IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2013/0028

BETWEEN

THE HON. GASTON BROWNE
(THE LEADER OF THE OPPOSITION)

Appellant

and

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

First Respondent

and

[1] MR. JUNO SAMUEL
[2] MR NATHANIEL JAMES
[3] MR JACK KELSICK
[4] MR. ANTHONYSON KING
[5] MRS GLENDINA MCKAY
[6] MRS PAULA LEE
(members of the Antigua and Barbuda Electoral Commission under the provisions of The Representation of the People (Amendment) Act No 12 of 2011)

Other Respondents

Before:

The Hon. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan SC., with him, Ms. Samantha Marshall
for the Appellant
Mr. Justin L. Simon QC., (Attorney General) for the First Respondent
Mr. Russell Martineau SC with him, Ms. Emily Patricia Forde for
the Other Respondents

2014: February 18;
April 28.

Civil appeal – Constitutional law – Antigua and Barbuda Constitution Order 1981 – Electoral Commission –Right to vote - Entitlement to vote – Representation of the People Act – Representation of the People (Amendment) Act 2010 – Change in qualification for Commonwealth Citizens to vote in elections – Whether amendment to Act contravenes the provision of the Constitution – Whether amendment to Act limits or restricts the right of Commonwealth Citizens to vote – Registration process – Whether registration process illegal – Bias – Whether Electoral Commission was tainted with bias

In 2010, Parliament, by ordinary legislation, amended the **Representation of the People Act** ("principal Act") which amendment changed the qualifications for Commonwealth citizens to be eligible to vote in Antigua and Barbuda. Section 5 of the **Representation of the People (Amendment) Act 2010** ("amending Act 2010") altered section 16 of the principal Act by increasing from 3 years to 7 years the residency qualification of a Commonwealth citizen before such citizen could be registered as an elector. Additionally, section 6 of the amending Act 2010 repealed and replaced section 18 of the principal Act by prescribing a period within which persons who now qualify under the amended section 16 are to apply for registration as an elector. The Electoral Commission ("the Commission") conducted a registration exercise in light of the new qualification for Commonwealth citizens.

The appellant challenged the constitutionality of the **Representation of the People (Amendment) Act 2010** ("amending Act 2010") and posited that the re-registration process had retrospective effect and that this infringed section 40(3) of the **Antigua and Barbuda Constitution Order 1981** ("the Constitution") and section 19 of the principal Act. The appellant alleged that during the registration process the Supervisor of Elections was illegally striped of her duties as the Chief Registration Officer. This rendered the re-registration process null and void. Further, the Chairman of the Commission was actuated with bias and this bias infected the Commission and its subsequent functions.

The learned trial judge disagreed with the appellant's allegations and claims and found that Parliament had the authority to legislate from time to time with respect to the qualifications for Commonwealth citizens. The amending Act 2010 did not violate or infringe any provisions within the Constitution. The learned judge found that the legislation prescribes the needed qualifications which are required at the time the right to vote is to be exercised. The learned judge could not identify any specific function of the Supervisor of Elections that was usurped. In addition, the learned judge found that there was no evidence of bias.

The appellant appealed contending that the amending Act 2010 was in direct contravention of the entrenched right to vote in the Constitution. In the event that Parliament had the authority to lawfully prescribe such qualifications the appellant alleged that evidence of the legitimate aim pursued by this prescription ought to have been adduced. The appellant further contends that the application of the amending Act 2010

violated the principle against retrospectivity and the rights of those persons already registered to vote, the compulsory re-registration process violated the Constitution, the learned trial judge failed to consider the cumulative effect of all the evidence in relation to the issue of bias and as the Supervisor of Elections was declared by the court to have been stripped of all powers as Chief Registration Officer this rendered the re-registration process illegal as the Supervisor of Elections was not involved in the process.

Held: dismissing the appeal and making no order as to costs, that:

1. The scope of section 40 of the Constitution identifies the parameters within which a person becomes entitled to vote. It recognises that the right to vote is made subject to inter alia a person's registration as a voter. Apart from being a Commonwealth citizen having attained the age of 18 years and having not been disqualified to vote, a person must possess such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe to be entitled to register as a voter. The words "may prescribe" specifically mentioned in section 40(2) of the Constitution gives to Parliament the power to legislate from time to time and as it sees fit in respect of the qualifications relating to residence or domicile for registration of any person as a voter. The section clearly reserves to Parliament the power to pass ordinary laws in relation to the specified qualifications. Thus, it must be presumed that the framers of the Constitution intended that Parliament retain such power. In that regard, Parliament having made an amendment to the principal Act was not infringing section 40 or any other provision of the Constitution. Parliament purported to act within the powers directly conferred on it by the Constitution, particularly section 40(2).

   Section 40 of the **Antigua and Barbuda Constitution Order 1981** applied; **Lester Bryant Bird v Attorney General** Claim No. ANUHCV2012/0164 approved; **Attorney General v McLeod** [1984] 32 WIR 451 applied; **George Rick James v Ismay Spencer and Lorna Simon** – Civil Appeal No. 27 of 2004 followed.

