

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv. Apps. Nos. 21 & 22 of 2001

H.C.A. Nos. 3224 & 3223 of 2000.

In the Matter of the Constitution of Trinidad and Tobago

And

In the matter of Chapter I thereof

And

In the Matter of the Rules of the Supreme Court 1975

BETWEEN

WILLIAM CHAITAN

And

WINSTON PETERS Appellants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Respondent

And

FARAD KHAN

AND

FRANKLIN KHAN

Added Respondents

CORAM:

M. de la Bastide, C.J.

S. Sharma, J.A.

R. Nelson, J.A.

Delivery date 31st July 2001.

Appearances:

Dr. F. Ramsahoye Q.C. and Mr. A. Ramlogan instructed by Mr. D. Maharaj for William Chaitan .

Mr. F. Hosein instructed by Mr. D. Maharaj for Winston Peters

Mr. J. Guthrie Q.C., Mr. G. Armorer and Mr. J. Walker instructed by Mrs. M. Dean-Armorer for the First Respondent

Mr. A. Alexander S.C., Mr. R. Armour, Mr. D. Mendes, Mr. J. Jeremie, Mr. M. Quamina and Ms Maxine Williams instructed by Ms. D. Shurland for the Added Respondents

JUDGMENT

Nelson J.A

INTRODUCTION

The President of the Republic of Trinidad and Tobago issued writs for a general election of members of the House of Representatives on November 6, 2000. The writs relating to the election of members for the Pointe-a-Pierre and Ortoire-Mayaro electoral districts specified November 20, 2000 as the date for nomination of candidates (which date is hereinafter referred to as (“nomination day”). The United National Congress nominated Mr. William Chaitan for the Pointe-a-Pierre electoral district, while the People’s National Movement nominated Mr. Farad Khan. The United National Congress nominated Mr. Winston Peters for the Ortoire-Mayaro electoral district, whereas the People’s National Movement nominated Mr. Franklin Khan.

The following other dates were material for the purposes of the general election:

- (1) For the posting of the revised list of electors - Registration Rules – rule 62(8) – not later than November 27, 2000. Actual date of posting November 20, 2000.**
- (2) For taking the poll – December 11, 2000 (see Form No. 35 notice published November 10, 2000).**
- (3) For the return of the writs– Election Rules, rule 108(1) (a) -7 days after declaration of result and winner.**

Mr. Chaitan and Mr. Peters, the applicants for constitutional redress, (“hereinafter together referred to as “the appellants”) lodged their respective nomination documents on November 20, 2000, as did their opponents Mr. Farad Khan and Mr. Franklin Khan (hereinafter referred to as “the respondents” to distinguish them from the statutory or nominal respondent, the Attorney-General).

Electors from the respective electoral districts signed nomination papers nominating Mr. Chaitan and Mr. Peters to serve as members of the House of Representatives for those electoral districts. Mr. Chaitan and Mr. Peters endorsed their respective consents on the relevant nomination paper. Mr. Chaitan and Mr. Peters on the same date delivered to the returning officer statutory declarations made on November 13 and November 9, 2000 respectively in accordance with the prescribed form, Form No. 39.

On November 20, 2000 the returning officers certified as valid the nomination papers and statutory declarations delivered to them, and caused to be posted up copies of each statutory declaration for public scrutiny for a period of seven days.

By each statutory declaration each of the appellants swore as follows

(so far as relevant):

“That I am duly qualified to be elected as a member of the House of Representatives for the Electoral District and that –

1. I am a citizen of Trinidad and Tobago of the age of eighteen years or upwards.

.....

3. I am not, by virtue of my own act, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state.”

Each of the respondents by letters dated November 23, 2000 challenged the validity of the nomination of Mr. Chaitan and of Mr. Peters respectively. The challenge was based on section 48(1) (a) of the Constitution.

Section 48(1) (a) of the Constitution provides:

“48(1). No person shall be qualified to be elected as a member of the House of Representatives who –

“(a) is a citizen of a country other than Trinidad and Tobago having become such a citizen voluntarily, or is under a declaration of allegiance to such a country;”

Each of the respondents alleged that the declaration of his opponent

was false and took steps to advise the electors in his constituency that his opponent was disqualified for nomination and election to the House of Representatives. The respondents further warned that any votes cast in favour of his opponent on December 11, 2000 (the day of the poll) would be wasted votes.

The poll was held on December 11, 2000. On December 12, 2000 the returning officers declared that Mr. Chaitan had been elected for the Pointe-a-Pierre electoral district, and that 11,124 votes had been cast for him, and 6,847 votes for the only other candidate, Mr. Farad Khan.

On December 12, 2000 the returning officer for the Ortoire-Mayaro electoral district declared that Mr. Peters had been elected, and that 10,516 votes had been cast for him, and 9,710 votes for the only other candidate Mr. Franklin Khan.

On or before December 19, 2000 the returning officers delivered to the Chief Election Officer the writs of election duly endorsed with their return certifying the election of Mr. Chaitan and of Mr. Peters respectively and a statement of the votes cast for each candidate at the poll.

In the meantime prior to the taking of the poll on December 11, 2000 but after nomination day on November 20, 2000 each of the applicants successfully divested himself of his foreign citizenship.

As I understand the evidence, Mr. Chaitan was born in Trinidad and Tobago and by reason of his birth automatically became a citizen of Trinidad and Tobago after independence in 1962. He voluntarily became a citizen of

Canada on February 14, 1978 and thereby lost his Trinidad and Tobago citizenship. By an amendment in 1988 of the Trinidad and Tobago Citizenship Act, 1976 (“the Citizenship Act”) former citizens by birth or descent who acquired a foreign citizenship could apply to the Minister for restoration of their Trinidad and Tobago nationality.

Mr. Chaitan on December 1, 1989 applied for and was granted restoration of his Trinidad and Tobago citizenship on January 10, 1990. It seems clear, however, that Mr. Chaitan retained his Canadian citizenship until he obtained a “Certificate of Renunciation, effective December 06, 2000,” from the Canadian authorities. As to the effective date of renunciation there is no challenge to the evidence of Mr. Mendel Green Q.C. of the Ontario Bar on behalf of the Attorney-General in the following terms:

“With regard to the formalities for renouncing citizenship, Canadian citizenship cannot be renounced merely by making a personal declaration to this effect... Where the application to renounce citizenship is approved, a certificate of renunciation is issued and the applicant ceases to be a Canadian citizen after the expiration of the day on which the certificate is issued...”

Further, it was the expert opinion of Mr. Green Q.C., and it has not been challenged, that:

“The legislation and this case (sc. Roach v Minister of State) thereby affirm that the oath of

allegiance (sc. to the Queen of Canada) is an integral, and constitutionally valid, part of becoming a naturalized Canadian citizen.”

Mr. Peters was born in Trinidad and Tobago and upon independence in 1962 automatically became a citizen of Trinidad and Tobago. He voluntarily became a citizen of the United States of America on July 3, 1996. Therefore by the 1988 amendment of the Citizenship Act he was entitled to retain his native citizenship. However, the learned judge in the court below found that:

“It was not disputed that the process of voluntary acquisition of citizenship in the United States involves the taking of a public oath renouncing and abjuring absolutely and entirely, all allegiance and fidelity to any foreign state of which the applicant was formerly a citizen, and undertaking to support and defend the Constitution and laws of the United States and to bear true allegiance to same.”

Mr. Peters renounced his American citizenship before the U.S. consul at the American Embassy in Trinidad on December 4, 2000, and on December 6, 2000 the U.S. Department of State issued to him a certificate of loss of nationality.

It seems clear on the facts that on nomination day both respondents were citizens of a foreign country and/or had taken oaths of allegiance to another country, but by the date of the poll had stripped themselves of such

citizenship or allegiance.

Against this background the respondents sought leave to file election petitions, as required by section 52(2) of the Constitution. The respondents sought to make their applications ex parte before Smith J. Attorneys for the appellants and for the Attorney-General appeared and asked to be heard, each contending that the applications should be heard inter partes and that the learned judge had no jurisdiction to hear them. Smith J. offered to hear the applications as opposed ex parte applications, and was prepared to stand down the matters for one hour. Counsel for the appellants and for the Attorney-General did not regard the time allowed of one hour as sufficient and did not participate in the ex parte hearing. Whether in the light of the well-rehearsed arguments of counsel for the appellants and for the Attorney-General and their anticipation of the application, one hour was adequate time for preparation is not for present purposes important. I am prepared to treat the applications as ex parte hearings without deciding whether the applicants had an adequate opportunity to be heard. In any event no appeal has been filed against the grant of leave ex parte pursuant to section 52(3) of the Constitution.

By separate petitions dated December 20, 2000 the respondents challenged the validity of the election of each of the appellants as members of the House of Representatives and sought to have themselves declared instead as duly elected.

Mr. Farad Khan alleged in his petition that on nomination day Mr. Chaitan:

- “(a) was a citizen of a country other than Trinidad and Tobago, namely of Canada, having become such citizen voluntarily;**
- (b) had, in a public ceremony, sworn a pledge of allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada as a condition of his becoming a citizen of Canada”.**

Mr. Franklin Khan stated in his petition that on nomination day Mr. Peters:

- “(a) was a citizen of a country other than Trinidad and Tobago, namely of the United States of America, having become such a citizen voluntarily;**
- (b) had, in a public ceremony, renounced and abjured absolutely and entirely all allegiance and fidelity to the Republic of Trinidad and Tobago;**
- (c) was also then under a pledge of allegiance to the United States of America having given such pledge of allegiance in the said public ceremony as a condition precedent to his becoming a citizen of the United States of America.”**

In response to these election petitions served on Mr. Chaitan on December 22, 2000 and on Mr. Peters on December 23, 2000 the appellants

filed constitutional motions on December 22, 2000 in similar terms seeking the following reliefs:

- “(a) a declaration that proceedings commenced by leave of the High Court to unseat the Applicant as an elected member of the House of Representatives by a determination of the judicial arm of the State will contravene the fundamental human rights of the Applicant guaranteed by sections 4 and 5 of the Constitution;**
- (b) declaration that the Applicant’s membership of the House of Representatives cannot be lawfully terminated or pronounced against by the judicial arm of the State in proceedings which have been instituted against him by leave of the Court;**
- (c) a declaration that the Applicant is duly qualified to be and is entitled to remain a member of the House of Representatives duly elected and to enjoy the emoluments and privileges thereto appertaining until his term comes to an end by the dissolution of the House or otherwise in due course of law;**
- (d) a declaration that the proceedings purporting to be taken against the Applicant as a member of the House of Representatives under the Representation of the People Act are null void and of no**

effect;

- (e) a declaration that the subordinate legislative powers of the Rules Committee and of the President are being contravened by the said proceedings and the procedures which are made and/or approved by and/or adopted therein by the judicial arm of the State;**
- (f) an order that no representation petition be heard or determined to question the validity of the election of the Applicant to the House of Representatives prior to the hearing and determination of this motion;**
- (g) all such orders and directions as may be necessary or appropriate to protect and preserve the rights of the Applicant as a duly elected member of the House of Representatives;**
- (h) a conservatory order to prevent the judicial arm of the State from proceeding to the trial of a representation petition to question the validity of the Applicant's election to the House of Representatives or to make a determination thereon until the hearing and determination of this motion;**
- (i) further or other relief;**
- (j) costs."**

On January 8, 2001 the respondents on their own application were

without objection joined as added respondents to the constitutional motions .

