HONG KONG BAR ASSOCIATION
Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

3 July 2008

The Hon. Lam Sui Lung Stephen, JP
Secretary for Constitutional and Mainland Affairs
Constitutional and Mainland Affairs Bureau
Government Secretariat
3/F, Central Government Offices, Main Wing,
Lower Albert Road
Hong Kong.

Dear Stephen,

Re: Race Discrimination Bill: Clauses 8(3)(b) to (d)

I refer to the Hong Kong Bar Association's Further Submission of 12 June 2008 to the Bills Committee of the Race Discrimination Bill.

The Bar Association reiterated, inter alia, for the deletion of clauses 8(3)(b) to (d) of the Bill, which together seek to exclude acts done on the ground of a person's immigration status (not being a permanent resident of the HKSAR), length of residence in the HKSAR, or nationality, citizenship or resident status of another country or place, from constituting acts done on the ground of race, colour, descent or national or ethnic origin of a person.

The Bar Association has recently been able to access the judgment of the Privy Council in *David Leo Thompson v The Bermuda Dental Board (Human Rights Commissioners intervening)* [2008] UKPC 33 (9 June 2008) (with copy attached). The Bar Association considers that this unanimous judgment of Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Carswell, Lord Mance and Lord Neuberger of Abbotsbury provides strong support of the Bar Association's view that clauses 8(3)(b) to (d) of the Bill should be deleted and undermines the Administration's view that these clauses merely "are intended to make it clear that considerations such as Hong Kong permanent resident status and length of residence do not come within the definition of race" (see the Administration's paper LC Paper No. CB(2)2152/07-08(01) <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-2152-1-e.pdf>).

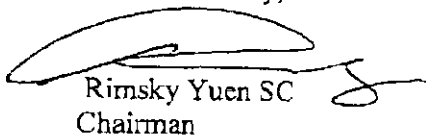
The Privy Council considered in the *Thompson* case whether the Bermudan Dental Board's policy of limiting registration to persons having Bermudian status (which is a concept akin to HKSAR permanent resident status, there being no Bermudan nationality as such) was prohibited under the Bermudian Human Rights Act 1981, which outlaws discrimination on the ground of a person's "race, place of origin, colour or ethnic or national origins". The Privy Council held in paragraph 26 of the judgment that "discriminating someone on the ground that he or she is not Bermudan, or indeed on grounds of nationality or citizenship, is discrimination on grounds of 'race, place of origin, colour, or ethnic or national origins' within s 2(2)(a) of the Bermudan Human Rights Act 1981. A person's 'national origins' under the 1981 Act would include, but not be limited to, his present nationality or citizenship, and (where it differs) his past nationality or citizenship". The Privy Council also explained in detail the reasoning that led to the conclusion above and that the narrow interpretation taken by the majority of the House of Lords in *Ealing London Borough Council v Race Relations Board* [1972] AC 342 was not preferred.

The Bar Association has found the Privy Council's reasoning convincing. Clauses 8(3)(b) to (d) are not merely clarificatory as the Administration had considered. They impermissibly seek to undercut the proper scope of legislation sought to be enacted to tackle race discrimination. Their enactment would simply invite unnecessary and disruptive litigation for declaratory judgment for their removal on constitutional ground.

Accordingly, I write to you to urge the Administration to consider introducing a Committee Stage Amendment to delete clauses 8(3)(b) to (d) of the Bill.

A copy of this letter is also sent to the Hon. Margaret Ng, Chairman of the Bills Committee, for distribution to members of the Legislative Council in support of the relevant but less than comprehensive Committee Stage Amendments on clause 8(3) that Ms. Ng would move on behalf of the Bills Committee when the debate on the Bill resumes on 9 July 2008. Nevertheless, it is the Bar Association's view that it is incumbent upon the Administration to introduce suitable Committee Stage Amendment to accord with up-to-date jurisprudence, ensure a proper scope of protection against racial discrimination and address loopholes in enforcement of the enacted legislation.

Yours sincerely,



Rimsky Yuen SC
Chairman

cc: The Hon. Margaret Ng (Legislative Council Building and 10/F New Henry House)

Thompson Ltd & Anor v. The Bermuda Dental Board (Bermuda) [2008] UKPC 31 (09 June 2008)

Privy Council Appeal No 8 of 2007

David Leo Thompson *Appellant*

v.