2. Fundamental rights and freedoms are generally protected under the Constitution except in certain instances where the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. The right to vote, though it is a constitutional right, is not a fundamental right. As such, there was no requirement for the State to show that the amendment was justifiably required in a democratic society. Auxiliary to that, section 40(2) of the Constitution does not speak to "justifiably required in a democratic society". On those bases, the changing of the provision with respect to the residency qualification does not attract or engage the requirement of "reasonably justifiable in a democratic society". Simply, section 40(2) does not engage the issue of proportionality.

   Elloy de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries Lands and Housing et al (Privy Council Appeal No. 42 of 1997) distinguished; **Paponnette v Attorney General of Trinidad and Tobago** (2010) 78 WIR 474 distinguished.

3. There is a common law presumption that a statute is not intended to operate retrospectively. The presumption can be rebutted if it clearly appears that it was the intention of Parliament to produce the result in question. The words contained in the amendment to the Act in no way suggest that it was the intention of Parliament for the Act to operate retroactively or retrospectively. The entitlement to vote belongs to a person entitled to be registered. Parliament, exercising powers sanctioned by the Constitution, amended the law. The fact that the law is amended from time to time does not mean that those who were entitled to vote before the amendment and not entitled after the amendment could succeed in arguing that the amendment has retroactive effect. The amending Act 2010 unmistakably affected or altered existing rights prospectively. Therefore, the appeal on the retrospectivity of the amending Act 2010 fails.

   Wilson v Secretary of State for Trade and Industry [2003] UKPC 40 applied; Section 40 of the **Antigua and Barbuda Constitution Order 1981** applied.

4. Section 40 of the Constitution does not confer on a person an entitlement to be registered for the purpose of voting ad infinitum or in perpetuity. The entitlement to vote is restricted to every person who is registered as a voter. With respect to the residency qualifications, Parliament reserves the right to alter such qualifications as it sees fit and from time to time. The amending Act 2010 altered the residency qualifications from 3 years to 7 years. That is the law which Parliament has prescribed and which law is currently in force. To be entitled to be registered to vote every Commonwealth citizen must satisfy the 7 year requirement. It follows that persons who do not fall within the new residency criteria are not entitled to be registered to vote. A re-registration process is but one method of ensuring that all persons registered to vote are so entitled based on the new residency criteria and so as to ensure that the register of electors are properly maintained at all times. Persons who were previously registered but have now failed to meet the new qualifications that Parliament lawfully prescribed cannot rightfully assert the right to remain registered. They have become "disqualified for registration" by virtue of the amending Act 2010.

   Section 19 of the **Representation of the People Act** applied; Section 40 of the **Antigua and Barbuda Constitution Order** 1981.

5. The appropriate test in determining an issue of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. The fair-minded and informed observer can be assumed to have full knowledge of all the material facts and must adopt a balanced approach in assessing the facts. The material facts in this case indicate that the Chairman of the Commission was appointed by the Prime Minister after consultation with the leader of the Opposition, the majority of the members of the Commission are not nominees of the Prime Minister, the changes made to the principal Act were made by Parliament and not the Commission or its Chairman and finally, that there was no evidence the Chairman of the Commission conspired with or caused the UPP to make the statements which they made. Those material

facts are what a fair-minded and informed observer would have within their contemplation when assessing whether there exists any evidence of apparent bias. The facts plainly show that there would be no basis for a fair-minded and informed observer to conclude that there was a real possibility of bias.

Porter v Magill [2001] UKHL 67 applied; **Belize Bank Ltd. v Attorney General** [2011] UKPC 36 applied; **R v Abdroikov** [2007] 1 WLR 2679 applied; **Gillies v Secretary of State for Work and Pensions (Scotland)** [2006] 1 WLR 781 applied.

6. The position of Chief Registration Officer had previously not been statutorily established and hence not mentioned or specifically defined in the principal Act. General direction and control of the preparation of the register is given to the Commission and not to the Supervisor of Elections or the Chief Registration Officer. The Supervisor of Elections had always acted under the direction of the Commission, whether it be under the principal Act or the amending Act 2010. The Commission's use of registration officers in the re-registration process was provided for in both the principal Act and the amending Act 2010. That being the case, there can be nothing unlawful about that procedure being adopted by the Commission. Moreover, there are no specific statutory duties assigned to the Supervisor of Elections. As such, there could not have been an usurpation of the Supervisor of Elections' role in the re-registration process. Additionally, it could not be the intention of Parliament that if the wrong person is appointed Chief Registration Officer the registration process is void.

AG Herbert Charles v Judicial and Legal Service Commission 61 WIR 471 applied.

JUDGMENT

[1] **BAPTISTE JA**: The appellant's case is a challenge to the constitutionality of the **Representation of the People (Amendment) Act 2010**[1] (the amending Act 2010) and the registration process conducted by the Electoral Commission pursuant to that Act. The amending Act 2010, by ordinary legislation, changed the qualification for Commonwealth Citizens to vote in elections in Antigua and Barbuda. The appellant contends that the amending Act 2010 violates the Constitution in doing so. It takes away the right to vote of Commonwealth Citizens and discriminates against them. Pursuant to the amending Act 2010, the Electoral Commission conducted a registration exercise especially in the light of the new qualification for Commonwealth citizens. The appellant claims that the Commission is not entitled to

[1] Statutory Instrument No. 6 of 2010.

do so. In that connection the appellant also says that during the exercise, the Supervisor of Elections was stripped of certain of her functions illegally as found in High Court Claim No. ANUHCV2012/0164.[2] The appellant also contends that the Chairman of the Commission is bias and his bias has infected the Commission.