The learned trial judge, Archie J., dismissed the constitutional motions on March 9, 2001; on the same day the appellants appealed and the Attorney-General on March 19, 2001 cross-appealed. Now the appellants seek to have their appeal allowed; the Attorney-General cross-appeals not to have the order of the learned judge upheld and the appeal dismissed, but to have the appeal allowed, as prayed for by the appellants, although on slightly different grounds.

In constitutional motions the Attorney-General is the statutory defendant: see section 14(3) of the Constitution and section 19(2) of the State Liability and Proceedings Act Chap. 8:02. However, where the person, entity, institution or office which is the real subject-matter of the constitutional proceedings wishes to defend those proceedings, the courts will in general grant leave for joinder of such a party. On the other hand, the courts must be vigilant to see that in every constitutional matter there is a real justiciable case or controversy between the applicant and the Attorney-General or between the applicant and an added respondent. If there is no real controversy of a constitutional kind between the parties the true forum is not the constitutional court. Because of the unforeseen reverberations of constitutional orders on other citizens' rights, there can be no declarations unopposed or by consent, where there is no contest.

PART ONE

The issues on appeal

Much ingenuity has been displayed in the arguments and numerous authorities have been cited. However, I hope I do no injustice to the parties if I reduce the issues to seven:

1. Whether the appellants have established a breach of constitutional rights by state action.
2. Were the appellants entitled to be heard on the ex parte application for leave? Assuming they should have been, what is the impact on the leave proceedings and election petitions?
3. What is the effect of the absence of rules of court made pursuant to section 144 of the Representation of the People Act Chap. 2:01 (“hereinafter referred to as “the Act”)?
4. Does the High Court have jurisdiction to hear disqualification proceedings as opposed to matters relating to controverted elections?
5. What is the proper interpretation of section 48(1) (a) of the Constitution? Is disqualification to be assessed on nomination day or on polling day?
6. Did section 14 of the Constitution permit the appellants to object to election petitions and bring constitutional motions on the same subject-matter?
7. Can the appellants justify the constitutional proceedings on the basis that they raised matters of interpretation of the Constitution?

It was apparent that the success of the appeal turned on whether the

appellants could establish that there had been breaches of constitutional rights as a result of state action. The substance of the appellants' complaints is that, as there is no jurisdiction to hear the election petitions ex parte, the grant of leave to hear the petitions, the hearing of them by a judge would constitute a denial of due process and the protection of the law.

By the same token if there was jurisdiction, there could be no breach of constitutional rights. I agree with the reasoning of the learned Chief Justice and his conclusions that the appellants have failed to establish any breach of their constitutional rights. But because of the nature of these appeals I wish to state publicly my reasons for arriving at the decision to which I have come.

The alleged infringements

The learned judge held that the jurisdiction conferred on the courts with respect to disputed elections and returns was vested in the High Court and not in a tribunal in which a judge of the High Court sat. He said: "...they are still proceedings in the High Court and not proceedings in any subordinate or derivative body". This finding of the learned judge is not challenged on appeal. It therefore means that an election court is not a tribunal with no power to pass on its own jurisdiction.

However, the appellants say that the judge hearing the petitions lacks jurisdiction because the leave granted ex parte was in breach of natural justice and so void. They further contend that in the absence of rules made pursuant to section 144 of the Act, particularly where matters are required

to be prescribed such as the form manner and time of certain steps, the jurisdiction of the courts remained inchoate and incapable of exercise. Counsel for the appellants also contended that issues of disqualification of its members had always been the prerogative of the House of Representatives, which had not divested itself of that power either under the Constitution or the Act.

The respondents contended that no constitutional right was breached if the defending litigant resisted a claim on the ground that there was no jurisdiction in the court to entertain a claim adverse to that litigant's interest. The court had jurisdiction to decide its own jurisdiction.

Where such an objection is made a judge would usually decide the matter of his or her jurisdiction in limine. The judge's decision on the objection would then constitute "the due process of law" or "the protection of the law" to which the parties are entitled.

I endorse dicta of Lord Diplock to similar effect in Chokolingo v The Attorney General [1981] 1 WLR 106, 111:

“...when in Chapter 1 the Constitution of Trinidad and Tobago speaks of “law” it is speaking of the law in Trinidad and Tobago as interpreted or declared by the judges in the exercise of the judicial power of the state.”

Later the learned law lord continued:

“It is fundamental to the administration of justice

under a constitution which claims to enshrine the rule of law (preamble to the Constitution, paragraphs (d) and (e)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal) the relevant law as interpreted by the judge in reaching the court's decision is the "law" so far as the entitlement of the parties to "due process of law" under section 1(a) and the "protection of the law" under section 1(b) are concerned. Their Lordships repeat what was said in Maharaj v Attorney-General of Trinidad and Tobago (No.2) [1979] AC 385. The fundamental human right guaranteed by section 1(a) and (b) and section 2, of the Constitution is not to a legal system which is infallible but to one which is fair."

Counsel for the appellants and the Attorney-General contended that their objections could not be raised on the representation proceedings because their complaint was against such proceedings. That position, it was said, was different from Boodram v The Attorney General [1996] 2 WLR 464 (P.C.), where the Board held that the protection given by sections 4(a) and 4(b) and 5(2) (e) and (f) of the Constitution related to the existence of the right to a fair trial and the mechanisms employed by the courts to ensure such fairness.

The argument seemed to be that Boodram v Attorney-General

(supra) did not apply to the instant case because the objection here was as to jurisdiction. In my judgment, however, since the judge in the election proceedings is entitled to decide on his jurisdiction, it is just as much a matter for the judge to adjudicate fairly on his jurisdiction, as it is for the judge at a criminal trial to take all necessary steps including warnings, directions, challenges or stays of proceedings to negative or neutralize adverse publicity and ensure a fair trial.

Another aspect of the argument on jurisdiction was the contention that issues of the disqualification of a member have always been the preserve of the House of Representatives on the analogy of the House of Commons. The learned judge rightly rejected this submission. He referred to the Tipperary Case (1875) 3 O'Malley and Hardcastle 19 as a case in which the courts determined whether John Mitchel, who had become a naturalized citizen of the United States and had previously been convicted of treason-felony and sentenced to transportation, was validly elected as a member of Parliament in the light of his disqualifying alienage and conviction. Equally, Viscount Stansgate who had purported to renounce his peerage was held by the courts to be disqualified for election to the House of Commons and to have lost the seat he won in a bye-election. One of the principles that emerges from these cases is that election to parliament whilst disqualified is a matter within the jurisdiction of the courts after 1868. It is a concept to be distinguished from subsequent disqualification after being validly elected.

Further, the learned judge correctly relied on the fact that in Trinidad

and Tobago jurisdiction over subsequent disqualification of a member of the House of Representatives is expressly granted to the courts where a member has vacated or is required to vacate his seat pursuant to section 49(3) of the Constitution. I shall deal with the issue of disqualification more fully later in this judgment.

In my view it is clear that the fact that disqualification is raised in the election petitions is no ground for saying there is a lack of due process of law or a denial of the protection of the law.

State action

During the course of the argument in this court the appellants and the Attorney-General confirmed that the state action relied on was the action of the judges in hearing the application for leave ex parte and the future hearing of the election petitions in the High Court. If the representation proceedings were heard, and the judge ruled in favour of the appellants, there could be no breach of constitutional rights. On the other hand, if the judge ruled against stopping or staying the election proceedings the appellants would be entitled to appeal. At the end of the day the submission properly translated meant only that the appellants felt they had a cast-iron defence to the election petitions, and ran the risk that the judges might deprive them of certain success. In my judgment the notion that a judge of the High Court hearing a matter could by an adverse decision to one party thereby deprive him of constitutional rights is entirely far-fetched.

In Maharaj v Attorney-General of Trinidad and Tobago (No.2) (supra)

Lord Diplock said at page 394, and I agree with him:

“In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal that the consequences of the judgment or order cannot be put right on appeal to the appellate court.”

For the reasons stated above I hold that the appellants have failed to establish any state action upon which to found constitutional relief.

Did the state deprive the appellants of liberty or property?

The learned judge held that the right to elect and the right to be elected or to stand for election were not constitutional rights. He relied on Jyoti Basu and others v Debi Ghosal Civil Appeal No. 1553 of 1980, February 26, 1982 (unreported), a decision of the Calcutta Court of Appeal.

The learned judge refused to regard the emoluments and the privileges incidental to retaining office as a member of the House of Representatives as “property” or as “liberty”. In my judgment the learned judge rightly rejected this submission of the appellants and the Attorney-General. The argument is a circular one since it begs the question whether

the applicants were validly elected to the office and so entitled to enjoy the perquisites and income thereof.

Protection of the law

There was some argument in the court below that there was uncertainty as to whether section 48(1) (a) of the Constitution disqualified dual citizens from standing for Parliament and whether that vagueness or uncertainty had the effect of denying the appellants the protection of the law. As no oral argument was directed to this point I do not deal with it. In any event, the interpretation of section 48(1) (a) of the Constitution was in the way the appeal unfolded separately argued.

Equality before the law

It was contended that to interpret section 48(1) (a) as disqualifying dual citizens would amount to unequal treatment within section 4(d) of the Constitution. The argument was that as the citizenship laws now permitted dual citizenship, the interpretation of the Constitution should move in step with that policy. Any other interpretation would discriminate against dual citizens and would be contrary to the canons of constitutional interpretation which required clear words before a right was restricted.

If the interpretation of section 48(1) (a) is settled by a court, then presumably even the alleged inequality of treatment by undefined state action would not arise. I therefore propose to deal with this issue later in this judgment as a matter of the interpretation of the Constitution.