The Bermuda Dental Board *Respondent*

Human Rights Commissioners *Interveners*

FROM

THE COURT OF APPEAL OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 9th June 2008

Present at the hearing:-

Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell
Lord Mance
Lord Neuberger of Abbotsbury

[Delivered by Lord Neuberger of Abbotsbury]

1. In order to practise in Bermuda, a dentist must register with the respondent, the Bermuda Dental Board, which has a policy of limiting registration to Bermudians or spouses of Bermudians. Consequent upon the policy, the respondent refused to register the application of the appellant, Dr David Thompson, a citizen of the United Kingdom, to

practise as a dentist in Bermuda. The question raised on this appeal is whether Dr Thompson has thereby been subjected to direct or indirect discrimination contrary to the provisions of the Bermudian Human Rights Act 1981 as amended ("the 1981 Act").

The factual background

2. The present appeal arises as a result of an agreed preliminary issue. Accordingly the factual basis for Dr Thompson's complaint is assumed to be correct, but has yet to be established, although there appears, at any rate at first sight, to be much in the point made on behalf of Dr Thompson that its seems unlikely that the assumed facts will transpire to be incorrect.

3. Dr Thompson was born in the United Kingdom, where he trained and qualified as a dentist. In February 2001, the Department of Immigration granted him a work permit, which entitled him to be employed as a dentist in the practice of a Dr David Dyer in Bermuda. In order to practise as a dentist in Bermuda, Dr Thompson also needed to be registered with the respondent under the provisions of the Dental Practitioners Act 1950. He duly applied for registration, but his application was refused. This refusal was founded on the respondent's long established policy to accept applications for registration only from Bermudians or the spouses of Bermudians.

4. In this connection, as Bermuda is a British overseas territory, there is no Bermudian nationality as such. The concept of a Bermudian has therefore to be understood by reference to the provisions of the Bermuda Immigration and Protection Act 1956, in particular sections 16 to 22. As Evans JA helpfully explained in para 8 of the judgment in the Court of Appeal in this case, there are five main categories of "Bermudian status", namely:

> "(i) Birth – whether in or outside Bermuda, if the parents were domiciled in Bermuda and at least one parent possessed Bermudian status at the time of the birth..., or as the child of a person who has Bermudian status, wherever born, but only until the age of 22 years...;
> (ii) Long term residence in Bermuda – by grant from the Minister, if qualified by residence in Bermuda for at least ten years, and with a 'qualifying Bermudian connection'..;
> (iii) Domicile – a transitional provision ...;
> (iv) Spouses of persons having Bermudian status, coupled with a residence requirement, and by grant from the Minister;

(v) By grant from the Minister in certain other cases, with residence, birth and parentage requirements...."

5. As a result of the application of the respondent's policy, Dr Thompson was therefore initially not permitted by the respondent to sit the examinations required for registration as a dentist in Bermuda. However, the Ministry of Health then intervened and prevailed upon the respondent to permit Dr Thompson to take the examinations. He passed the theory examination; however, he failed the practical examination, and the respondent refused him permission to resit. The Supreme Court then quashed the decision to fail him on the practical examination, on the grounds of apparent bias and internal inconsistency. Thereafter, Dr Thompson's attempts to arrange to resit the practical examination were delayed until his work permit expired in February 2002. Despite his requests, the work permit was not thereafter renewed.

6. The present appeal originates from Dr Thompson's complaint to the Human Rights Commission ("the Commission") that the actions of the respondent in (a) initially refusing to permit him to sit the examination, (b) failing him in the practical examination, and (c) refusing to let him resit the practical examination constituted acts of unlawful discrimination against him contrary to the 1981 Act. A Board of Inquiry set up by the Commission determined that all three aspects of the complaints were well founded, in that there had been unlawful discrimination against Dr Thompson pursuant to sections 2(2) and 5 of the 1981 Act on grounds of Dr Thompson's "place of origin".