[2] Section 5 of the amending Act 2010 altered section 16 of the **Representation of the People Act**[3] (the principal Act), by increasing from 3 years to 7 years the residency qualification of a Commonwealth citizen before such citizen could be registered as an elector. Additionally, section 6 of the amending Act 2010 repealed and replaced section 18 of the principal Act by prescribing a period within which persons who now qualify under the amended section 16 are to apply for registration as an elector.

[3] Section 16 of the **Representation of the People Act**, as amended by the amending Act 2010 provides:

> "(1) Subject to this Act and any enactment imposing any disqualification for registration as an elector, **a person is qualified to be registered as an elector for a constituency** if, on the qualifying date he
> (a) is a citizen of Antigua and Barbuda; or
> (b) is a Commonwealth citizen (other than a citizen of Antigua and Barbuda) who has resided in Antigua and Barbuda for a period **of at least seven years** immediately before the qualifying date; and
> (c) is 18 years of age or over; and
> (d) has resided in that constituency for a period of at least six (6) months immediately preceding that qualifying date." (my emphasis)

The period in section 16 (1) (b) was previously three (3) years; the period in 16 (1) (d) was previously one (1) month.

[4] The main thrust of the appellant's argument on appeal is as follows:

(a) that section 5 of the amending Act 2010 is discriminatory in effect and therefore unconstitutional in so far as it prescribes a different residency requirement for non-Antigua and Barbuda Commonwealth citizens before they can qualify to be registered as an elector for a constituency;

---

[2] The Hon. Lester Bryant Bird v The Attorney General of Antigua and Barbuda et al (delivered 6th November 2013.

[3] Cap. 379, Vol. 8, Laws of Antigua and Barbuda, Revised Edition 1992.

(b) that section 5 of the amending Act is unconstitutional in that it infringes or violates the right to vote conferred by section 40 of the **Antigua and Barbuda Constitution Order 1981**[4] ("the Constitution")which is itself an entrenched section;

(c) that the re-registration exercise conducted pursuant to section 6 of the amending Act 2010 (which amended section18 of the principal Act 2001), was retrospective in effect and accordingly infringed section 40(3) of the Constitution and section 19 of the principal Act 2001;

(d) that the re-registration process was, as a consequence of having been undertaken at a time when the Supervisor of Elections was unlawfully stripped of her powers and duties as Chief Registration Officer (as later determined in Claim No. ANUHCV2012/0164), null and void; and

(e) that there was bias on the part of the Chairman of the Electoral Commission, given his alleged political connections and public utterances, in commencing the re-registration process.

The Judgment Below

[5] In the court below, the learned judge found that section 40(2) of the Constitution does not set out the qualifying criteria for eligibility to be registered as an elector. It leaves the responsibility to Parliament. The phrase 'as Parliament may prescribe' in section 40(2) of the Constitution is ambulatory. It must mean as Parliament may prescribe from time to time, as Parliament always has the power to enact legislation for the peace, order and good government of the State. If Parliament chooses to enact legislation which it is specifically permitted to do by section 40(2), it cannot be viewed as inconsistent with the Constitution as the very section permits it. The learned judge also found that there was no merit in the discrimination argument because section 14 (4) of the Constitution itself authorizes different treatment for Commonwealth citizens from the treatment of citizens of Antigua and Barbuda.[5]

---

[4] Vol. 1, Laws of Antigua and Barbuda, Revised Edition 1992.

[55] See para. 11 of the judgment of Cottle J delivered 18th December 2013; also at pg. 28 of the Record of Appeal, Vol. 1.

[6] The learned judge then recognised that the effort of Parliament to alter the powers, functions and duties of the Supervisor of Elections fell afoul of the Constitution and that the powers, functions and duties are entrenched and cannot be affected by ordinary legislation. The learned judge said that he was unable to find any indication of what functions have been carried out during the just concluded registration exercise that should only have been done by the Supervisor of Elections. The learned judge accepted that thus far the Supervisor of Elections played no part in the registration exercise. In the actual registration process the work is carried out by registration officers.[6] He said that because the Commission was yet to publish the Register there has been no action taken by any other person or authority to usurp the material duty of the Supervisor of Elections. There was no evidence of usurpation.

[7] The learned judge then said that the argument of the legislation being bad because of retrospective effect is of academic interest only. There was no evidence to show than any Commonwealth citizen had in fact been disadvantaged by the operation of the Act. More so, the right to vote is a right to vote at an election. Denial of any such right is moot in the absence of an election. Further the legislation prescribes the needed qualifications which are required at the time the right to vote is to be exercised. Accordingly, the judge held that there was no merit in the retrospective argument.

[8] Finally the learned judge found that there was nothing in the evidence to show that in carrying out of the functions of the Commission there were decisions which were tainted by bias. Accordingly, the learned judge found no merit in the bias challenge.

The Issues identified by the appellant

[9] The issues in this appeal concern:

(a) The proper construction and application of section 40 (1) to (3) of the Constitution. These issues raise the corollary issues as to whether:

[6] See para.14 of the judgment of Cottle J; also at pg. 31 of the Record of Appeal, Vol. 1.