The relief sought by the applicants

I next propose to examine the relief claimed in order to see whether these motions seek principally constitutional redress as opposed to relief in respect of the disputed elections.

As regards paragraph (a), as I have indicated earlier on the authority of Chokolingo v Attorney-General (supra), the hearing of an application for leave by a duly constituted court of first instance subject to correction and revision on appeal cannot amount to a breach of the constitutional rights in sections 4(a) and 4(b). In Attorney-General v McLeod [1984] 1 WLR 522 (P.C.) Lord Diplock said as follows at p. 531A:

“For Parliament to purport to make a law that is void under section 2 of the Constitution, because of its inconsistency with the Constitution, deprives no one of the “protection of the law”, so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the state is vested, a declaration of its invalidity that will be binding on the Parliament itself and all persons attempting to act under or enforce the purported law.”

Thus, access to the courts to challenge an alleged breach of constitutional rights by the legislative arm of the state constitutes “the

protection of the law”. Similarly, access to the courts to challenge an alleged breach by the judicial arm of the state constitutes “the protection of the law” and, in my view, due process.

Paragraph (b) of the relief sought seeks a declaration that the judiciary cannot terminate or pronounce against the applicants’ membership of the House of Representatives.

This ground really amounts to an objection to the jurisdiction of the election court and should properly be taken on the election petitions.

The third relief sought is a declaration that the applicants are duly qualified to be and remain members of the House of Representatives. This issue is entirely within the scope of section 52(1) (a) of the Constitution and is a matter for the election petitions. It would involve a determination of the objections made by the respondents to the election of the appellants.

The fourth relief prayed for is a declaration that the representation proceedings are null and void. The true contention here is that there is no jurisdiction to hear the election petitions in view of such matters as the absence of rules and the grant of leave ex parte. Again, this is a matter which properly belongs to the representation proceedings.

The fifth item of relief asks for a declaration that the hearing of the election petitions and any procedures devised by the judges to hear them would contravene the powers of the Rules Committee and the President. Again, this relief is really an objection to the jurisdiction of the election court rather than an item of relief in a constitutional motion.

The remaining reliefs are consequential. Since the election petitions have been stayed by order of the Court of Appeal in the election proceedings pending the determination of these appeals, practically the appellants have the benefit of the consequential relief sought.

I therefore conclude that the relief sought is substantially section 52 relief. Such constitutional relief as is sought is ancillary to and dependent on the appellants being right about their objections to the election petitions. In the premises I would order the election petitions to proceed and uphold the learned judge's dismissal of the constitutional motions.

Attorneys for the appellants and the Attorney-General contended that section 14 of the Constitution entitled them to bring "any other action with respect to the same matter which is lawfully available". I agree with counsel for the respondents that there is in any event no breach of a constitutional right, as I have indicated earlier in this Part. Further, the alternative remedy to constitutional redress is usually the right of the applicant for constitutional relief to file an ordinary action about the same subject-matter. The purpose of section 14(1) is not to enable a defendant to opt out of an action by bringing constitutional proceedings, particularly where the Attorney-General, the statutory defendant, is only an interested bystander and the real contest is between the parties to the original election petitions. For these reasons too I would uphold the learned judge's order.

It was also contended by the appellants and the Attorney-General that the Constitution provided for a right of appeal under section 109(1) (b) of the

Constitution to the Privy Council on final decisions involving a question as to the interpretation of the Constitution, whereas section 52(4) permitted a right of appeal only to the Court of Appeal. I am persuaded that this submission is wrong since section 109(4) expressly makes such a right of appeal subject to section 52(4) (no appeal from a decision of the Court of Appeal in respect of a decision on a section 52 matter). It follows that matters of interpretation arising out of disputed elections or returns are to be dealt with on an election petition.

In Browne v Francis-Gibson (1995) 50 WIR 143 cited in Russell v Attorney-General of St. Vincent and the Grenadines (1997) 51 WIR 110, at p.118 a defeated candidate brought an election petition and lost in the High Court and Court of Appeal. He sought leave to appeal to the Privy Council on the ground that a point of law of great public importance was involved and that the decision was a final decision in a civil or criminal proceeding involving a question of the interpretation of the Constitution. The relevant equivalent sections in the Trinidad and Tobago Constitution are sections 109(1) (c), 109(2) (a). Section 99(6) of the St. Vincent Constitution contained a provision excluding from appeal to the Privy Council any matter of the interpretation of the Constitution collateral to or related to an election petition. The local equivalent of section 99(6) is section 52(4) of the Constitution. Section 109(1) (c) is modified by the prohibition in section 52(4). In my judgment the dicta of Sir Vincent Floissac C.J. in Browne v Francis-Gibson (supra) at p. 151E applies to the instant case:

“That decision of this court is therefore unappealable to Her Majesty in Council, even if (arguably) that decision involves a question as to the interpretation of the Constitution or the question involved in the intended appeal is of great general or public importance.”

Similar statements were made by Sir Vincent Floissac C.J. in Russell v Attorney-General (supra) at page 122D in the context of the use of a general interpretation provision in order to obtain a declaration that the election of all candidates in the February 1994 elections in St. Vincent was illegal and void. Section 96 conferred jurisdiction on the courts to grant redress for breach of the Constitution but by sub-sections (1) and (7) respectively excluded therefrom (a) the Chapter dealing with fundamental rights and freedoms (b) the sections dealing with disputed elections and membership of the House of Assembly. The learned judge held that section 96(7), (which is analagous to the local section 52(4)) ensured that the constitutional jurisdiction was not available as a means of circumventing “the strict substantive and procedural rules which governed the parliamentary jurisdiction nor as a means of gaining ultimate access to Her Majesty in Council under the guise of seeking to enforce a constitutional provision”. Lord Mustill at p. 125G seemed to agree with that proposition when he said:

“Equally, the court will be alert to make sure that

such procedure will not be allowed to outflank the comprehensive jurisdiction over election disputes which the Court of Appeal has held to reside exclusively in section 36.”

I would therefore hold that since the constitutional motions concern principally matter within section 52 of the Constitution the mere fact that issues of constitutional interpretation may also arise is not enough without more to deprive the election court of jurisdiction. The right of appeal in matters of constitutional interpretation germane to election petitions is by section 109(4) restricted to the Court of Appeal. I am mindful of the dicta of Lord Diplock in Attorney-General v McLeod [1984] 1 WLR 522, 530H which said:

“Since a question of the interpretation of the Constitution was involved Mr. McLeod would have had an appeal to the Judicial Committee as of right under section 109(1) (c) of the Constitution, whichever form of procedure he had adopted...”

It seems evident that Lord Diplock was not there dealing with the exceptions to the general rule contained in section 109(4) of the Constitution, an exception which is applicable to the instant case.

Conclusion

For the reasons stated above I have come to the conclusion that the appellants have not established that any fundamental right has been

breached or that they are otherwise entitled to constitutional relief.

I am therefore in agreement with the learned judge because in my view no state action causing a breach of rights has been established. Even if there were state action, matters of interpretation arising out of election petitions are for the election court.

Nevertheless since it is possible that a higher court may arrive at a different conclusion, we agreed to consider the following further questions on which the learned judge ruled:

- (1) Whether the granting of leave ex parte to bring the election petitions rendered the leave null and void and vitiated all proceedings subsequent to such leave.**
- (2) Whether the absence of rules made pursuant to section 144 of the Act defeated the jurisdiction conferred by section 52 of the Constitution, or whether the absence of rules merely rendered the jurisdiction inoperable.**

During the course of the hearing, counsel for the appellants was given leave to file a motion seeking the interpretation of the Constitution in the following terms, agreed to by all the parties:

- 1. Is a person who is a citizen of Trinidad and Tobago disqualified from election to the House of Representatives under section 48(1) (a) of the Constitution if he is a citizen also of a country other than Trinidad and Tobago having become such a citizen voluntarily, or is under a declaration of allegiance to such a country?**

2. If the answer to (1) is ‘yes’, in the case of a contested election is a candidate disqualified if he holds such other citizenship, or is under such a declaration of allegiance, on nomination day but not on polling day?
3. Does a Court hearing a representation petition have power to hear and determine a question of disqualification pursuant to section 48 of the Constitution?

On these three issues, apart from disqualification, the learned judge declined to express an opinion.

PART TWO

Prolegomena

Underlying the appellants’ contentions in these appeals and on the further questions the court will now consider are three pivotal propositions.

1. The House of Representatives had control over its own membership and also of matters relating to controverted elections.
2. Parliament by section 52 of the Republican Constitution surrendered or transferred to the High Court the jurisdiction which was vested in the House of Representatives to determine questions concerning its membership.
3. There being no rules of court made pursuant to section 144 of the Act the jurisdiction to grant or refuse leave to bring election petitions , whether ex parte or at all, could not be exercised.

1. Control over membership of the House of Representatives

Trinidad was captured by the British in 1797 and formally ceded to Great Britain in 1803. Trinidad and Tobago were administratively united in 1889. A legislative assembly was granted by the King in Council in 1924 for the first time, but it was only partially elected: see the Trinidad and Tobago (Legislative Council) Order in Council, 1924. From the outset sections XXI and XXIX of this Order in Council provided that disputed elections and disputed questions of membership were to be within the exclusive jurisdiction of the Supreme Court. The Chief Justice was to determine finally any election petition and his certified determination was to be final. Further, it is to be remembered that as a Crown Colony ruled directly from London, the Governor, as the Sovereign's representative, had the power "at any time by Proclamation", to prorogue or dissolve the Legislative Council: see section LI of the 1924 Order in Council.

Sections 40(2) and 47 of the Trinidad and Tobago (Constitution) Order in Council, 1950 after full adult suffrage continued to reserve to the courts matters relating to membership and controverted elections.

"40(2) All questions which may arise as to the right of any person to be or remain an Elected Member of the Legislative Council, shall be referred to and determined by the Supreme Court of the Colony in accordance with the provisions of any law in force in the Colony."

