (as summarised at para 38 of the judgment of the Grand Chamber). The applicant appealed to the Grand Chamber. At para 96 the Grand Chamber stated:

> "The court reiterates that article 12 of the convention is a lex specialis for the right to marry. It secures the fundamental right of a man and woman to many and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees v United Kingdom* [1986] ECHR 9532/81 at para 49). While it is true that some contracting states have extended marriage to same-sex partners, article 12 cannot be construed as imposing an obligation on the contracting states to grant access to marriage to same-sex couples (see [*Schalk and Kopf*] at para 63)."

In relation to the applicant's complaint based on article 8, at para 70 the Grand Chamber noted that the practical effect of the applicant's argument that national law should allow her to preserve her existing marriage would be that two persons of the same sex could be married to each other. At para 71 the Grand Chamber said, "[t]he court reiterates its case law according to which article 8 of the convention cannot be interpreted as imposing an obligation on contracting states to grant same-sex couples access to marriage (see [*Schalk and Kopf*] at para 101)". The Grand Chamber also gave other reasons (paras 71-89) why there was no violation of article 8 in the particular circumstances of the case, having regard to the availability of a legally recognised civil partnership and an absence of consensus among states as to how to accommodate gender changes within existing marriages; but it expressed no disagreement with the view of the chamber in its judgment, summarised at para 38. It was not necessary for the Grand Chamber to explore the impact of article 12 being the lex specialis for the right to marry in the scheme of the ECHR upon article 14 because that provision was found not to be infringed for other reasons.

48. In a judgment of 2015, *Oliari v Italy* (2017) 65 EHRR 26, the ECtHR found Italy to be in breach of article 8 by reason of its failure to provide any form of legal recognition for same-sex couples, such as by way of a civil partnership regime. In the same judgment, the court rejected as manifestly ill-founded complaints that Italy was in breach of article 12 or in breach of article 14 in conjunction with article 12 by reason of the absence of recognition for same-sex marriage in its law. The court referred to

Schalk and Kopf and *Hämäläinen* and at para 192 it reiterated that article 12 does not impose an obligation to grant same-sex couples access to marriage. At para 193 it said:

> "Similarly, in *Schalk*, the Court held that article 14 taken in conjunction with article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. The Court considers that the same can be said of article 14 in conjunction with article 12."

49. In *Orlandi v Italy*, Application Nos 26431/12, 26742/12, 44057/12 and 60088/12, ECtHR, judgment of 14 December 2017, the applicants complained of a violation of their rights arising from the absence of the possibility of registering a same-sex marriage contracted under the law of a foreign jurisdiction. The ECtHR referred to its judgment in *Oliari v Italy* and noted that Italy had introduced a civil partnership regime in 2016. The ECtHR held that the applicant's rights under article 8 had been breached on the same basis as in the *Oliari* case in the period until the introduction of the civil partnership regime, while at the same time reiterating (para 192) that contracting states "are still free, under article 12 of the convention as well as under article 14 taken in conjunction with article 8, to restrict access to marriage to different-sex couples [citing *Schalk and Kopf* and *Chapin and Charpentier v France*, Application No 40183/07, ECtHR, judgment of 9 June 2016, para 39]. The same holds for article 14 taken in conjunction with article 12 [citing *Oliari v Italy*, para 193]."

50. In light of the similarity between the scheme of the Bill of Rights and the scheme of the ECHR, the reasoning of the ECtHR in *Schalk and Kopf*, *Hämäläinen*, *Oliari v Italy* and *Orlandi v Italy* supports the Board's interpretation of the Bill of Rights in the present case.

Other jurisprudence

51. Mr Fitzgerald sought to rely on the judgment of the Northern Ireland Court of Appeal in *In re Close's Application for Judicial Review* [2020] NICA 20. The claimants in that case were same-sex couples who had entered into civil partnerships. They wished to enter into a civil marriage, but the relevant law in Northern Ireland did not provide for same-sex marriage. They complained that this constituted unlawful discrimination against them on the basis of their sexual orientation contrary to article 14 of the ECHR as given effect in domestic law by the UK Human Rights Act 1998. Their claim was dismissed at first instance. The Court of Appeal allowed their appeal, holding (para 58) that when judgment was given at first instance in August 2017 the absence of same-sex marriage in Northern Ireland discriminated unlawfully against same-sex couples, in

that “a fair balance between tradition and personal rights had not been struck and that therefore the discrimination was not justified.”

52. However, with respect to the Northern Ireland Court of Appeal, the Board does not find its reasoning persuasive. At paras 27-33 of its judgment it referred to *Schalk and Kopf* and noted (para 32) the effect of para 101 of the ECtHR’s judgment in that case. At paras 34-36 the Court of Appeal referred to *Hämäläinen*, but did not include in its account of that case any reference to paras 71 and 96 of the Grand Chamber’s judgment, as set out above. Unfortunately, at para 41 of its judgment the Court of Appeal summarised the effect of the Strasbourg jurisprudence inaccurately. It correctly noted that this jurisprudence showed that article 12 does not establish a right to same-sex marriage and also said, correctly, that “[a]rticle 8 cannot supply what article 12, the lex specialis, does not supply and cannot, therefore, provide a means of establishing a right to same sex marriage”; however, it lost sight of the fact that according to the ECtHR this same point applied in relation to article 14 read with article 8 and instead indicated that the question of violation of article 14 depended on the issue of justification and whether the law under challenge lay outside the margin of appreciation allowed to a state in the application of that provision. The remainder of the court’s judgment dealt with that issue, arriving at the conclusion that the law was not justified. On a proper understanding of the Strasbourg case law, however, the effect of article 12 being the lex specialis in relation to marriage meant that no such question of justification arose under article 14. In the event, the court did not grant any relief, because by the time it gave judgment domestic legislation had been introduced to allow same-sex couples to marry. It may be for that reason that there was no appeal to the Supreme Court.