7. The respondent appealed against that determination to the Supreme Court, and, on 21 February 2006, Simmons J allowed the appeal, holding that there had been no unlawful discrimination, whether direct or indirect, against Dr Thompson. Dr Thompson appealed, and for reasons given by Evans JA, in a judgment with which Zacca P and Mantell JA agreed, the Court of Appeal upheld the decision of the Judge, and the appeal was consequently dismissed on 10 November 2006. In his present appeal, Dr Thompson maintains his case that the respondent has been guilty of unlawful direct or indirect discrimination by implementing its policy in favour of Bermudians (or those married to Bermudians) against him.

The Human Rights Act 1981

8. The 1981 Act starts with a preamble which includes the statements that "the European Convention on Human Rights applies to Bermuda", and that "the Constitution of Bermuda enshrines the fundamental rights and freedoms of every person whatever his race, place of origin, political opinions, colour, creed or sex...".

9. Part II of the 1981 Act is headed "Unlawful Discrimination" and it contains the various types of discrimination which are prohibited. Thus, sections 3, 4 and 4A prohibit discrimination respectively in respect of "notices", "disposal of premises", and "against Bermudians in disposal of premises".

10. Section 5, which is of central relevance in the present appeal, is concerned with "Provision of goods, facilities and services". Section 5(1) provides that:

> "No person shall discriminate against any other person in any of the ways set out in section 2(2) in the supply of any goods, facilities or services ... by refusing ... to provide him with any of them ... in the like manner ... in and on which the former normally makes them available to other members of the public."

Section 5(2) specifically provides that the "facilities and services referred to" include (but are not limited to) various facilities and services, in particular for present purposes "the services of any business, profession or trade or local or other public authority". Section 5(4) provides:

> "For the avoidance of doubt, it is hereby declared that nothing in this section shall be deemed to prevent the giving of preference to a Bermudian in respect of particular facilities by way of banking or for grants of loans, credit or finance."

11. Section 6 precludes discrimination "in any of the ways set out in section 2(2)" by employers, subject to exceptions. One of those exceptions is in subsection (9), which, "[f]or the avoidance of doubt", permits "preference to the employment of a Bermudian", and also permits "the nationality of any person" to be taken into account where "national security" is involved. Section 6A contains what is effectively a further exception, in that it empowers the Commission to approve "special programmes" for certain purposes. Those purposes are set out in section 6A(1), which specified, prior to its amendment in 2000, (a) "to relieve hardship" and "to assist disadvantaged persons or groups", and (b) "to increase the employment of members of a group...because of the race, colour, nationality or place of origin of the members of the group".

12. Section 2 of the 1981 Act is concerned with interpretation. It is necessary to set out section 2(2), which is referred to in section 5(1), in full. Paragraph (a) is concerned with direct discrimination, and paragraph

(b) with indirect discrimination; section 2(2), prior to its amendment in 2000, provided as follows:

> "For the purposes of this Act a person shall be deemed to discriminate against another person—
>
> (a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—
>
> (i) of his race, place of origin, colour, or ancestry;
>
> (ii) of his sex;
>
> (iii) of his marital status;
>
> (iv) he was not born in lawful wedlock;
>
> (v) she has or is likely to have a child whether born in lawful wedlock or not; or
>
> (vi) of his religious beliefs or political opinions;
>
> (b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—
>
> (i) which is such that the proportion of persons of the same race, place of origin, colour, ancestry, sex, marital status, disability, religious beliefs, or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and
>
> (ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ancestry, sex, marital status, disability, religious belief or political opinions of the person to whom it is applied; and
>
> (iii) which operates to the detriment of that other person because he cannot comply with it.

13. It is also necessary to refer to two definitions in section 2(1) of the 1981 Act, namely:

> ""Bermudian" means a person having a connection with Bermuda recognized by the law relating to Immigration for the time being in force;

....

"the Community" means all persons lawfully residing in Bermuda".

14. The Commission, which has intervened on this appeal, was created by section 13 (the first section of Part III) of the 1981 Act, and its functions and powers are set out in the following sections. Section 22 (also in Part III of the Act) renders it an offence "wilfully and unlawfully" to discriminate "against a person contrary to any provision of Part II". It goes on to provide that reasonably acting on advice that such discrimination was lawful is a defence for anyone accused of such an offence.