“47. Subject to the provisions of this Order, provision may be made, by or in pursuance of any law enacted under this Order, for the election of Elected Members of the Legislative Council including (without prejudice to the generality of the foregoing power) the following matters, that is to say:-

- “(a) the qualifications and disqualifications of electors;**
- (b) the registration of electors;**
- (c) the ascertainment of the qualifications of electors and of candidates for election;**
- (d) the division of the Colony into electoral districts for the purpose of elections;**
- (e) the holding of elections;**
- (f) the determination of all questions which may arise as to the right of any person to be or remain an Elected Member of the Legislative Council;**
- (g) the definition and trial of offences relating to elections and the imposition of penalties therefor, including disqualification for membership of the Legislative Council, or for registration as an elector, or for voting at elections, of any person concerned in any such**

**offence;
and any such law may amend or
revoke any of the provisions of section
44 or of section 45 of this Order.”**

**When a fully elected assembly was granted by the Crown in 1961,
similar provisions persisted in The Trinidad and Tobago (Constitution)
Order in Council 1961. Section 43 provided as follows:**

“43. Any question whether –

- (a) any person has been validly appointed as a
Senator or validly elected as a member of the
House of Representatives;**
- (b) any Senator or member of the House of
Representatives has vacated his seat or is
required, under the provisions of paragraph
(3) of article 18 or paragraph (3) of article 23
of this Constitution, to cease to exercise any of
his functions as a Senator or as a member of
the House of Representatives; or**
- (c) any person has been validly elected as Speaker
of the House of Representatives from among
persons who are not Senators or members of
the House of Representatives, or, having been
so elected, has vacated the office of Speaker,
shall be determined by the Supreme Court in
accordance with the provisions of any law for the
time being in force in the Territory.**

(2) Proceedings for the determination of any question

referred to in the preceeding paragraph shall not be instituted except with the leave of a judge of the Supreme Court.

- (3) No appeal shall lie from the decision of a judge of the Supreme Court granting or refusing leave to institute proceedings in accordance with the preceding paragraph.”

Westminister in granting independence in 1962 and Trinidad and Tobago in accepting it again entrusted the courts with the final determination of questions as to disputed elections: see section 35 of the 1962 Constitution:

“(1) Any question whether –

- (a) any person has been validly appointed as a Senator or validly elected as a member of the House of Representatives;
- (b) any Senator or member of the House of Representatives has vacated his seat or is required, under the provisions of subsection (3) of section 26 or subsection (3) of section 32 of this Constitution to cease to exercise any of his functions as a member of the House of Representatives;
or
- (c) any person has been validly elected a Speaker of the House of Representatives

from among persons who are not
Senators or members of the House of
Representatives,
shall be determined by the High Court in
accordance with the provisions of any law in force
in Trinidad and Tobago.

(2) Proceedings for the determination of any question referred
to in subsection (1) of this section shall not be instituted except with the leave
of a judge of the High Court.

(3) An appeal shall lie to the Court of Appeal from –

- (a) the decision of a judge of the High Court
granting or refusing leave to institute
proceedings for the determination of
any question referred to in subsection
(1) of this section;
- (b) the determination by the High Court of
any such question.

(4) No appeal shall lie from any decision of the Court of
Appeal given in an appeal brought in accordance with
subsection (3) of this section.”

The framers of the Republican Constitution continued that tradition
in section 52. The history of the Trinidad and Tobago Parliament is different
from that of the Parliaments of Australia and Canada. In Canada prior to
Confederation the legislatures of the various provinces followed the example
of the British Parliament and retained the right to deal with election matters:
see per Prendergast J. in Re Prince Albert City Provincial Election (1906) 3

The Western Law Reporter 571, 573.

In Australia after the federation of the Australian colonies in 1901 section 47 of the Australian Constitution robustly asserted its control over disputed questions of membership and over controverted elections:

Section 47 reads thus:

“Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.”

The House of Representatives of Trinidad and Tobago has never asserted or claimed any right to determine its own membership or to decide disputed elections. On the contrary, it has always reserved such questions to the courts.

Surrender of jurisdiction to the courts

The legislative assemblies of Trinidad and Tobago have never asserted control over matters relating to disputed elections or questions of membership on the basis of a *lex et consuetudo parliamenti*. The several Houses of Assembly of the provinces of Canada did assert an exclusive right to deal with such matters: Valin v Langlois (1870) SCR 1, per Ritchie C.J. Further, no local custom or usage asserted such a right during the era of

Crown colony government. Although by the Trinidad and Tobago Constitution Order in Council, 1950 power was granted to the local legislature to declare privileges, immunities and powers equivalent to but not exceeding those of the House of Commons, the local legislature never defined its privileges as including the right to determine disputed questions of membership or controverted elections. The relevant section of the 1950 Order in Council reads thus:

“60. It shall be lawful, by laws enacted under this Order, to determine and regulate the privileges, immunities and powers of the Legislative Council and its Members, but no such privileges, immunities or powers shall exceed those of the Commons House of Parliament of the United Kingdom of Great Britain and Northern Ireland or of the Members thereof.”

While I accept that the jurisdiction over disputed elections is a special jurisdiction it is a jurisdiction exercised by the Supreme Court exclusively over the past 76 years as part of its usual jurisdiction. There never was any surrender by Parliament of any control over these matters to the courts. Parliament never had it: the courts always did.

The appellants placed much reliance on dicta in Patterson v Solomon [1960] AC 579, 589 which suggested that there was in Trinidad and Tobago a transfer of the legislature’s jurisdiction over disputed elections from the legislature with its consent to the courts. However, Viscount Simonds was

merely paraphrasing a passage from Théberge v Laundry [1876] 2 App. Cas. 102 and applying it to the case before him. The learned law Lord expressly indicated that the decision of the Board to decline jurisdiction did not rest on the validity of the assumption that jurisdiction over disputed elections formerly resided in or was exercised by the legislature. I do not read Patterson v Solomon (supra) as contradictory of the historical context I have outlined in this judgment.

In 1976 the framers of the republican Constitution continued the tradition of vesting all questions as to disputed membership and controverted elections in the courts. Significantly, section 52 of the Constitution is not expressed to be subject to section 55, in which the Constitution granted Parliament for the first time the powers, privileges and immunities then enjoyed by the United Kingdom House of Commons. By that time the United Kingdom House of Commons had in any event divested itself of jurisdiction in relation to disputed elections and returns. Indeed the general words of section 55 cannot be construed as derogating from the exclusive vesting of such jurisdiction in the courts in the absence of any history of previous exercise or vesting in the legislature.

The jurisdiction of the courts and rules of court

The third major premise of the appellants is that the grant of jurisdiction to the courts is predicated on the introduction of rules of court under section 144 to give effect to the jurisdiction.

Counsel for the Attorney-General concedes that the Constitution has

vested jurisdiction in the courts, but contends that in the absence of rules of court the jurisdiction is inoperable.

There is no need for me to repeat the comprehensive refutation of both positions which the learned trial judge advanced.

However, I wish to make a few observations. On the assumption that no rules of court apply, which I do not accept, one must bear in mind the principle of construction enunciated by the Privy Council in Jaundoo v The Attorney General [1971] AC 972 at p. 982G:

“The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule-making authority to make specific provision as to how that access is to be gained.”

Lord Diplock went on to hold that where the Constitution provided for an application to be made but was silent on the relevant procedure, such application could be made in any way in which the High Court could be approached subject to the opposite side having notice of the application and an opportunity to be heard. In my judgment the courts would be slow to find that a jurisdiction granted by the supreme law of the land is frustrated by an omission by the rule-making authority.

The appellants, however, fail to grasp the difference between an enactment whereby jurisdiction is to be conferred by the rule-making

authority: see Moore v Assignment Courier Ltd. [1977] 1 WLR 658 (CA) and a situation whereby jurisdiction already exists and the rule-making authority merely regulates the exercise of that jurisdiction. Only in the former situation would the absence of rules be fatal: see Jamaat Al Muslimeen v Bernard (1994) 46 WIR 429, 434, 438B per Sharma J.A.

Part VI of the Act is a motley patchwork of sections thrown together at various intervals during the past 76 years without any coherent thinking or aim at providing a self-contained code of procedure for disputed elections. It has not been uncommon in the past for imperial legislation to be locally incorporated from time to time but through inadvertence or otherwise the associated subordinate legislation of the imperial law is not locally enacted. Parliament supplied such deficiencies in two ways: (1) by incorporating the practice and procedure applicable in England (2) by enacting a wide enabling rule-making provision, which made the Rules of Supreme Court applicable to every situation in which the High Court had special jurisdiction.

Incorporation of English practice and procedure.

English practice and procedure is invoked by the combined effect of section 14 of the Supreme Court of Judicature Act Chap. 4:01 (“the Judicature Act”) and section 20 of the former Judicature Ordinance. Ch. 3 No. 1 of the Laws of Trinidad and Tobago 1950.

Section 14 of the Judicature Act provides as follows:

“14. The jurisdiction vested in the High Court shall, so far as regards procedure and practice be exercised in the manner provided by this Act or by rules of court and where no special provision is contained in this Act or in rules of court with reference thereto any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the former Supreme Court under the Judicature Ordinance (repealed by this Act).

Section 20(1) of the Judicature Ordinance states:

“The jurisdiction hereby vested in the court shall be exercised as nearly as possible in accordance with the practice and procedure for the time being in force in the High Court of Justice in England so far as such practice and procedure is not displaced by rules of court made in pursuance of the Ordinance, and whether the cause of action arose before or after the commencement of this Ordinance.”

In so far as rules of court are not otherwise made for the hearing of election petitions Trinidad and Tobago practice and procedure would be governed mutatis mutandis by the equivalent English rules of practice and procedure prevailing as at August 30, 1962: see section 21 of the Interpretation Act Chap 3:01. In my view therefore the Election Petition

Rules 1960 (UK) will apply to the present case to supplement local practice and procedure. For an application of this procedure see Ramoo v Olds Discount (1967) 12 WIR 116 (CA).

The local Judicature Act makes the general rules of court applicable not only to its ordinary jurisdiction but also to any special jurisdiction bestowed upon it without the need for express incorporation of the Rules of the Supreme Court in the later enactments.

Section 78 is in the following terms:

“78(1). Rules of Court may be made under this Act for the following purposes:

- (a) for regulating and prescribing the procedure, including the method of pleading, and practice to be followed and the fees to be taken in the Court of Appeal and the High Court respectively in all causes and matters whatsoever in or with respect to which those courts respectively have for the time being jurisdiction, and any matters incidental to or relating to any such procedure or practice, including but without prejudice to the generality of the foregoing provision, the manner in which and the time within which, any applications which under this or any other Act, are to be made to the Court of Appeal or to the**

High Court shall be made;”

These enabling provisions gave birth to the Rules of the Supreme Court 1975, which expressly applied those rules to every proceeding in the High Court under any enactment: see Order 1 rule 2, the relevant parts of which I reproduce hereunder:

“2(1) Subject to the following provisions of this rule, these Rules shall have effect in relation to all proceedings in the Supreme Court.