53. Mr Fitzgerald also relied on the decision of this court in *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1. In that case, the claimants were an opposite-sex couple who wished to be able to enter a civil partnership rather than marry, at a time when civil partnership was only available for same-sex couples. This court held that the omission to make civil partnership available to them was incompatible with their rights under article 14 of the ECHR taken in conjunction with article 8. The authority does not assist Mr Fitzgerald. It is not concerned with the right to marry and the interaction of articles 8, 12 and 14 of the ECHR. Article 14 was engaged because the civil partnership regime was agreed to fall within the ambit of article 8, as the Strasbourg case law indicated that it did. That is not true of the right to marry, and as Lord Kerr of Tonaghmore pointed out (para 34) if article 8 had not been engaged “no need for justification would have arisen” under article 14.

54. The Board considers that the approach of the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights ("the ICCPR") in its views of 1999 in *Joslin v New Zealand*, Communication No 902/1999. UN Doc A/57/40 (2002) provides further support for its interpretation of the Bill of Rights. The ICCPR contains a specific right to marry in article 23(2) in these terms: "The right of men and women of marriageable age to marry and found a family shall be recognised". In the *Joslin* case the applicants claimed that the failure of domestic legislation to provide for same-sex marriage violated their rights under article 16 (right to recognition before the law), article 17 (right to privacy), article 23(1) (protection for the family) and article 26 (right to equality) of the ICCPR. The Human Rights Committee was of the view that the facts did not disclose a violation of the ICCPR. It treated article 23(2) as the lex specialis which governed the case and the applicants fell outside that provision. The Human Rights Committee said (para 8.2), "[g]iven the existence of a specific provision in the [ICCPR] on the right to marriage, any claim that this right has been violated must be considered in the light of this provision."

Section 16(7)(b) of the Bill of Rights

55. As regards Mr Fitzgerald's reliance on section 16(7)(b) of the Bill of Rights, it does not assist the appellants for the reasons given by Ms Rose. The language of section 14(1) constitutes the definition of the right it establishes and cannot be regarded as a "restriction" on that right for the purposes of section 16(7)(b). Section 16(7)(b) does not have the effect that the limits on the right in section 14(1) are made subject to a justification test. That would undermine the lex specialis status of section 14(1) which the drafters of the Bill of Rights obviously intended it should have.

Travaux préparatoires

56. The Court of Appeal reached its conclusion on the interpretation of the Bill of Rights without needing to refer to the transcript of Mr Hendry's statement in the third round of negotiations leading to the adoption of the Constitution. Similarly, the Board reaches its conclusion without reference to this material. In an appropriate case, reference to the travaux préparatoires for an instrument like the Constitution may be relevant. However, it is not appropriate in this case in view of the clarity and precision of the drafting of section 14(1).

57. Furthermore, the Constitution was adopted pursuant to a process involving a vote by the public to approve it in a referendum. It was the instrument as approved by the public in that referendum which was adopted as the Constitution. The public were

entitled to understand that they were voting to approve the Constitution in the form in which it was presented to them, interpreted in the light of the context and circumstances in the public domain at that time. The transcript of Mr Hendry's comments was not available to the public when they voted to approve the Constitution, so the Board doubts whether in principle it could be said that his comments can properly qualify as an aid in interpreting it. As Lord Diplock said in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279, "[e]lementary justice or … the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible"; see also *R (Public & Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin); [2010] ICR 1198, para 55 (Sales J) ("… it is fundamental that all materials which are relevant to the proper interpretation of such an instrument [an Act of Parliament] should be available to any person who wishes to inform himself about the meaning of that law") and *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622, para 39 (Lord Reed and Lord Thomas) ("In our view it would be wholly inconsistent with the transparent and open democratic process under which Parliament enacts legislation to take into account matters that have passed in private …"). That is so where a person has to find out the meaning of the law which is to be applied to him and it seems to the Board that similar points could be made with still more force where the public is given such an important role as in this case in approving prospectively the fundamental legal rules for the state as set out in a constitutional instrument. It might not be putting it too strongly to say that it would be "a confidence trick … and destructive of all legal certainty", to use the language of Lord Diplock at p 280, if, having invited approval of the Constitution by the public on one basis, the Government were able to refer to private materials which were not publicly available at that time and say that its interpretation is to be taken to be affected by them.

Section 5 of the 2009 Order

58. Since the Board will advise Her Majesty that this appeal should be dismissed and the judgment of the Court of Appeal upheld, it does not need to deal with any point regarding the meaning and effect of section 5 of the 2009 Order.

Constitutional rights and the Legislative Assembly

59. The Board takes this opportunity to reiterate the point made by the Court of Appeal, that the interpretation to be given to the Bill of Rights as explained in this judgment does not prevent the Legislative Assembly from introducing legislation to recognise same-sex marriage. The effect of the interpretation endorsed by the Board is

that this is a matter for the choice of the Legislative Assembly rather than a right laid down in the Constitution.

Conclusion

60. For the reasons set out above, the Board will humbly advise Her Majesty that the appeal should be dismissed.