15. The Human Rights Amendment Act 2000 ("the 2000 Act"), which came into force on 24 August 2000, made certain amendments to the 1981 Act, which are of significance for present purposes. In particular, in sections 2(2)(a)(i) and 2(2)(b)(i) and (ii), the word "ancestry" was replaced by the words "ethnic or national origins". In section 6A(1)(b) the word "nationality" was also replaced by the words "ethnic or national origins". Additionally, the words "religious beliefs" in paragraphs (a) and (b) of section 2(2) were replaced by the words "religion or beliefs". For completeness, it should be added that a new section 2(2)(a)(vii) was added, dealing with criminal records. When the 2000 Act was introduced as a Bill, an accompanying "Explanatory Memorandum" stated that the amendments it made had been "requested by" the Commission, and that the amendments just referred to were "to apply consistency to the use of terminology".

Direct discrimination

16. Dr Thompson's case before the Courts below was that a policy which favours Bermudians discriminates on grounds of "place of origin" within section 2(2)(a)(i) in its original and current form. As a result of an invitation by their Lordships when granting special leave, Dr Thompson has an alternative case, which was only touched on in the argument below, namely that such a policy discriminates on grounds of "national origins" within section 2(2)(a)(i) as amended by the 2000 Act.

17. When considering the case under section 2(2)(a)(i), it is convenient to dispose first of a preliminary argument raised by Mr James Guthrie QC, on behalf of the respondent. He contended that, even if discrimination on grounds of nationality was precluded by the 1981 Act, discriminating against Dr Thompson because he was not Bermudian could not be within paragraph (i) of section 2(2)(a) of the 1981 Act, as it was "negative" discrimination. To fall within the paragraph, he argued,

discrimination had to be "positive", viz., in this case, because Dr Thompson was British or European. That argument is incoherent in principle, unsatisfactory in practice, and inconsistent with authority.

18. The argument is incoherent because positive and negative discrimination amount to the same thing. The argument accepts that discrimination against people who come from Europe is prohibited; that prohibition, it is accepted, must apply equally to discrimination against people who come from Europe or Asia, or who come from Europe, Asia or Australia. Accordingly, as a matter of logic, it must follow that the prohibition applies to discrimination against people who come from anywhere but Bermuda. The practical results of this preliminary argument are also self-evidently undesirable and contrary to the purpose of the 1981 Act as revealed in its preamble.

19. As for authority, the preliminary argument falls foul of the reasoning of the House of Lords in *R v Rogers* [2007] 2 AC 62. In that case, the expression "racial group" in a statute concerned with racially aggravated offences was held to extend, in the context of a derogatory remark, to "foreigners". In para 10 of her opinion, Baroness Hale of Richmond said that the argument that the Act in question required that a racial group "be defined by what it is rather than by what it is not ... cannot be right as a matter of language", and she reached the same conclusion in para 12 "in policy terms". The same reasoning applies in this case in relation to the interpretation of the 1981 Act.

20. The principal argument raised on behalf of the respondent, which found favour with the Court of Appeal, is that the respondent's policy in favour of Bermudians (and their spouses) involved discrimination on the grounds of nationality, or something close to nationality, which is not the same as "place of origin" or "national origins". As Evans JA put this argument in paras 21 and 22 of his judgment, Bermudian status "is accurately described as a legal concept which is equivalent to citizenship, or even nationality", whereas "place of origin" is "an inherent characteristic acquired involuntarily by the child at the time of birth (and possibly during its early upbringing)".

21. The conclusion of the Court of Appeal, which was supported by Mr Guthrie, was essentially based on two grounds. First, it considered that the natural meaning of section 2(2)(a)(i) of the 1981 Act did not extend to nationality or citizenship, and in particular to Bermudian status. Secondly, the Court of Appeal drew support for this conclusion from the decision and reasoning of the House of Lords in *Ealing London Borough Council v Race Relations Board* [1972] AC 342.

22. So far as natural meaning is concerned, Evans JA said that "place of origin" was "an inherent characteristic which a person acquires at the time of his or her birth", and that it was "not the same as nationality, or citizenship, or any equivalent relationship which a person may have with a country or state from time to time during his or her life". He also stated that the meaning should take into account the fact that "[t]he place or even the country of birth might be fortuitous ... and it might be different from the place which the child's parents might regard as their home ... at that time". Because Dr Thompson's case below did not rely much, if at all, on "national origins", Evans JA made little reference to that expression, but he did say that "place of origin" was "not necessarily analogous to race or equivalent to 'national origins'".