(2) The Rules shall not, except as expressly provided by these Rules, have effect in relation to the following proceedings:-

6. ...Any other proceedings in the High Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.

(4) In the case of the proceedings mentioned in paragraphs (2) and (3) nothing in those paragraphs shall be taken as affecting any provision of any rules (whether made under the Act or any other Act or Ordinance) by virtue of which the Rules of the Supreme Court 1975 or any provisions thereof are applied in relation to any of those proceedings.”

I agree with the learned judge that section 78(1) (a) of the Judicature

Act and Order 1 rule 2 make the Rules of the Supreme Court applicable to election petitions. Indeed the old Order 53 rule 10 expressly provided for consolidation of applications under the Representation of the People Act, 1967.

In my judgment Parliament must have been aware that since a power to make local election petition rules was introduced by the Elections (Legislative Council) Amendment Act, No. 18 of 1934, no local rules specific to election petitions had been made. In the absence of such rules the English practice and procedure in relation to election petitions apply by virtue of section 14 of the Judicature Act and section 20 of the Judicature Ordinance. Section 4 of the Wills and Probate Ordinance Ch. 8 No.2, provides a different example of specific incorporation of English practice in the field of succession in the absence of rules of court. In such a case “the jurisprudence and practice for the time being of the Probate Division of the High Court of Justice in England so far as the same may be applicable” became part of our law.

For the reasons stated above I reject the submission that the jurisdiction granted to the courts is still-born or that the jurisdiction exists but in a state of paralysis.

I turn now to the two questions on which the learned judge ruled:

- (a) breach of the rules of natural justice by the granting leave ex parte and

- (b) the absence of rules pursuant to section 144 of the Act.**

2. Section 52 of the Constitution: the leave requirement

I will first set out the provisions of section 52 in full:

“52. (1) Any question whether—

(a) any person has been validly appointed as a Senator or validly elected as a member of the House of Representatives;

(b) any Senator or member of the House of Representatives has vacated his seat or is required, under the provisions of section 43(3) or section 49(3), to cease to exercise any of his functions as a Senator or as a member of the House of Representatives; or

(c) any person has been validly elected as Speaker of the House of Representatives from among persons who are not Senators or members of the House of Representatives,

shall be determined by the High Court.

(2) Proceedings for the determination of any question referred to in the subsection (1) shall not be instituted except with the leave of a Judge of the High Court.

(3) An appeal shall lie to the Court of Appeal from—

- (a) the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in subsection (1);
 - (b) the determination by the High Court of any such question.
- (4) No appeal shall lie from any decision of the Court of Appeal given in any appeal brought in accordance with subsection (3).”

The appellants contend that the grant of leave to institute proceedings against the appellants pursuant to section 52 was a nullity since the grant of leave contravened the rules of natural justice, thereby contravening their constitutional rights under section 4(a) (due process) and 4(b) (the protection of the law) in particular their right to a fair hearing in accordance with the principles of fundamental justice.

I have already indicated that the submission that the grant of leave arose out of a special jurisdiction transferred by Parliament from itself to the courts is misconceived. Also, for the reasons stated above I do not accept that there is no right to invoke the jurisdiction of the High Court to grant leave until rules of court have been made pursuant to section 144 of the Act and consequently the jurisdiction to determine questions of membership “remains in the House itself”.

It is clear that the framers of the Constitution are silent as to the

procedure to be employed in seeking leave to institute an election petition. Nor is any procedure laid down or required to be laid down in Part VI of the Act, which only purports in section 106(1) to deal with the progress of legal proceedings “where leave has been granted under section 52(2) of the Constitution”.

Where a decision or order may adversely affect the interests of a person the decision-maker may still have a duty to afford such a person an opportunity to be heard. Lord Guest in Wiseman v Borneman [1969] 3 WLR 706, at p. 712 put the principle thus:

“It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties’ rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied.”

The principle is equally applicable to courts of law. Nevertheless one must heed the words of Tucker LJ in Russell v Duke of Norfolk [1949] 1 All E.R. 109, 118:

“There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is

acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.”

I am mindful that it is not enough to look literally at the words of the Constitution and the absence of procedure and jump to the conclusion that the rules of natural justice do not apply. One has to look at the context and see whether the provision operates unfairly against the respondents. Only then will the courts be required to supply the legislative omission: see generally Wiseman v Borneman (supra at p. 719) per Lord Wilberforce.

Yet the legislature may clearly intend to exclude the rules of natural justice at a particular stage. In Rees v Crane [1994] 1 All ER 833, 844J. Lord Slynn agreed with the proposition here advanced and identified some situations which might indicate that the rules of natural justice were not to apply:

- (1) the fact that the investigation was purely preliminary
- (2) the fact that there would be a full chance of dealing with the complaints later
- (3) the fact that the making of the inquiry without observing the audi alteram partem rule is justified by urgency or administrative necessity
- (4) that no penalty or serious damage is inflicted by proceeding to the next stage without such

preliminary notice

- (5) that the statutory scheme properly construed excludes the right to know and to reply at the earlier stage.**

In attempting to arrive at the intention of the makers of the Constitution I have considered the following factors:

- (1) Election petitions are to be determined with speed and urgency. Section 113(3) of the Act reflects this policy: election petitions must as far as possible be heard from day to day until their conclusion.**

The need to determine election cases promptly and speedily is also emphasized in the authorities: see Senanayake v Navaratne [1954] AC 640; Arzu v Arthurs [1965] 1 WLR 675; Devan Nair v Teik [1967] 2 WLR 846.

- (2) The fact that section 110 of the Act requires the petitioner within five days of presentation of the petition to give notice of its presentation suggests that it was not contemplated that the respondent be a party at the leave stage.**

- (3) In the Bahamas article 51(1) of the Constitution reserves questions of disputed elections to the courts. Paragraphs (4) and (5) of article 51 provide as follows:**

“(4) Proceedings for the determination of

any question referred to in paragraph (1) of this Article shall not be instituted except with the leave of a Justice of the Supreme Court.

- (5) An appeal shall lie to the court of Appeal on a point of law from the decision of a Justice of the Supreme Court granting or refusing leave to institute proceedings in accordance with this Article, but, subject as aforesaid, that decision shall be final.”

Section 78(1) of the Representation of the People Act, 1969 provides so far as is material:

“No election petition shall be presented unless leave therefor has been granted on an application made ex parte to a Judge of the Supreme Court...”

In Wallace –Whitfield v Hanna (March 24, 1983, unreported), Civil Appeal No. 12 of 1982 the Court of Appeal of the Bahamas held that the provisions of section 78(1) of the Representation of the People Act, 1969 permitting an application for leave to present an election petition ex parte were intra vires article 51 of the Constitution.

In a joint judgment Luckhoo P., Sir James Smith and da Costa JJA. said:

“The clear purpose we think is to avoid the

bringing of frivolous or vexatious petitions. The Supreme Court judge in that regard must be satisfied that the applicant has locus standi to bring the petition in question... The judge is not required to make any finding that would affect any right of or determine anything to the detriment of any person who might eventually be made a party to a petition. No mini trial is contemplated before the Supreme Court judge. No counter affidavits or cross-examination are envisaged in such an application as they certainly are in an inter partes application. The judge is, in effect a judicial censor to screen, as it were, applications before applicants are permitted to bring proceedings against persons against whom allegations, are to be made in those proceedings.”

I would respectfully adopt these dicta of the Court of Appeal of the Bahamas. As in the present case the Constitution was silent about the procedure. However, the Representation Act expressly provided that leave was to be applied for ex parte. The case explored the question whether an application which was required to be ex parte offended against the principles of fundamental justice and so was unconstitutional. Wallace-Whitfield v Hanna is authority for saying that an ex parte application for leave to present an election petition under section 52(2) of the Constitution is valid, contrary to the contentions of the appellants.

(4) Even if the appellants do not appear at the leave stage they have

no locus standi to set aside an order made ex parte since on an application for leave to institute proceedings they are not parties: see Jones v Vans Colina [1966] 1 WLR 1580 (CA), especially at 1584H – 1585A. Therefore it seems that the framers of the Constitution intended that a party affected by the grant of leave to institute proceedings should have a right to be heard only at the level of the Court of Appeal, and that there should be no further right of appeal.

As Mason J. said in Twist v Council of the Municipality of Randwick (1976) 136 CLR 106, a case in which a council was entitled to make a demolition order without a hearing but a limited right of appeal existed thereafter:

“...the appeal is not restricted in any way. It is a full appeal on facts and on law in which the appellant is entitled to call evidence. The appeal extends to such elements of discretion as may enter into the making of the order as well as to the existence or non-existence of the conditions which are to be satisfied before an order can be made.”

The same principles would apply to the right of appeal in section 52(3) of the Constitution. The time frame for appealing is governed by Order 59, which applies to “every appeal to the Court of Appeal”: see rule 2 thereof.

(5) I am also influenced by the fact that once the election proceedings are instituted the respondents would be entitled to impugn the leave granted by making an application under Order 18 rule 19 of the Rules of the Supreme Court.

I have for the reasons outlined above come to the conclusion that the policy and intention of the architects of the Constitution were to exclude the rules of natural justice at the leave stage, but to grant the proposed respondent a full opportunity to be heard by a panel of appeal judges without any right of further appeal. There is nothing contrary to fundamental justice in allowing the application for leave to be made ex parte but permitting a party a full opportunity to be heard by a panel of three judges.

For the purposes of this judgment it is assumed that the appellants did not participate in the application for leave to bring the election petitions. Whether they did or did not is an issue of fact upon which I express no opinion at this stage.

3. The absence of rules of court pursuant to section 144

The second issue on which the learned judge expressed an opinion concerns the absence of rules of court made pursuant to section 144 of the Act.

The learned judge said:

“The scheme and purpose of the 1961 Ordinance is clear and all the interpretative factors point to the conclusion that Parliament intended that the Rules Committee should prescribe those matters

requiring prescription under Part VI of the RPA. That it has clearly failed to do.”

The learned judge also held that the Rules of the Supreme Court applied to election petitions but did not provide a complete answer to the arguments of the appellants. The issue of the manner of publication of the petition by the Registrar pursuant to section 107(5) was not answered. However, the judge held, the jurisdiction of the Court was not thereby affected. Any residual deficiencies could be cured by recourse to the House of Commons procedures and the inherent jurisdiction of the Court.

