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Representing Bermuda in international sport – an important decision of the Supreme Court

Service area / [Dispute Resolution and Litigation](#)

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In the recent case of *S (a minor), B (a minor) & Equal Opportunities in Sport v Bermuda Amateur Swimming Association [2018] SC (Bda) 82 Civ* the Supreme Court decided who qualifies as a “citizen” or “national” of Bermuda for the purposes of eligibility to represent Bermuda in sporting events. In particular, the case clarified whether a person who is deemed to “belong to Bermuda” within the meaning of section 11(5) of the Bermuda Constitution Order 1968 (**Bermuda Constitution**) is to be considered a “citizen” or “national” of Bermuda for these purposes.

The facts

The Plaintiffs are two minors who belong to Bermuda pursuant to section 11(5)(d) of the Bermuda Constitution by virtue of being the children of naturalised British Overseas Territories Citizens. The Defendant is Bermuda Amateur Swimming Association and is the Bermuda affiliate of the Central American and Caribbean Amateur Swimming Confederation Constitution (CCCAN), a regional sports organisation responsible for organising aquatic sports events in Central America and the Caribbean. The Defendant is responsible for selecting and entering Bermuda athletes in CCCAN events. In these proceedings the Defendant had taken a neutral position. Ms. Charmaine Smith, a director of the Defendant, attended the hearing of this matter without making any submissions in relation to the issues raised in these proceedings. Prior to this Judgment only those holding Bermudian Status and “deemed Bermudians” were considered eligible for selection to represent Bermuda in international sporting events.

As such, the Plaintiffs sought a declaration from the Court deeming them eligible to represent Bermuda in international sporting events.

Article 7 of the CCCAN Constitution (2015) provides that CCCAN is committed to accept the eligibility rules established by the Federation Internationale De Natation (**FINA**) and to act in accordance with the rules in force at the time of an application of the rules.

Rule 1.1 of FINA General Rules (**FINA Rules**) provides that all competitors shall be registered with their National Federation to be eligible to compete. Rule 2.5 provides that when a competitor represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalisation, of the nation he/she represents, provided that a naturalised person shall live in that country for at least one year prior to that competition. Rule 2.5 further provides that competitors, who have more than one nationality according to the laws of the respective nations, must choose one “Sport Nationality”.

Rule 2.5 of FINA Rules indicates that for the purposes of determining the “citizenship” or “nationality” one must look to the internal law of the participating country. This is confirmed by an arbitration award in the Court of Arbitration for Sport, Arbitration CAS 94/132 *Puerto Rico Amateur Baseball Federation and USA Baseball*, award of 15 March 1996.

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In that case the arbitration tribunal held that “each country has the right to determine its own rules as to nationality. No other country may dispute such right. The Panel expressly does not decide that there would be no exceptions to this principle which might result from the application of internationally accepted norms”. Accordingly, international sporting bodies would ordinarily accept the determination of citizenship and/or nationality by the domestic tribunals of the participating country in accordance with the laws and rules of that participating country unless such laws or rules exceed internationally accepted norms.

The law

In his judgment in the present case, the Chief Justice, in finding in favour of the Plaintiffs, reviewed the Bermuda Immigration Protection Act 1956 (BIPA) and the Bermuda Constitution. The former piece of legislation specifies who would be entitled to “Bermudian status”, as defined by BIPA, while the latter addresses the broader issue of “belonging to Bermuda”.

The most distinct benefit to having Bermudian status is the ability to participate in Bermuda’s political process vote in parliamentary elections¹ and the eligibility to be appointed as a Senator or elected as a member of the House of Assembly². The Bermuda Constitution also specifies that a person deemed to belong to Bermuda shall be able to move freely throughout Bermuda, have the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion from Bermuda³.

Section 12 of the Bermuda Constitution contains provisions addressing the fundamental right dealing with protection from discrimination on the grounds of race, place of origin, political opinions, colour or creed. The Chief Justice when reviewed the Bermuda Court of Appeal decision in *Minister of Home Affairs v Melvern Williams (Civil Appeal No. 15 of 2015)* and noted:

“The effect of section 11(1) and section 12(1) of the Constitution, as interpreted in Williams, is that a person belonging to Bermuda enjoys the same rights in relation to freedom of movement (including the right to live in Bermuda) and with respect to employment, engaging in any business or profession in Bermuda as a person who possesses Bermudian status. These are fundamental rights which are ordinarily enjoyed, without any special permission, by a citizen or national of a country.”

Finally, the Chief Justice considered *British Overseas Territories law*⁴, which states that “belonger” status in overseas territories which are not independent states can fairly be described as equivalent of a local “citizenship” of that overseas territory.

Decision and impact

The Chief Justice decided that for the purposes of a sporting competition, any person “deemed to belong to Bermuda” for purposes of section 11(5) of the Bermuda Constitution Order is considered equivalent to a citizen and/or national under Bermuda law for such purposes.

As a result of this case, belongers will enjoy the same privileges as those with Bermudian status in respect of participation in international sporting events.

This judgment adds further clarity to the position taken by the Court in the recent cases of *Williams and A v The Attorney General, [2017] SC (Bda) 90 Civ* where in it was determined that persons belonging to Bermuda as per section 11(5) of the Bermuda Constitution shall enjoy the same rights and privileges as a person with Bermuda Status insofar as it relates to the ability to reside and work in Bermuda with a work permit⁵ and to the application of the 60/40 rule contained in the Companies Act 1981⁶ and the restrictions on holding land pursuant to the Bermuda Immigration and Protection Act 1956⁷.

Resultantly, a person belonging to Bermuda pursuant to section 11(5) of the Bermuda Constitution can own shares or be a director of a company where less than 60 percent of the ownership and control of the company is in the hands of Bermudians, hold land in Bermuda without a license as well as represent Bermuda in International Sporting events.

1 See section 55(1) of the Bermuda Constitution Order 1968

2 See section 29 of the Bermuda Constitution Order 1968

3 See section 11 of the Bermuda Constitution Order 1968

4 *British Overseas Territories law, Second Edition (2018), Chapter 11*

5 *Bermuda Immigration and Protection Act 1956, section 60*

6 *Companies Act 1981, sections 113, 114 and the Third Schedule*

7 *Bermuda Immigration and Protection Act 1956, Part VI and Section 72(1)*

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