(i) the 7 years residency qualification rule[7] imposed on Commonwealth citizens other than Antiguans and Barbudans by the amending Act 2010, contravenes the letter and spirit of section 40(2) of the Constitution by restricting or limiting the right of every Commonwealth citizen to vote unless and until they qualify to be citizens of Antigua and Barbuda.

(ii) alternatively, and on the assumption the Parliament could lawfully prescribe qualifications to vote which in substance restrict the right to vote to citizens of the State, or persons qualified to be citizens of the State, whether the respondents, and in particular the first respondent were required to adduce evidence of the legitimate aim pursued by this prescription or imposition;

(b) Whether there existed statutory authority for the demand by the respondent Commission that all persons duly registered on the Register including citizens of the State of Antigua and Barbuda must, in view of the new qualification of 7 years residence imposed only on Commonwealth citizens, be required to re-register notwithstanding their existing entitlement to vote, on pain of de-registration; and/ or

(c) Whether such demand and compulsory re-registration violated section 40 (3) of the Constitution or section 19 of the **Representation of the People (Amendment) Act 2001**.

(d) Whether the application of the amending Act 2010 to all Commonwealth citizens duly registered on the Register of Voters violated the principle against retrospectivity and/ or violated the rights of those duly registered which are guaranteed and protected by section 40(3) of the Constitution,

[7] The precise residential qualification required for citizenship of Antigua and Barbuda.

and section 19 and other sections of the **Representation of the People (Amendment) Act 2001** [8]("the amending Act 2001");

(e) Whether the Judge erred when he failed to follow or give effect to the obvious consequences of the judgment of Madame Justice Clare Henry in Claim No. ANUHCV2012/0164, and apply **Hinds** v **R**.[9] In **Hinds** the Privy Council held that any law which is inconsistent with the Constitution is void and that unless severance was possible the consequences of such a finding is that all decisions and acts made under or in furtherance of this law are also void. Even if severance is assumed, the Judge's finding means that the absence of the Supervisor of Elections from the re-registration process rendered it unlawful. The appellant's case is that there was no basis in fact or law for the Judge to disagree with the findings of Madame Justice Clare Henry or reach any different conclusion than that the Parliament had previously stripped the Supervisor of Elections of all powers as Chief Registration Officer, and for not giving full legal effect to this judgment.[10]

(f) Whether the Judge erred when he held there was no evidence of de-registration;

(g) The real likelihood of bias on the part of the Chairman and its effect on the other respondents and process. Whether the judge failed to consider the cumulative effect of all the evidence in relation to the issue of bias.

The Constitutional framework

[10] Section 40 of the Constitution provides:

> "40.(1) Each of the constituencies established in accordance with the provisions of section 62 of this Constitution shall return one member to the House who shall be directly elected in such manner as may, subject to the provisions of this Constitution, be

[8] No. 17 of 2001.
[9] [1976] 2 WLR 366.
[10] See Police Authority for Huddersfield v Watson [1947] 1 KB 842 at 846-848.

prescribed by or under any law.

"(2) **Every Commonwealth citizen** of the age of eighteen years or upwards who possesses such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe shall, unless he is disqualified by any law from registration as a voter for the purpose of electing a member of the House, be entitled to be registered as such a voter in accordance with the provisions of any law in that behalf and no other person may be registered.

"(3) Every person **who is registered** as a voter in pursuance of subsection (2) of this section in any constituency shall, unless he is disqualified by any law from voting in that constituency in any election of members of the House, **be entitled so to vote** in accordance with the provisions of any law in that behalf." (my emphasis)

[11] Section 47 (1) to (5) of the constitution provides:

"**ALTERATION OF THIS CONSTITUTION AND SUPREME COURT ORDER**

"47.(1) Parliament may alter any of the provisions of this Constitution or of the Supreme Court Order in the manner specified in the following provisions of this section.

"(2) A bill to alter this Constitution or the Supreme Court Order shall not be regarded as being passed by the House unless on its final reading in the House the bill is supported by the votes of not less than two-thirds of all the members of the House.

"(3) An amendment made by the Senate to such a bill as is referred to in subsection (2) of this section that has been passed by the House shall not be regarded as being agreed to by the House for the purpose of section 55 of this Constitution unless such agreement is signified by resolution supported by the votes of not less than two-thirds of all the members of the House.

"(4) For the purposes of section 55(4) of this Constitution, an amendment of a bill to alter this Constitution or the Supreme Court Order shall not be suggested to the Senate by the House unless a resolution so to suggest the amendment has been supported by the votes of not less than two-thirds of all the members of the House.

"(5) A bill to alter this section, schedule 1 to this constitution or **any of the provisions of this Constitution specified in Part I of that schedule** or any of the provisions of the Supreme Court Order specified in Part II of that schedule shall not be submitted to the Governor-General for his assent unless-

(a) there has been an interval of not less than ninety days between the introduction of the bill in the House and the beginning of the proceedings in the House on the second reading of the bill in that House;

(b) after it has been passed by both Houses of Parliament or, in the case of a bill to which section 55 of this Constitution applies, after its rejection by the Senate for the second time; and

(c) the bill has been approved on **a referendum**, held in accordance with such provisions as may be made in that behalf by Parliament, by not less than two-thirds of all the votes validly cast on that referendum." (my emphasis)

Appellant's submissions

[12] Mr. Astaphan SC, the appellant's counsel, contends that sub-paragraph iv of Part 1 of Schedule 1 of the Constitution expressly mentions section 40 of the Constitution as a provision protected by section 47 (5) of the Constitution. Section 40 is an entrenched provision of the Constitution. It is incapable of being altered in any way otherwise than in accordance with the provisions of section 47 (5) which include a referendum. Mr. Astaphan SC argues that this entrenchment of section 40 has a specific purpose, i.e. to safeguard the principle and interest, if not public interest, of the right of Commonwealth citizens to vote in free and fair elections. This deep and strict entrenchment therefore raises the fundamental issue of constitutional importance namely, whether the Parliament can by an ordinary law circumvent or undermine the right of Commonwealth citizens to vote.