Counsel for Mr. Peters submitted that the procedural requirements of the Act had to be strictly complied with and obeyed in the minutest detail. He further contended that the general jurisdiction of the High Court in an ordinary civil action pursuant to section 145 of the Act did not permit the courts to cure omissions where no rules had been made. Nor did the principles, practice and procedure of the committees of the House of Commons in section 129 of the Act apply since no rules had been made under Part VI of the Act, which was a condition precedent to their applicability. Further the general Rules of the Supreme Court did not apply unless expressly incorporated.

According to counsel for Mr. Peters, the failure to prescribe rules with respect to section 52 of the Constitution and several sections of the Act including section 107(3), (5) and (6) went to jurisdiction. The jurisdiction of the court was circumscribed, it was contended, by the Constitution, the Act

and the matters required to be prescribed.

Counsel for Mr. Chaitan strove to link the alleged absence of rules with a denial of due process of law and of the protection of the law. Parliament had vested in the Rules Committee and the President the power to make rules and they had not done so. The Act required matters to be prescribed for the law to be effectual. Therefore, so the argument ran, there was no jurisdiction to hear the election petitions. The Rules of the Supreme Court did not apply because (a) the promulgation of rules was a condition precedent to the jurisdiction or (b) could not apply to the special jurisdiction of election petitions, a jurisdiction in which compliance with rules was strictly observed. The alleged absence of rules denied the applicants due process necessary to protect their right to membership of the House of Representatives and their entitlement to the emoluments and privileges attached thereto.

Counsel for the Attorney-General, however, conceded that jurisdiction had been effectively vested in the courts but the means of exercising it was defective. He endorsed the learned judge's dicta to the effect that Parliament intended rules to be made pursuant to section 144 but the Rules Committee had failed to do so. There were no rules to prescribe the form, manner and time within which steps were to be taken under the Act. Section 129 (principles, practice and rules of House of Commons committees to apply) and section 145 (powers jurisdiction and authority of High Court in an ordinary action to apply) did not fill the gap. Further the

principle in Jaundoo v Attorney General of Guyana [1971] AC 972, 982H did not apply where rules were expressly provided for but not made. By way of comment on the latter point, it follows that the principle in Jaundoo must also apply where statute implied a power to make rules under and by virtue of section 55 of the Interpretation Act Chap 3:01 and none were made.

I agree with the submission of the respondents and the ruling of the learned judge that Counsel for the appellants and the Attorney-General have not pointed to anything in the Constitution or the Act that makes the promulgation of rules or the prescription of matters left to be prescribed a condition precedent to jurisdiction. I have already referred to Moore v Assignment Courier (supra) and Jamaat Al Muslimeen v Bernard (supra) where in contrast to the present case Parliament had granted the rule-making authority the power to designate the situations in which interim payments could be made.

Quite apart from that I reject entirely the notion that there are no rules of procedure applicable to election petitions. Ever since Port-of-Spain celebrated the introduction of English law in 1844 by the exhortation to the population to toss the Siete Partidas into the Gulf of Paria and burn the Novísima Recopilación, the most persistent feature of our law has been its dependence on the legislation, practice and procedure and precedents of the English legal system. Every artifice has been used to enable the courts to draw upon English authority. As regards practice and procedure general incorporation clauses have been used. I have already indicated that section

14 of the Judicature Act Chap 4:01 and section 20 of the Judicature Ordinance is one such provision. It applies here to incorporate the Election Petition Rules 1960 (U.K.). In the field of succession specific incorporation clauses have been used to supplement local practice and procedure.

I agree with the learned judge that the local rules of court are expressly made applicable by section 78(1) (a) of the Judicature Act and Order 1 rule 2 of the local rules.

In the light of section 48 of the Interpretation Act, Chap 3:01, which deems a statutory instrument to be made not only under the specific law under which it is expressed to be made, but “under all powers thereunto enabling that person or authority”, it is, in my view, unarguable that no rules have been made or deemed to be made pursuant to section 144 of the Act.

As regards the jurisdiction point, I drew the attention of counsel to section 55 of the Interpretation Act, which gives the rule-making authority an implied power to make rules in respect of every enactment without the necessity for a specific provision empowering it to do so. If, as argued, the failure to make rules deprives the court of jurisdiction where there is an express power to make rules, one would expect that where there is an implied power (which would be the normal case) and no rules are made the same remorseless lack of jurisdiction would befall the courts and the general public. That result is so absurd as to persuade me that the failure of a rule-making body to make rules cannot result in an absence of jurisdiction in the courts.

In the final analysis I am satisfied that on a proper reading of the Interpretation Act, the Judicature Act, the Rules of the Supreme Court and upon appropriate applications being made to the court (if at all necessary) there are no procedural lacunae that would prevent the hearing of the election petitions.

In the light of the conclusion I have arrived at I do not find it necessary to deal with sections 129 and 145 of the Act, which are in any event relics of the English history of disputed elections prior to 1868. I do not, however, say that they have no application to election petitions.

Nor do I regard the submission that there has been a failure to prescribe as a point of any substance having regard to the Act itself and the matters I have set out above. If the object of procedural rules in the new dispensation fathered by Lord Woolf is to facilitate rather than stultify fairness, I do not anticipate present-day courts would be impressed by the arguments of the type that prevailed in Sabga v Solomon (1963) 5 WIR 66 (certified cheque not a deposit of money).

For all these reasons I would uphold the finding of the learned judge that there is no absence of applicable procedural rules and that there is jurisdiction in the High Court to hear the petitions.

PART THREE

A. THE FIRST QUESTION

I turn now to the first of the matters of interpretation not dealt with

by the learned judge –the proper construction of section 48(1)(a) of the Constitution. I hasten to say that in my view all matters of interpretation related to disputed elections are cognizable before the judge trying an election petition. However, should a higher court take a different view, I now consider the questions placed before the Court.

Section 48(1)(a) is again set out hereunder for convenience:

“48(1) No person shall be qualified to be elected as a member of the House of Representatives who –

- (a) is a citizen of a country other than Trinidad and Tobago having become such a citizen voluntarily, or is under a declaration of allegiance to such a country;”

However, section 48 is not to be read in isolation; it must be read with section 47, which says in part:

“47. Subject to the provisions of section 48, a person shall be qualified to be elected as a member of the House of Representatives if, and shall not be qualified to be so elected unless, he –

- (a) is a citizen of Trinidad and Tobago of the age of eighteen years or upwards....”

The primary qualification for Parliament, therefore, is Trinidad and Tobago citizenship. Aliens flounder at the first hurdle, and do not come

within section 48(1)(a). However, even a Trinidad and Tobago citizen may be disqualified for any of the reasons stated in section 48(1).

In my view section 48(1)(a) is clear and unambiguous. There is no need for interpretive aids such as purposive construction or current policy or international conventions or the principle that rights may only be restricted by clear words.

Since 1962 the law as regards entry into Parliament has always been that a Trinidad and Tobago citizen wishing to enter Parliament must have no allegiance to another country, whether in terms of nationality of or allegiance to another country.

Counsel for the appellants and the Attorney-General contended as follows:

- (1) Section 48(1)(a) had to be interpreted in the context of current citizenship legislation which since the amendment to the Citizenship Act 1976 by Act No. 63 of 2000 permitted dual citizenship. Accordingly a purposive construction of the Constitution will not disqualify dual citizens for entry into Parliament.**
- (2) One should interpret section 48(1)(a) so as not to discriminate against a category of citizen and breach his or her right of equality of treatment.**
- (3) The section of the Constitution should not be interpreted so as to restrict the rights of citizens, e.g. to stand for Parliament. Only clear words could do so.**
- (4) Since no one was now required to renounce foreign citizenship dual citizens should now be allowed to stand for Parliament.**

- (5) Section 48(1)(a) of the Constitution was never intended to apply to Trinidad and Tobago citizens, but only to aliens.**
- (6) The second limb of section 48(1)(a) applied only to persons who served governments abroad in the army or the public service and were required on that account to swear oaths of allegiance to a foreign government.**

In order to understand the points urged on us one has to trace the policy of the Citizenship Act over the years. The 1962 Constitution set out the national policy against dual citizenship in section 14. A Trinidad and Tobago citizen who acquired a foreign citizenship by voluntary act other than marriage lost his or her Trinidad and Tobago citizenship unless he or she renounced that foreign citizenship within one year of its acquisition: section 14(3) of the 1962 Constitution. The effect of that provision, to my mind, was to modify the common law's acceptance of dual nationality and to put that concept on a statutory footing.

Before 1988 the Constitution and the Citizenship Act recognized three categories of dual citizen:

- (a) citizens by adoption during minority;**
- (b) citizens who became nationals of other countries by marriage**
- (c) Trinidad and Tobago citizens who being born in a Commonwealth Caribbean country automatically became citizens of their native island when it achieved independence.**

The next major development was to enable Trinidad and Tobago citizens by birth or by descent who after 1988 acquired a foreign nationality to retain their local nationality and not to lose it “by reason only of such acquisition”: see section 11(2D) of the Citizenship Act as amended in 1988. In the year 2000 another amendment permitted foreign applicants for Trinidad and Tobago citizenship to retain their foreign nationality.

The policy against dual citizenship is still enshrined in section 11(1) of the Citizenship Act 1976 which states:

“Subject to this Act a citizen of Trinidad and Tobago shall cease to be such a citizen if he acquires the citizenship of another country by voluntary act other than marriage”.

Further, by section 11(2D) of the Citizenship Act a Trinidad and Tobago citizen who acquires a foreign citizenship and in addition makes a formal renunciation of Trinidad and Tobago citizenship may well be treated as having committed a greater sin than mere acquisition of a foreign nationality, in which case he or she may not qualify for dual nationality.

I have examined some categories of dual citizenship to show that despite the general prohibition, which still persists, there have always been persons who hold dual nationality and could not run for Parliament because of their dual nationality. Further, it is incorrect to say that the basic policy against dual citizenship has vanished while section 11(1) of the Citizenship Act remains on the statute books.

Further, I remain unhappy with the proposition that a provision of the Constitution not requiring a special majority may be amended by implication. On that basis it may be difficult at any given time to know which provisions of the Constitution (not entrenched) are still extant, and if so, to what extent. In any event, I should be more than a little surprised if Hansard revealed that the Minister piloting Act No. 63 of 2000 intended to amend section 48(1)(a) of the Constitution.

Declaration of allegiance to another country

Counsel for the respondents submitted that “declaration of allegiance to another country” applied only if a Trinidad and Tobago citizen worked in a foreign country, e.g. in the army or public service, and had to swear a declaration of allegiance without taking the nationality of that foreign country. Brennan J. in Sykes v Cleary (1992) 176 CLR, 109-110 made a helpful analysis, which I adopt, of a similar section in the Australian Constitution.

