

# B.G. v The Attorney General of the Commonwealth of Dominica and others

*Case digest of B.G. v Attorney  
General of the Commonwealth  
of Dominica and others*

Human  
Dignity  
Trust

*Prepared May 2024*

## CASE DIGEST

### **B.G. V The Attorney General of the Commonwealth of Dominica and others**

#### **The High Court of Justice of the Eastern Caribbean Supreme Court Commonwealth of Dominica**

**Claim No. DOMHCV2019/0149, 22 April 2024**

**Claimant:** B.G.

**Defendant:** The Attorney General of the Commonwealth of  
Dominica

**Judge:** Justice Kimberly Cenac-Phulgence

The Bishop of Roseau, the Methodist Church, the Anglican Church and the Dominica Association of Evangelical Churches were joined as interested parties in the case.

#### **Summary**

Same-sex sexual activity is prohibited under sections 14 and 16 of the Sexual Offences Act 1998 (‘the SOA’), which criminalise, respectively, acts of “gross indecency” and “buggery.” These provisions carry a maximum penalty of twelve years’ imprisonment. The law was originally inherited from the British during the colonial period, in which the English criminal law was imposed upon Dominica.

In 2019, a case which challenged the constitutionality of these provisions was filed by a gay man living in Dominica. This case was heard by the High Court of Dominica in September 2022.

On 22 April 2024, the High Court of Dominica declared that the SOA provisions breach three of the claimant's rights as guaranteed by the Constitution: the rights to liberty, freedom of expression, and privacy of the home (paragraphs 22, 32 and 41). The court further found that the contravention of these rights is not reasonably justifiable by any public interest considerations (paragraph 45).

## **Challenged Provisions**

### **Section 14 of the Sexual Offences Act – Gross Indecency**

“(1) Any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction to imprisonment for five years. (2) Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent. ... (4) In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of genital organs for the purpose of arousing or gratifying sexual desire.”

### **Section 16 of the Sexual Offences Act – Buggery**

“(1) A person who commits buggery is guilty of an offence and liable on conviction to imprisonment for— ... (b) ten years, if committed by an adult on another adult; ... and, if the Court thinks it fit, the Court may order that the convicted person be admitted to a psychiatric hospital for treatment. ... (3) In this section “buggery” means sexual intercourse per anum by a male person with a male person or by a male person with a female person.”

## **Grounds of claim**

The claimant argued that sections 14 and 16 are in violation of the following rights contained in the Constitution of the Commonwealth of Dominica ('the Constitution'):

- Right to liberty – Sections 1(a) and 3
- Right to freedom of expression – Sections 1(b) and 10(1)
- Right to freedom of assembly and association – Sections 1(b) and 11(1)
- Right to privacy of the home, including protection from entry of others on one's premises without consent – Sections 1(c) and 7(1)
- Right to security of the person – Section 1(a)
- Right to protection from inhuman or degrading punishment or other treatment – Section 5
- Right to protection from discrimination – Section 13

## **Remedies sought**

The claimant sought:

- A declaration that sections 14 and 16 of the SOA are void and of no effect to the extent that they contravene his rights as guaranteed by the Constitution.
- Orders prohibiting the Commonwealth of Dominica Police Force from laying charges under sections 14 and 16 of the SOA in relation to consensual activities between same-sex adults, and the Director of Public Prosecutions or its agents from prosecuting persons in respect of such offences.

## **Orders granted**

The High Court declared that sections 14 and 16 of the SOA contravene sections 1(a), 1(b), 1(c) and 10 of the Constitution, and are void to the extent to which the provisions criminalise consensual same-sex sexual conduct between persons aged 16 and over (paragraph 46). The court declared that the provisions should be read to exclude such acts from being included in the offences. The court therefore found it unnecessary to consider the orders sought by the claimant prohibiting the

Police Force and Director of Public Prosecutions from laying charges relating to consensual same-sex sexual conduct under the SOA provisions (paragraph 51). There was no order as to costs.

## **Written decision**

### Right to liberty – sections 1(a) and 3 of the Constitution

The claimant submitted that the SOA provisions breach his right not to be deprived of his personal liberty unless authorised by law, as guaranteed by sections 1(a) and 3 of the Constitution. Relying on the cases of [Motshidiemang v Attorney General](#) and [Lawrence v Texas](#), he submitted that the right to liberty includes not only freedom from physical constraint and detention, but also the right to sexual autonomy, and that the SOA provisions restrict his ability to make intimate decisions about his personal life (paragraphs 18 and 19). The defendant accepted that section 1 (a) of the Constitution protects the right to pursue consensual sexual conduct regardless of sexual orientation, and the liberty protected by the Constitution allows all persons to freely enter into relationships in their private lives (paragraph 21).