23. The *Ealing* case involved consideration of the U.K. Race Relations Act 1968 ("the 1968 Act"), which prohibited discrimination in certain fields "on the ground of colour, race or ethnic or national origins" - see section 1(1). The issue was whether discrimination against a Pole because he did not have British nationality (within the British Nationality Act 1948) constituted discrimination on the ground of "national origins". The House of Lords held that it did not, although Lord Kilbrandon dissented.

24. Lord Donovan said at 354C that the expression "national origins" must "mean something different from mere nationality, otherwise there would be no reason for not using that one word, as indeed the Act does in later provisions...". At 354G, he accepted that "in many cases", the expression may "embrace nationality", but concluded that it did not do so in the 1968 Act, partly because of the use of "nationality" elsewhere in the Act and partly because, as discrimination prohibited by the Act was a crime, a wider construction could only be adopted if it was one in which he felt "reasonable confidence", which he did not (at 355C).

25. Viscount Dilhorne reached the same conclusion primarily because of the long title to the 1968 Act, which referred to "discrimination on racial grounds" and "relations between people of different racial origins" (quoted at 358G). This, he thought, indicated that "the word 'national' in 'national origins' means national in the sense of race and not citizenship" (at 358F). However, in the same passage, he accepted that "national" could refer to what he called "citizenship". Lord Simon of Glaisdale also relied on the limited scope, and the long title, of the 1968 Act (362B-D). He also relied on the absence of the word "nationality" in the section, at 362E-F, where he described the language of section 1(1) of the 1968 Act as "rubbery and elusive". He was also influenced by the relationship between the 1968 Act and its statutory predecessor (at 362G-H) and by the fact that unlawful discrimination gave rise to criminal sanctions (at

363D). Lord Cross of Chelsea concurred on the basis of very similar reasoning.

26. While acknowledging the force of the points made by the Court of Appeal, their Lordships have reached a contrary conclusion, in agreement with the submissions of Ms Dinah Rose QC for Dr Thompson (supported by Mr Alan Newman QC for the Commission). In their Lordships' view, discriminating against someone because he or she is not Bermudian, or indeed on grounds of nationality or citizenship, is discrimination on grounds of "race, place of origin, colour, or ethnic or national origins" within section 2(2)(a)(i) of the 1981 Act. A person's "national origins" under the 1981 Act would include, but not be limited to, his present nationality or citizenship, and (where it differs) his past nationality or citizenship.

27. As a matter of ordinary language, the expression "national origins" is plainly capable of extending to nationality or citizenship, as at least four of the members of the House of Lords accepted in *Ealing* (Lord Donovan and Viscount Dilhorne expressly, Lord Simon by implication, and Lord Kilbrandon self-evidently). As Ms Rose pointed out, the fact that the expression may not *mean* "nationality" begs the question, as it leaves open the issue whether it includes, but is not limited to, nationality. In the context of a statute which refers in its preamble to the European Convention and is plainly aimed at discrimination on a much broader canvass than the 1968 Act, the reference to "national origins" (with the contrasting use of the plural) in a paragraph which also refers to "place of origin" is apt to cover nationality, not least as the absence of an express reference to nationality in a Bermudian statute may be explained by Bermuda's status.

28. The reasoning in the *Ealing* case would have provided considerable support for the conclusion reached by the Court of Appeal if the 1981 Act had not been amended in 2000. However, even then, there are many differences in the context in which the same expression, "national origins", is used in the Bermudian 1981 Act and the U.K. 1968 Act. Having said that, it is appropriate to consider in a little more detail the various factors which lead their Lordships to the conclusion that there was direct discrimination in this case.

29. First, there is the purpose of the 1981 Act. The preamble, in express terms, goes much wider than race, which is all that was referred to in the preamble to the U.K. 1968 Act. That point is made equally, if not more, clearly by the various paragraphs of section 2(2)(a) of the 1981 Act. In interpreting a statute which is aimed at discrimination relatively generally, it cannot be appropriate to lean in favour of a narrow

construction of an expression such as "national origins" (although their Lordships are not suggesting that an artificially wide construction is thereby warranted). In relation to the *Ealing* case, the Bermudian 1981 Act is plainly intended to have a much wider reach than the U.K. 1968 Act.