Section 44(i) of the Australian Constitution provides:

“Any person who –

- (i) Is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power..... shall be incapable of being

chosen or of sitting as a senator or a member of the House of Representatives.”

Brennan J. held that apart from acknowledgment of adherence to a foreign power the sub-section contained three categories of disqualification. The first was where as a matter of fact the person has acknowledged allegiance to a foreign power.

The second category covered persons, who by reason of their status as subjects or citizens of a foreign power owe a duty of allegiance to the foreign power according to the law of the foreign power.

The third category related to those who, though not foreign nationals, are under the protection of a foreign power, as if they were subjects or citizens of the foreign power.

In my view the phrase “under a declaration of allegiance to such a country” in section 48(1)(a) of the Constitution embraces the three categories referred to by Brennan J. I am unable to see why it should be restricted to Trinidad and Tobago citizens who are subjects of another country by denization, however temporary.

Should legislators be exclusively Trinidad and Tobago citizens?

There appears to be good reason why this country since 1962 has insisted that its legislators have undivided loyalty to this country. In Sykes v Cleary (supra) at page 107 Mason C.J., Toohey and Mc Hugh JJ. expressed the following sentiments about the similar Australian provision:

”It has been said that the provision was designed to ensure that members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments.”

In my opinion the rationale for the Australian provision is equally applicable to Trinidad and Tobago.

It seems unrealistic to contend that section 48(1)(a) discriminates against dual citizens. If there is discrimination it is against the foreign nationality or loyalty held by a Trinidad and Tobago citizen. The purpose of the provisions is to prevent persons with foreign loyalties or obligations from being members of Parliament, as Deane J, who dissented in Sykes v Cleary (supra) held.

My conclusion, therefore, is that a citizen of Trinidad and Tobago is disqualified for election to the House of Representatives under section 48(1)(a) of the Constitution if he is a citizen also of a country other than Trinidad and Tobago having become such citizen voluntarily, or is under a declaration of allegiance to such a country.

I, therefore, reject the submissions of the appellants and the Attorney-General.

B. THE SECOND QUESTION

The second of the questions which counsel on all sides agreed that we should consider by way of interpretation of the Constitution was formulated

as follows:

“2. If the answer to (1) is ‘yes’, in the case of a contested election is a candidate disqualified if he holds such other citizenship, or is under such a declaration of allegiance, on nomination day but not on polling day?”

Counsel for the appellants and the Attorney-General contended that the Constitution made a distinction between nomination and election. They referred to section 47(b) of the Constitution, which prescribes a residence requirement for candidates for election to the House by reference to “the date of nomination for election”. Section 23 of the Constitution, it was argued, in laying down the qualifications for the office of President used the phrase “qualified to be nominated”. Therefore, when the Constitution used the phrase “qualified to be elected”, it was referring to qualification on the date of being elected, i.e. on polling day.

The alleged dichotomy

In my opinion the dichotomy contended for is of little assistance since the authorities make it clear that “election” can be used in a narrow sense to refer the act of voting on polling day or in a wide sense embracing the electoral process, of which nomination is an essential part: see Harford v Linskey [1899] 1 QB 852, 858; Petrie v Attorney-General (1968) 14 WIR 292, 296 I; Sykes v Cleary (1992) 176 CLR 77, 99.

In any event sections 47(b) and 48(1) of the Constitution are in almost

identical terms in the 1961 and 1962 Orders in Council. However, section 23 was introduced in 1976 because a President was to be the head of state, instead of the Queen. I am unable to see how the new section 23 could provide the key to the interpretation of the phrase “qualified to be elected” which was there since 1961.

Nomination paper invalid on limited grounds

It was further argued that a nomination paper could be invalidated only on the limited grounds set out in rule 6(6) of the Election Rules:

6(6) “The Returning Officer is entitled to hold a nomination paper invalid only on one of the following grounds:

- (a) that the particulars of the candidate or the person signing the nomination paper or the statutory declaration are not as required by law;
- (b) that the nomination paper or the statutory declaration is not signed as so required.”

The argument was that the Returning Officer could not consider whether a candidate would be disqualified on polling day, but only whether on the face of the documents the nomination was valid. Thus, a returning officer could not invalidate a nomination paper on the ground that a candidate had made an untrue or incorrect declaration. Indeed a candidate who was disqualified could be validly nominated. Reliance was placed on **Hobbs v Morey** [1904] 1 KB 74,78.

The fact that a returning officer can reject a nomination paper on limited grounds is a matter relevant only to the policy of those in charge of the administration of elections. It is not that invalid nominations or nominations of disqualified persons are to be ignored. On the contrary, rule 11(5) of the Elections Rules states:

“(5) Subject to subrule (4), nothing in this rule shall prevent the validity of a nomination paper being questioned on a representation petition.”

The Supreme Court of India in N.P. Ponnuswami v Returning Officer [1952] 3 SCR 218, 234 said as follows:

“(1) Having regard to the important function which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of election should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.”

In my judgment the policy of the Trinidad and Tobago elections law also favours limited challenges to the nomination process. The reason for that is rooted in the policy above described and not in a principle that disqualification for election can only be assessed on polling day.

Indeed in Hobbs v Morey it was accepted by the respondent that he was disqualified for election because at the time of his nomination he was a partner in a firm that had a contract to supply goods to the council. The issue in that case was whether as a result of that disqualification the petitioner was entitled to be declared the winner. Such a declaration could only be made if notice was given to the electorate of the disqualification, unless the disqualification was apparent and known to the electorate.

Hobbs v Morey (supra) supports the conclusion that disqualification at the time of nomination may invalidate the election of a candidate.

Nor do I consider valid the distinction, which counsel sought to draw between disqualification for nomination and disqualification for election. In both cases there is incapacity and upon an election petition the election of such a candidate would be considered void. A person who is disqualified for nomination, as was the case of the enumerator in Nedd v Simon (1972) 19 WIR 347 (CA), is also disqualified for election.

In my judgment the proper approach to the question of the point at which disqualification for election to the House of Representatives is to be determined is to recognize that the right to vote or to stand as a candidate for election is the creature of statute and subject to the limitations imposed thereby: see NP Ponnuswami v Returning Officer (supra) at p. 236.

The Constitution deals with election to the House of Representatives in a general way. It indicates by section 46(1) that members shall be elected “in the manner provided by Parliament”. The manner of such election is to

be found in the Act and the rules scheduled to it, the Election Rules, the Registration Rules and the Prescribed Forms Rules.

The legislation is principally for the benefit of the major dramatis personae of elections: the electors, the candidates and the administrators. The administrators must before polling day identify those persons who are to constitute the pool of qualified electors. The administrators must also before polling day identify to the electors the persons who are qualified candidates. It is readily apparent that it cannot be left up to the candidate to decide whether he or she would be a qualified candidate. For example, administrators cannot defer the issue of eligibility of electors until the day before polling day on the basis that some persons might attain the age of eighteen on that day and so qualify to vote on polling day. Nor can administrators wait until the declaration is made that the candidate who has the most votes has been elected before they decide whether that candidate is qualified to be elected. In my judgment there must be a date known to qualified electors and qualified candidates alike at which qualified electors and qualified candidates can be identified.

The critical date for qualified electors

For the purposes of identifying qualified electors section 12 of the Act applied a “qualifying date”, which is defined in section 2(1) of the Act as “the ninth day after the date fixed as the date of commencement of an electoral registration by Proclamation issued under section 30”. The cut-off point for identifying qualified electors at an election is fourteen days before polling

day: see rule 62(8) of the Registration Rules.

The critical date for qualified candidates

Section 33(1) of the Act provides that an election is instituted by a writ of election issued by the President addressed to the returning officer for the electoral district for which the election is to be held. Each such writ of election is to specify among other things the date on which the writ is returnable to the Election and Boundaries Commission: section 33(3) of the Act.

Section 35 of the Act states as follows:

“35(1) The proceedings at an election shall be conducted in accordance with the Election Rules”.

Accordingly one goes to the Election Rules to discover the qualifying date. Rule 4(1) requires the returning officer within two days of receipt of the writ of election or notification thereof to publish in the Gazette, in a newspaper and within the electoral district election notices, which will state inter alia (a) the day and place fixed for examination of nomination documents (b) the day and place fixed for nomination of candidates.

By rule 7(1) the returning officer is to attend for the purpose of receiving the nomination of duly qualified candidates.

It is important to note that nominations are to be made of duly qualified candidates. Each such candidate must on nomination day deliver or cause to be delivered to the returning officer “a statutory declaration of

his qualifications made and subscribed to by him”; see rule 8. It is clear that the qualifications referred to are those contained in sections 47 and 48 of the Constitution. Further, the required statutory declaration (the relevant prescribed form being Form No.39) can only declare the candidate’s qualifications and absence of disqualifications as at nomination day. In my judgment, therefore, the critical date for determining whether a candidate is duly qualified is nomination day.

I am fortified in this view by rule 15(2), which provides that if only one person is validly nominated, the returning officer must forthwith publicly declare that person elected and immediately thereafter endorse on the writ the fact of such election. The critical date in that case is nomination day.

Counsel for the appellants have contended for polling day as the critical date for determining qualification to be elected, but if qualification is a matter personal to the candidate then logically he or she need not qualify until the returning officer publicly declares the result of the poll and announces that the candidate with the most votes has been elected pursuant to rule 104 of the Election Rules.

Indeed the election process does not end until the returning officer has transmitted the writ with his return endorsing thereon the name of the candidate who secured most votes to the Chief Election Officer, who then notifies the name of the elected candidate to the Speaker: see rule 108(1) and (5). Therefore the *reductio ad absurdum* of the appellants’ reasoning is that

a candidate need only be qualified for election immediately prior to notification to the Speaker.

The purpose of the Act and the rules scheduled thereto is to identify to the candidates before polling day the qualified electors whose vote they must win and to specify to the electors before polling day the slate of qualified candidates, whose policies and programmes they will consider, in making their choice on polling day. In my view the scheme of the rules makes it clear that the critical date is nomination day – at least for identifying qualified candidates.

This conclusion, arrived at upon a construction of the Act and the rules scheduled thereto, is amply supported by authority.