[13] Mr. Astaphan SC posits that the question is; whether in substance and effect, the amending Act 2010 altered (whether expressly or by implication) the provisions of section 40(2) of the Constitution when it imposed the residency qualifying period of 7 years as the qualifying period for registration. In other words, has the amending Act 2010, in substance and effect, restricted the right to vote to citizens or persons eligible to be citizens of Antigua and Barbuda by requiring them to now meet the threshold for citizenship of the State before they can qualify as Commonwealth citizens to vote? Mr. Astaphan SC contends that it would have been constitutionally impermissible for the Parliament to have enacted expressly that

only citizens of Antigua and Barbuda can lawfully be qualified to register and therefore vote. Such an Act would have directly contravened the provisions of section 40(2) of the Constitution. This would have amounted to an obvious alteration of section 40(2) because it would require the repeal or the word 'Commonwealth' and its replacement with the words 'citizen of the State of Antigua and Barbuda'. Such an Act would clearly be null and void.

[14] Mr. Astaphan SC argues that there ought to be no question that an alteration can take place by implication. Therefore, the critical question for the Court of Appeal is whether the Parliament could avoid the stamp of unconstitutionality through the back door or indirectly by ordinary legislation. In this case, the Parliament imposed the residency qualification of seven (7) years for qualification to vote, which is the identical period of time required for any person to be a citizen or become eligible to a citizen. By doing so the Parliament has in substance restricted the right to vote to only persons who are or qualify to be citizens. The fact that the Act does not mention the words 'citizens of Antigua and Barbuda' expressly is irrelevant. It has done so by implication or implicitly by the amending Act 2010.

[15] Mr. Astaphan SC recognises that the Parliament may restrict or limit the right to vote to citizens of Antigua and Barbuda but argues that if it intends to so restrict the right to the status of citizenship of the State, it must alter the provisions of section 40(2) strictly in accordance with section 47(5) of the Constitution. It has not done so as the amending Act 2010 is an ordinary law.

[16] Mr. Astaphan SC therefore submits that the amending Act 2010, to the extent that it restricts, limits or denies Commonwealth citizens the right to vote unless they become or are eligible to be citizens of the State, it unlawfully alters the provisions of section 40(2) of the Constitution, and is null and void.[11]

[11] See Hinds v R [1976] 2 WLR 366 at 374 (b) to (g) and 391 (h) to 392 (c); Attorney General v Ryan [1980] 1 WLR 143 at 150 (h) to page 151 (a); State of Mauritius v Khoyratty [2007] 1 AC 80 at page 93 (d) to 94 (f), 96 (b) to (g), and 97 (g) to 98 (a) and IJCHR v Marshall-Burnett [2005] 2 AC 356 at page 367 (a) to (g)].

Principles of constitutional construction

[17] Mr. Astaphan SC relies on the following authorities in support of his argument:

Pillai v. Mudanayake and others[12] where Lord Oaksey said:

> "With much of the reasoning of the Supreme Court of Ceylon their Lordships find themselves in entire agreement, **but they are of opinion that there may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result, and that in such circumstances the legislation would be ultra vires. The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board, and a legislature must, of course, be assumed to intend the necessary effect of its statutes**.. But the maxim omnia praesumuntur rite esse acta is at least as applicable to the Act of a legislature as to any other acts, and the court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. **It must be shown affirmatively by the party challenging a statute which is upon its face intra vires that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly**." (my emphasis)

[18] In **Hinds v. R**[13] Lord Diplock said:

> "In considering the constitutionality of the provisions of section 13(1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of "public safety, public order or the protection of the private lives of persons concerned in the proceedings." The presumption is rebuttable. **Parliament cannot evade a constitutional restriction by a colourable device**: *Ladore v. Bennett [1939] A.C. 468, 482*. But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had

[12] [1953] AC 514 at page 528 to 529.
[13] At page 383 (d) to (g).

misinterpreted the provisions of section 20 (4) of the Constitution under which it purported to act. (my emphasis)

No evidence has been adduced by the appellants in the instant case to rebut the presumption as respects the interests of public safety and public order. Unlike the judges of the Court of Appeal, their Lordships have no personal knowledge of the circumstances in Jamaica which gave rise to the passing of the **Gun Court Act 1974**. They have noted, however, the account contained in the judgment of Luckhoo P. in the Court of Appeal of matters of common knowledge of which he felt able to take judicial notice. These plainly negative any suggestion that the Parliament was acting in bad faith in declaring that section 13 was in the interest of public safety and public order.'