30. Secondly, there is the reference in the preamble to the European Convention on Human Rights and Fundamental Freedoms ("the Convention") applying in Bermuda. Article 14 of the Convention prohibits discrimination in relation to the enjoyment of the "rights and freedoms set forth" in the Convention. The prohibited grounds are "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The wide ambit of this Article, which applies to Bermuda, supports a wide construction of section 2(2)(a)(i) of the 1981 Act, as that would tend to minimise the circumstances in which discrimination that would fall foul of Article 14 would be permitted under the 1981 Act. At the very least, the draftsman of the 1981 Act would have appreciated that discrimination on grounds of nationality would be caught by "other status" in Article 14.

31. By 2000, when the 1981 Act was amended to include "national origins" in section 2(2)(a)(i), the European Court of Human Rights had made it clear that the expression "national origin" in Article 14 of the Convention embraced nationality in its judgment in *Gaygusuz v Austria* (1996) 23 EHRR 364. In para 33 of the judgment, the applicant was recorded as complaining of "discrimination based on national origin, contrary to Article 14", which was then quoted, in part, with "national...origin" as the only ground. It is clear that the discrimination in that case was on the ground of nationality, and indeed the Court expressly described it as such in para 42.

32. The notion that the draftsman of the 2000 Act had in mind the European Court's interpretation of "national origin" in Article 14 of the Convention may seem to some a little unreal: after all, it is the intention of the legislature which must ultimately be determinative. However, it is far more likely that a decision four years earlier as to the meaning of an expression used in a Convention referred to in the preamble to the 1981 Act was in the mind of the draftsman of an Act amending the 1981 Act, than it is to think that he had in mind a decision nearly thirty years earlier as to the meaning of the same expression in a UK statute (subsequently repealed and re-enacted) and not referred to in the 1981 Act.

33. Thirdly, there is the contrast between "place of origin" and "national origins". The 2000 Act must have been intended to add

something significant to the original ambit of section 2(2)(a)(i). Further, the use of the plural word "origins" suggests that the draftsman of the 2000 Act had in mind the possibility of a person having more than one national (or indeed ethnic) origin, which lies happily with a relatively wide meaning, but does not lie easily with Evans JA's "inherent characteristic which a person acquires at the time of his or her birth".

34. Fourthly, there is the fact that the 2000 Act did not merely replace "ancestry" in the 1981 Act with the expression "ethnic or national origins": it also replaced "nationality" in that Act with that expression. One of the purposes of the 2000 Act in this connection was avowedly to introduce consistency, but it is also very unlikely that the purpose was to cut down the ambit of the 1981 Act in any way, not least because the 2000 Act was introduced at the request of the Commission. That tends to suggest that "ethnic or national origins" was intended to include ancestry and nationality.

35. Fifthly, there are the other provisions of the 1981 Act. Mr Guthrie relied on the fact that "nationality" was specifically referred to in the 1981 Act in two places (albeit that in one case, section 6A(1), the word was replaced by "ethnic or national origins" by the 2000 Act). This point is of no assistance as it is not inconsistent with "national origins" including, but going further than, "nationality". Section 6(9), and one or two other provisions permitting discrimination in favour of Bermudians, which were relied on by Ms Rose as indicating that nationality was a precluded ground of discrimination, do not assist either. First, they are mostly introduced by the words "[f]or the avoidance of doubt...". Secondly, their inclusion could anyway be justified as being necessary to defeat a claim based on indirect discrimination under section 2(2)(b) of the 1981 Act.

36. Sixthly, there is the fact that, as Bermuda is a British overseas territory, there is no such thing as Bermudian nationality as such: Bermudians are British citizens. That makes it rather easier to explain why there is no reference to "nationality" in section 2(2)(a)(i). In the *Ealing* case, the discrimination complained of was actually based on a statutorily defined nationality, whereas there is no such thing in Bermudian law.

37. Seventhly, there are the developments in U.K. law since the decision in the *Ealing* case. The White Paper which preceded the Race Relations Act 1976 ("the 1976 Act", the successor to the 1968 Act) recommended that precluded discrimination specifically be extended to nationality, and this was done in section 3(1) of the 1976 Act. That is probably neutral in the present context.