In Harford v Linskey [1899] 1QB 852, the petitioner and the respondent were nominated as candidates for municipal elections in Liverpool. Before polling day the respondent objected to the petitioner's nomination paper on the ground that his firm had contracts with the Liverpool Corporation for the supply of police uniform requisites. Section 12 of the Municipal Corporations Act provided that "a person shall be disqualified for being elected and for being a councillor" if he or she had such contracts. Although the petitioner could have assigned his interest to a third party with the consent of the Corporation before polling day, the objection was upheld. The respondent was then declared elected.

The petitioner challenged the ruling and the election result on the basis that while he was disqualified for election he was not disqualified for

nomination as a candidate especially since his disqualification might have ceased before polling day.

The Divisional Court of the Queen's Bench lamented the lack of authority on the point, but held that a person who at the time of nomination is disqualified for election is also disqualified for nomination.

I find Harford v Linskey (supra) persuasive since it deals with the construction of a similar phrase "disqualified for being elected" to the one at issue in section 48(1) of the Constitution. The force of this authority is not diminished because it is a local government case. Our Act applies to elections to Parliament, Municipal and County Councils. The disqualifying offices and appointments are the same, e.g. Chairmanship of the Board of Film Censors: see section 32 of the Act.

Further Wright J., and I agree with him, considered that any other interpretation would mean that no one could know whether the persons nominated as candidates would be qualified candidates on polling day. Wright J. also raised the difficult question as to the validity of a candidate's election where disqualification continued (a) until the poll began (b) until the middle of polling day (c) until the close of the polls. In such a case how were the votes to be counted?

Harford v Linskey (supra) was applied by the High Court of Australia in Sykes v Cleary (1992) 176 CLR 77. In Sykes the petitioner sought an order declaring that Cleary, who had been elected at a parliamentary election, was incapable of being elected under the Constitution because he

(Cleary) held an “office of profit under the Crown”. Cleary was a secondary school teacher and on polling day, April 11, 1972 he was on extended unpaid leave, but on April 16 he resigned from the teaching service. The declaration of the poll took place on April 22, 1992.

The petitioner contended that Cleary was incapable of being chosen as a member of the House of Representatives within section 44 (iv) of the Constitution of Australia. The argument was that the disqualification precluded participation in the electoral process, which began with nomination.

On the other hand, Cleary contended that since candidates are chosen within the terms of the Australian Constitution when the member is declared to be elected, it was not polling day but the day the poll was declared that mattered, i.e. April 22, 1992.

The High Court of Australia with one dissent held that where a candidate was disqualified at the time of lodging his or her nomination and at the date of the poll but became qualified before the declaration of the poll he was incapable of being chosen as a member of the House. The majority held that nomination was an essential part of the electoral process and therefore someone who was disqualified for nomination was incapable of being chosen as a member of the House.

Although the phrase “incapable of being chosen” was being construed in Sykes v Cleary (supra) in my view the principle to be gleaned from the case applies to the present case. The High Court of Australia considered that

disqualification at nomination day vitiated the electoral process which began with nomination. Disqualification at the nomination stage of the process disqualified the candidate for being chosen or elected on polling day, or in the words of the section “sitting asa member of the House of Representatives”.

In South Africa in Tromp v Steenkamp (1920) C.P.D. 284 it was held that a candidate for election as a divisional councillor had to be eligible to be elected at the time of nomination as well as on polling day. Juta J. said:

“If then a candidate is ineligible to be elected, because he is disqualified at the time of the nomination , it would, I think, require clear and express provision in the Ordinance to render him eligible to be elected if such disqualification has ceased to exist before polling day. The nomination is essential to the right to be elected; it is part of the “election”; and if a person had no right to be nominated because he was ineligible to be elected, then he has no legal right to be elected, in the absence of provision to the contrary.”

In my judgment in the absence of any clear provision in the Act to the contrary disqualification must be assessed at the nomination stage of the electoral process.

Counsel for the appellants and the Attorney-General relied heavily on

Evo v Supa (1986) L.R.C (Const) 18 in support of the proposition that the critical date was polling day.

In that case the respondent, Supa, was a headmaster and a candidate for a seat in the national elections of the Solomon Islands. Before nomination day he applied for permission to stand for election, and the Education Board granted him unpaid leave from October 1, 1984.

There was no dispute that on nomination day he was holding public office, but that on the date of the election (October 24, 1984) he was not.

The court upheld Supa's election, holding that the critical date for determining disqualification was the date of election. The reasons were as follows:

- (1) The statutory declaration in the nomination form viz., that the officer was not holding a public office at the date of nomination, was ultra vires the Electoral Act and the Constitution. The Act only required certification that a person was willing and qualified to stand for election. He was not required to state that he was not holding public office.**
- (2) The Teaching Service Handbook published pursuant to the Education Act directed that a teacher, who was given permission to stand for election, would have unpaid leave from the day the list of candidates was published i.e. after nomination day. Thus the court**

would interpret the word “election” so as not to treat teachers allowed to stand for election as disqualified from nomination day.

- (3) As the Constitution did not specify either the date of nomination or the date of election, it seemed that the date of election or polling day was more in accordance with the policy objective of allowing persons in the public service and teachers in particular to offer themselves as candidates for election.

Evo v Supa (supra) was clearly decided on its own special facts. The main factors in the decision were the official interpretation of the Ministry of Education and the policy of encouraging public servants to stand for election.

Evo v Supa directly contradicts obiter dicta of Daly C.J. in Saemala v Gatu 1980/81 SILR 196. In the circumstances I would consider that there is a conflict of authority on this point in the Solomon Islands, and that in any event because of the prominence of policy considerations peculiar to those islands the case must be confined to its own particular facts.

In my judgment on a proper construction of the Constitution and the Act and upon authority, the relevant date for determining whether a candidate for election is disqualified is the date of nomination.

C. THE THIRD QUESTION

I turn now to the final question relative to the interpretation of the Constitution:

“Does a court hearing a representation petition have a power to hear and determine a question of disqualification pursuant to section 48 of the Constitution?”

Counsel for Mr. Peters submitted that the House of Representatives continued to have power to deal with disqualification itself, or to refer the matter to the courts if it so wished, or to refer the matter to the Privy Council by virtue of the imperial Judicial Committee Act 1833 (U.K.)

Counsel for Mr. Chaitan argued that section 55(3) of the Constitution preserved all the powers, privileges and immunities of the House. The matter of disqualification had always been a matter for the House of Representatives: Erskine May (11th edn.) pp. 29 – 32. The powers, privileges and immunities of the House can only be surrendered by clear and express words.

Counsel for the respondents in rejecting the submission of the appellants, relied on the learned judge’s reasons and Sue v Hill (1999) 163 ALR 648.

I cannot emphasize too much the different history of Trinidad and Tobago in relation to legislative assemblies. I refer to what I said earlier in this judgment on this topic.

The legislative council was always without power over disputed returns and elections and even disqualifications. It never transferred power, as was done in Canada and Australia, to the courts on these matters. The framers of the independence constitutions continued the idea of separate

vesting treating the resolution of controversies over elections as a matter for judges.

The first point to be made as regards disqualification relates to its meaning. A distinction must be made between election of a disqualified person to the House, which is a matter covered by the controverted elections procedure in section 52 of the Constitution, and disqualification of a member once duly qualified, which is governed by the vacancy provisions of section 52(1)(b), section 49 and sections 130 to 136 of the Act: see Erskine May (21st ed., 1989) at pages 52-53.

The cases referred to by the learned judge – The Tipperary Case (supra) and Re Bristol S.E. Parliamentary Election demonstrate the point. Such cases raise questions whether a person is validly elected. I also rely on the historical account given by Gaudron J. in Sue v Hill (supra) at paragraph 116 pages 679 – 680.

In the United Kingdom sections 5 and 50 of the Parliamentary Elections Act 1868 vested exclusively in the courts all issues relating to controverted elections, including whether persons were validly elected.

Section 52(1) of the Constitution effectively vests jurisdiction over disputed elections exclusively in the High Court.

The learned judge quite properly observed that section 52(1)(b) of the Constitution and sections 130 to 136 of the Act (disputed vacancies) expressly give the Trinidad and Tobago courts jurisdiction over subsequent disqualification of a member of the House of Representatives. The UK 1868

Act contained no equivalent provisions as regards subsequent disqualifications. Outside the area of disputed elections the House of Commons retained jurisdiction to determine questions affecting the seats of its members: see Erskine May at p. 36.

Section 55 of the Constitution and the House of Representatives (Powers and Privileges) Act Chap 2:02 provide in outline the main powers, privileges and immunities of the House. In so far as privileges are not identified in those sources or though identified require elaboration, reliance may be placed on the practice of the House of Commons at the commencement of the 1976 Constitution on August 1, 1976.

Section 55(3) provides as follows:

“(3) In other respects, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of this Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution.

At the commencement of the 1976 Constitution the House of Commons had vested exclusively in the courts jurisdiction with regard to controverted elections. Disqualification in the sense relevant to the present case falls within the ambit of controverted elections.

Therefore, even on the basis that section 55(3) of the Constitution applies, the issue of whether a candidate was elected while disqualified is a matter within the exclusive jurisdiction of the High Court of Trinidad and Tobago.

So far as disqualifications supervene after a member is duly elected section 52(1)(b) gives the courts exclusive jurisdiction. In so far as section 55(3) of the Constitution, a general provision, imports from the UK a shared jurisdiction between the courts and the House of Representatives over disqualifications and vacancies it would be overridden by the specific provisions in section 52(1)(b) of the Constitution giving exclusive jurisdiction to the Courts.

It is significant that in Patterson v Solomon [1960] AC 599, an action for a quo warranto injunction, the Privy Council treated the real issue as one of subsequent disqualification of a member of the Legislative Council, which by section 40(1)(ii) of the Trinidad and Tobago (Constitution) Amendment Order in Council 1956 had been vested in the courts, and in respect of which no appeal lay to the Privy Council.

As regards section 4 of the Judicial Committee Act 1833, the submission fails on the ground that having regard to the clear intention of section 52 of the Constitution and the Act to make the decision of the local courts final to all intents and purposes the prerogative right to admit an appeal does not apply: see Théberge v Laudry (1876) 2 App. Cas. 102, 108.

In any event such an appeal is expressly barred by section 109(4) of the Constitution.

I conclude that a court hearing a representation proceeding has jurisdiction to hear and determine the question of disqualification pursuant to section 48 of the Constitution.

PART FOUR

The result

I have read in draft the judgment of de la Bastide C.J. and concur in his reasoning and the orders he proposes. For completeness I merely say that I would dismiss these appeals as well as the Attorney-General's cross-appeals with the consequences as to costs proposed by the learned Chief Justice.

**Rolston F. Nelson
Justice of Appeal.**