[19] In **R v Morgentaler**,[14] the Supreme Court of Canada held:

> "The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. … the court "will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve", its background and, in appropriate cases, will consider evidence of the second form of effect", , the actual or predicted practical effect of the legislation in operation. The ultimate long-term, practical effect of the legislation will in some cases be irrelevant: see *Reference re Anti-Inflation Act, supra, at p. 468*."

[20] At pages 562 to 563 of **Morgentaler** Sopinka J said:

> "**Moreover, the ordinary approach to pith and substance entitles the court to look beyond the terms of the legislation**. As Rand J. declared in *Margarine Case*, supra, at pp 471-2, a statement of purpose is at most "a fact to be taken into account, the weight to be given to it depending on all of the circumstances.
>
> **"In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing:**
>
> > "[t]he legislative bodies cannot, by statutory recitals, settle the classification of their own statutes for purposes of the distribution of powers.... **Selection of the aspect that matters is the**

[14] (1993) 107 DLR (4th) 537.

> **exclusive prerogative of the court, and the so-called doctrine of colourability is simply an instance of this rule....**
>
> "… **Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about. As stated by Laskin C.J.C. in Potash, supra, at p. 631, "[i]t is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing.**" (my emphasis)

[21] Mr. Astaphan SC contends that the authorities referred to above required the Court to do more than look at the literal language of section 40 and the impugned Act. It is required to also consider the effect of the Act. Additionally, the Court is required to give effect to the letter and spirit of section 40 within its historical context, and context of the Constitution as a whole, and determine whether the imposition of the seven (7) year residency rule by the amending Act 2010 was and is a colourable device by the Parliament calculated or intended to restrict or limit the right of every Commonwealth citizen to vote by requiring them to be first qualified or eligible to be citizens of the State of Antigua and Barbuda.

[22] Mr. Astaphan SC points out that the Court of Appeal of the Eastern Caribbean Supreme Court has repeatedly held that the right to vote is a constitutional right, and therefore election laws and regulations including the registration regulations which concern or relate to the right to vote must be construed purposively to give effect to and not restrict the right to vote. Consequently, the provisions of the Constitution, which are entrenched, ought to be construed in a manner which enfranchises or enables enfranchisement, and protects the right to vote especially an accrued right to vote.[15]

[23] Mr. Astaphan SC therefore submits that the provisions of section 40(1) to (3) of the

[15] See August and Another v Electoral Commission (1999) SALR 1 at paragraph [17]; Russell v The Attorney General (1995) 50 WIR 127 at page 139; Jacqui Quinn-Leandro and Others v Dean Jonas and Others Antigua and Barbuda High Court Civil Appeal HCVAP2010/018 at paragraphs [108] to [111] and [114] to [117] and Joseph Parry v Mark Brantley St. Kitts and Nevis High Court Civil Appeal HCVAP2012/003 at paragraphs [49] to [50].

Constitution, which are entrenched provisions of the Constitution, ought to be construed and applied in a manner which enfranchises rather than restricts or limits a constitutional right to vote. Mr. Astaphan SC contends that the result of the respondents' construction and the Judge's decision is that the power of the Parliament to prescribe qualifications enables the Parliament, directly or indirectly, to circumvent the right of Commonwealth citizens to vote by now requiring them, whether previously registered or not, to first qualify or meet the qualification for citizenship before being allowed to register and vote (contrary to the letter and spirit of the Constitution).

[24] Mr. Astaphan SC further submits that the Constitution, particularly in view of the deeply entrenched provisions of section 40, ought to be construed so as to prevent a political party in Government from invoking the legislative powers of the State to emasculate a right or permit a Government or Commission to undo or revoke a Register after the completion of the objection and due process procedures simply on the basis of an unfounded allegation of an unclean register, and certainly not without compelling evidential justification.[16]

[25] Alternatively, and on the assumption that Parliament has the power under section 40(2) to prescribe different qualifications for different Commonwealth citizens, (which is not accepted by the appellant), Mr. Astaphan SC submits that such a power is not unfettered, and is subject to the rule of law and constitutional limitation of the pursuit of a legitimate aim and proportionality. In other words, the respondents, and in particular the first respondent, were required to adduce evidence of the legitimate aim of this imposition in order to justify this new and onerous qualification on Commonwealth citizens other than Antiguans. No such evidence was adduced. Indeed, the only evidence on the background, context

[16] See for example Hinds v. R [1976] 2 WLR 366 at page 383 (d) to (g); Attorney General v Ryan [1980] 1 WLR 143 at 150 (h) to page 151 (a) and Joseph Parry v Mark Brantley St. Kitts and Nevis High Court Civil Appeal HCVAP2012/003 at paragraphs [49] to [50].

and effect of the Act came from the appellant's side and admissions by the Chairman of the respondent Commission.[17]

Respondents' submissions

[26] In summary, the first respondent accepts that section 40 is a specially entrenched constitutional provision by virtue of its being enumerated in Schedule 1, Part 1 of the Constitution and therefore necessitates a section 47(5) process for amendment, that is, a two-thirds majority of all members of the House of Representatives followed by approval on a referendum by not less than two-thirds of all votes validly cast on the referendum. The respondents, however, submit that there has been no amendment of section 40, whether directly or indirectly by necessary intendment.