38. However, there are two decisions of the House of Lords on the 1976 Act which seem to demonstrate a wider approach to interpretation than that adopted by the majority in the *Ealing* case. In *Mandla v Dowell Lee* [1983] 2 AC 548, the House had to consider whether a Sikh was a member of a "racial group" in the light of his "ethnic...origins". Lord Fraser of Tullybelton said at 562G that "[p]rovided a person who joins the group feels himself... to be a member of it, and is accepted by other members, then he is, for the purposes of the [1976] Act, a member". If that is true of "ethnic origins", it would tend to support the notion that it should also be true of "national origins". In *Orphanos v Queen Mary College* [1985] AC 761, Lord Fraser said at 773B that ordinary residence, which was not a specifically precluded ground of discrimination, was "so closely related to ... nationality that the discrimination cannot be justified irrespective of nationality". This wider approach is also to be found in the *Rogers* case referred to above.

39. Eighthly, it is true that discrimination outlawed by the 1981 Act can be an offence, and Lords Donovan and Simon in the *Ealing* case thought that this was a point in favour of a narrow construction of "national origins". However, for the reasons already given, this factor is not nearly telling enough: this is a case where their Lordships feel what Lord Donovan characterised as "reasonable confidence" that the wider interpretation is correct. In any event, there can be no offence under the 1981 Act unless the discrimination was "wilful" and was not reasonably based on advice.

Indirect discrimination

40. The question of indirect discrimination does not in these circumstances appear to arise. However, it is right to record that, on the assumption that the Court of Appeal was right in its view as to the restricted meaning of "place of origin" and (by implication) "national origins", their Lordships consider that the Court of Appeal's conclusion that there could have been no indirect discrimination against Dr Thompson cannot possibly be supported.

41. In this connection, it is clear, both on the evidence and as a matter of common sense, that the proportion of persons who are not of Bermudian national origins or whose place of origin is not Bermuda (using those expressions on the above assumption) who have Bermudian status is considerably smaller than the proportion of persons who are of Bermudian national origins or whose place of origin is Bermuda. Accordingly, at least on the face of it, if there were no direct discrimination, then, unless it could be justified under section 2(2)(b)(ii) of the 1981 Act, Dr Thompson would be able to succeed in his claim

based on indirect discrimination. There was no suggestion that the discrimination could be so justified.

42. The reasoning of the Court of Appeal as to why, despite this, there was no indirect discrimination against Dr Thompson is not entirely easy to follow. In para 36, Evans JA said that "when a stated condition is shown to be independent of the alleged prohibited ground of discrimination under sub-section (a), the same condition is not made unlawful by the operation of sub-section (b)". In so far as their Lordships understand this conclusion, it appears to suggest that, if there is no direct discrimination, there can be no indirect discrimination. As a proposition, that is self-evidently unsustainable.

43. Mr Guthrie understandably did not seek to defend this reasoning. Instead, he argued that, as section 6(9) of the 1981 Act permitted discrimination in favour of Bermudians in relation to employment, and Dr Thompson was seeking registration with the respondent in order to be employed by Dr Dyer in his dental practice, he could have no claim under the 1981 Act. The argument is ingenious, but it is not right. Section 6(9) is expressly limited to "limitation of or preference in employment", which has nothing to do with the functions of the respondent. As far as the respondent was concerned, Dr Thompson wanted to practise as a dentist in Bermuda, and it was nothing to the point whether he did so on a self-employed, an employed, or even a charitable, basis.

44. If Dr Dyer had refused to employ Dr Thompson because he was not Bermudian, then section 6(9) might very well have been in point. However, Dr Thompson's complaint was not that Dr Dyer refused to employ him in breach of section 6, but that the respondent refused to let him practise his profession in breach of section 5 of the 1981 Act.

Conclusion

45. In these circumstances, their Lordships will humbly advise Her Majesty that Dr Thompson's appeal should be allowed, and that his complaint be remitted to the Board of Inquiry set up by the Commission. The respondent must pay Dr Thompson's costs before Simmons J, the Court of Appeal and the Privy Council. The Commission accepts that it should bear its own costs.