The court held that the SOA provisions violate the claimant’s right to liberty and are therefore unconstitutional. However, the court found that the provisions do not infringe section 3 of the Constitution, as this “specifically guarantees the right to liberty in the sense of freedom from bodily or physical restraint” (paragraph 22).

### Right to freedom of expression – sections 1(b) and 10(1) of the Constitution

The claimant submitted that the SOA provisions breach his right to freedom of expression, as guaranteed by sections 1(b) and 10(1) of the Constitution. He submitted that freedom of expression includes the “presentation of oneself to the world and expression of intimacy and pleasure through sexual connection with another consenting partner”, and that the provisions restrict the identity of LGBT people and their private expression of intimacy (paragraphs 25 and 26). The claimant relied on various decisions, including [Orozco v Attorney General of Belize](#) (‘Orozco’), [Orden David v Attorney General of Antigua and Barbuda](#) (‘Orden David’), and [Jamal](#)

[Jeffers and others v Attorney General of St. Christopher and Nevis \('Jamal Jeffers'\)](#), in which similar criminalising provisions were found to have infringed the claimants' rights to free expression of their sexual orientation. The defendant accepted that the SOA provisions, to the extent to which they criminalise gross indecency and buggery, amount to a contravention of the right to freedom of expression and are not reasonably justifiable (paragraph 31).

The court held that the SOA provisions amount to an “unjustifiable restriction of the constitutionally guaranteed right to freedom of expression in a free and democratic society” and thus are void to this extent (paragraph 32).

[Right to privacy of the home, including protection from entry of others on one's premises without consent – sections 1\(c\) and 7\(1\)](#)

The claimant submitted that the SOA provisions breach his right to protection for the privacy of the home and protection from entry by others on his premises without his consent, as guaranteed by sections 1(c) and 7(1) of the Constitution. He submitted that by criminalising same-sex sexual conduct within the privacy of the home, the provisions encourage others to violate the privacy of LGBT people (paragraphs 34 and 35). Relying on *Orden David, Jamal Jeffers and Orozco*, the claimant pleaded that the right to privacy includes individual dignity, encompassing gender identity, sexual orientation and the right to have sexual relationships with others (paragraph 36). The claimant further submitted that the SOA provisions “contribute to a climate where break-ins, home invasions and police inaction to violence against LGBT people is normalized and justified” (paragraph 39). The defendant accepted that the SOA provisions violate the constitutional right to privacy as guaranteed by section 1(c) of the Constitution (paragraph 40).

The court held that the SOA provisions violate section 1(c) of the Constitution “insofar as they intrude on the private home life of an individual by proscribing the choice of consenting adults as to whom to engage in intimate sexual activity with, and are, therefore void.” However, the court was not satisfied that, without more, the provisions breach section 7(1) of the Constitution, which guarantees freedom from

arbitrary entry (paragraph 41).

Having found that the SOA provisions violate the claimant's constitutional rights to liberty, freedom of expression, and privacy and home life, the court further held that the provisions could not be said to be reasonably justifiable in a democratic society (paragraph 45).

### Other rights

Whilst not necessary for the outcome of the case, the court then considered whether the other rights pleaded by the claimant are breached by the SOA provisions.

The claimant submitted that the SOA provisions breach his rights to security of the person and protection from inhuman or degrading punishment, as guaranteed by sections 1(c) and 5 of the Constitution respectively. He submitted that the provisions directly harm the physical and mental integrity of LGBT individuals, and that their existence encourage attacks against LGBT Dominicans (paragraphs 53 – 55). However, the court held that the provisions do not ipso facto violate the right to security of the person, as “it cannot be said that sections 14 and 16 of the SOA permits or encourages arbitrary detention, or indefinite detention pending investigation or without charge” (paragraph 65). The court was also not satisfied that the existence of the provisions amounts to inhuman or degrading punishment or treatment, as there was no “real and serious objective risk of [an attack]” resulting from the provisions (paragraphs 70 – 73).

In relation to the claimant's right to protection from discrimination as guaranteed by section 13 of the Constitution, the court also held that this is not breached by the SOA provisions. The court did not accept that the prohibition against discrimination on the basis of sex in the Constitution could be interpreted to include sexual orientation, as this would be “to apply a meaning that is not supported by the clear wording of the Constitution” (paragraph 92).

The court also found that the SOA provisions do not violate the claimant's right to freedom of association, as guaranteed by sections 1(b) and 11(1) of the Constitution. The court held that the right to freedom of association does not apply to intimate sexual relationships, and that the SOA provisions are "prohibitions against certain expressive conduct" rather than "prohibitions against conduct of an associational nature" (paragraphs 101, 103 and 106).