[27] Mr. Martineau SC, counsel for the other respondents, argues that section 40(2) of the Constitution does not entrench a three year residency qualification for Commonwealth citizens. The section entrenches "Commonwealth citizens" and "18 years". "Commonwealth citizens" and "18 years" cannot be changed by ordinary legislation. Further the amending Act 2010 amends the **Representation of the People Act** and this Act is not listed in section 47 of the Constitution as one of the Acts which require a special majority for amendment.

Court's assessment

[28] Section 40(3) of the Constitution provides as follows:

> "Every person who is registered as a voter in pursuance of subsection (2) of this section in any constituency shall, unless he is disqualified by any law from voting in that constituency in any election of members of the House, be entitled so to vote in accordance with the provisions of any law in that behalf."

---

[17] See paragraphs 38 to 40 of the appellant's affidavit.
See also Mathieu-Mohin and Clerfayt v Belgium (1987) 10 EHRR 1 at paragraphs [51] and [53]; Yumak and Sadak v Turkey (2009) 48 EHRR 61 at paragraph 109 (i) to (iv); Elloy de Freitas v Permanent Secretary and Others [1999]1 AC 69 at page 80 (c) to (g) and Paponette v Attorney General of Trinidad and Tobago [2011] 3 WLR 219 at paragraph [42], page 231, and [52], page 233.

Subsection 3 of section 40 clearly and expressly recognises that the right to vote is dependent on (i) registration pursuant to sub-section (2) of section 40 and (ii) disqualification by any law from voting. Sub-section (2) so far as material reads:

> "Every Commonwealth citizen of the age of 18 years or upwards who possesses, such qualifications relating to residence or domicile.in Antigua and Barbuda as Parliament may prescribe shall, unless he is disqualified by any law from registration as a voter..., be entitled to be registered as such a voter in accordance with the provisions of any law in that behalf and no other person may be registered."

[29] Sub-section (2) means that Parliament may from time to time by ordinary legislation pass laws prescribing qualifications relating to residence and domicile for Commonwealth citizens to vote[18] That is what Parliament has done by the amending Act of 2010. It follows that, (as section 40(2) of the Constitution says) only persons who satisfy the qualifications set out in the amending Act 2010 and no other person may be registered. It also follows that by virtue of section 40(3) only those persons (being entitled to be registered and being registered as voters) are entitled to vote.

[30] With respect to the right to vote, there is no fundamental "right to vote" provision under Chapter II of the Constitution. However, the entitlement to vote by any person, (which is enshrined in section 40(3)) is made subject to that person's registration 'as a voter in pursuance of subsection (2) of this section'. Section 40(2) enumerates four conditions which must be met before a person can claim to *"be entitled to be registered as such a voter in accordance with the provisions of any law in that behalf ":*

(1) the person must be a Commonwealth citizen;
(2) the person must be of the age of eighteen years or upwards;
(3) the person must possess such qualifications relating to residence or domicile in Antigua and Barbuda *as Parliament may prescribe*; and
(4) the person must not be disqualified by any law from registration as a voter .

[18] AG v McLeod (1982) 32 WIR 450 at 455 E-J.

[31] It is clear that that constitutional provision does not provide an exhaustive list of qualifications for the entitlement to be registered as a voter, and for the exercise of the right to vote. In its judgment, the Court of Appeal in **George Rick James v Ismay Spencer and Lorna Simon**[19] giving consideration to section 40(2) said:

> "This provision sets out the basic requirements for eligibility to be registered as an elector. However, the Constitution allows Parliament to prescribe more precisely the qualifications to be so registered. Parliament has done so, most recently, by the **Representation of the People (Amendment) Act No. 17 of 2001**."

[32] The words *"as Parliament may prescribe"* which appear in section 40(2) of the Constitution must be given a purposive meaning. Parliament is here given the power to legislate from time to time and as it sees fit in respect of the qualifications relating to residence or domicile for registration of any person as a voter.

[33] In **Attorney General v McLeod**,[20] Lord Diplock in giving the opinion of the Privy Council in its consideration of section 51 of the Trinidad and Tobago Constitution which used the terms "*as Parliament may prescribe"* and *"as may be prescribed"*, had this to say:

> ""Prescribe" by the definition section (section 3) means "prescribed by or under an Act of Parliament". So the introductory words of the section reserve to Parliament power to pass ordinary laws involving no amendment to the Constitution but which create disqualifications to be a Member of the House that are additional to those expressly referred to in either section 48 or section 51".

[34] Again, in **The Hon. Lester Bryant Bird v Attorney General and others**,[21] the meaning of the words "*as Parliament may prescribe"* was held to be different in both fact and substance to the words (also used in the section of the Constitution) *"as may be provided by law"*. At paragraph [41], the learned trial judge said this:

> "The words "as may be prescribed by Parliament" clearly convey the meaning that Parliament may prescribe the age at which the Supervisor vacates his office [at] the expiration of his term. The framers must have

[19] Antigua and Barbuda High Court Civil Appeal No. 27 of 2004 at para [4], (delivered 4th April 2005).
[20] [1984] 32 WIR 451 at 455.
[21] Antigua and Barbuda High Court Civil Appeal ANUHCV2012/0164, delivered

> intended that the phrase "as may be provided by law" used in section 67(2) would be given a different meaning. The court does not accept that the framers said the same thing using different language. It is to be presumed that if the framers intended that the Supervisor of Election[s] exercise such powers as may be prescribed by Parliament that they would have used the same language found in section 67(4)."

[35] In **Russell v Attorney General of St. Vincent and the Grenadines**,[22] quoted with approval in **Joseph Parry v Mark Brantley**,[23] it was said in relation to the constitutional right of enfranchisement in St. Vincent and the Grenadines that:

> "The constitutional right conferred by section 27 is two-fold. The first is the basic right to be registered as a voter in the appropriate constituency. The basic right is granted to every Commonwealth citizen of the age of 18 years or upwards, if he possesses the prescribed qualifications relating to residence or domicile in St. Vincent and is not disqualified by Parliament from registration as a voter. The second is the concomitant right to vote in the appropriate constituency. That concomitant right is granted to every citizen who is entitled to the basic right. That concomitant right is a right to vote "in accordance with the provisions of any law in that behalf"."

[36] That 'basic right', the first respondent contends is the right to be registered as provided in section 40(2) of the Constitution, which includes such qualifications relating to residence as Parliament may from time to time determine. Once that right has been established, the concomitant right to vote is guaranteed by the Constitution in section 40(3) which said right must be exercised "in accordance with the provisions of any law in that behalf " - unless the person is disqualified by any law from voting in that constituency. I agree. Subsection (3) of section 40 clearly states that, *"Every person who is registered as a voter in pursuance of subsection (2) of this section … shall,… be entitled so to vote in accordance with the provisions of any law in that behalf "* . The first respondent quite correctly submits that registration "in pursuance of subsection (2)" could only mean that the person has attained the age of eighteen and additionally is in compliance with the current law which specifies the qualification relating to residence or domicile, that is, the **Representation of the People Act**.

---

[22] [1995] 50 WIR 127 at page 139 a-b.

[23] St. Kitts and Nevis High Court Civil Appeal No. HCVAP2012/003, 004 and 005 at page 31, (delivered 27th August 2012.

[37] The respondents submit, and I agree, that in amending the principal Act (as previously amended by Act No. 17 of 2001) by way of repealing the word "three" and substituting the word "seven" in section 16, thereby increasing the residency qualification of Commonwealth citizens other than citizens of Antigua and Barbuda, the amending Act 2010 was not infringing section 40 or any other provision of the Constitution. Section 40(2) bestowed on Parliament the right to make such an amendment.

[38] Mr. Astaphan SC made forceful and attractive submissions regarding the residency qualification of seven (7) years as being the identical period of time required for any person to be a citizen or become eligible to be a citizen, in support of his position that the amendment was a colorable devise to amend the Constitution. The Attorney General posited that the fact that seven (7) years appears in section 114 of the Constitution does not say one thing or another with respect to the lawfulness of the qualifying criteria. The number of years is immaterial.

[39] As far as is material, section 114(1)(c)(i) and (ii) of the Constitution provides that the following persons shall be entitled, upon making application, to be registered as citizens on or after 1st November 1981:

i. every person being a Commonwealth citizen who on 31 st October 1981 was domiciled in Antigua and had been ordinarily resident therein for a period of not less than 7 years preceding that day;

ii. any person who being a Commonwealth citizen is domiciled in Antigua and Barbuda and has for a period of not less than 7 years immediately preceding his application been lawfully ordinarily resident in Antigua and Barbuda (whether or not that period commenced before 1st November 1981.)

[40] I am not persuaded that the qualifying period of seven (7) years mentioned in section 114 of the Constitution is of any moment in deciding the question of the lawfulness of the qualifying criteria in the amending Act 2010. Parliament in its

wisdom may well have provided for 4, 5, or 6 years. If this were the case, it is indubitable that the arguments advanced on behalf of the appellant would not have been made. The fact that the qualifying period of seven (7) years is the same as the qualifying time for citizenship is not decisive or determinative of the issue. What is important is whether the Constitution clothed the Parliament with the power to prescribe the qualifying criteria. To that question, the answer is in the affirmative and as has been demonstrated earlier, Parliament can so prescribe by ordinary legislation without amending the Constitution. Further, it is not unusual to find written in the Constitutions that certain provisions are "subject to the provisions of" other sections of the Constitution. It is therefore important to note that section 40 (2) under which Parliament prescribes the qualifications relating to residence or domicile in Antigua is not circumscribed by or made subject to section 114(1)(c) or any other provision of the Constitution.

[41] I now consider whether issues of the pursuit of a legitimate aim, proportionality and the adduction of evidence are engaged. Chapter 11 of the Constitution deals with the protection of Fundamental Rights and Freedoms. Some of the provisions covered by Chapter 11 – for example: freedom of expression, association, movement; and protection from deprivation of property - state that "… and except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;". This issue was addressed by the Privy Council in **Elloy de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries Lands and Housing et al**[24] and **Paponnette v Attorney General of Trinidad and Tobago.**[25]

[42] In both **de Freitas** and **Paponette**, the Board was concerned with infringement of the fundamental rights provisions of the Constitution. In **Paponete**, the Board considered whether the appellants were deprived of their fundamental right to the enjoyment of their property by due process of law. The appellants were members of the Maxi-Taxi Association who owned and operated taxis in Port of Spain,

[24] Privy Council Appeal No.42 of 1997, delivered 30th June 1998.
[25] (2010) 78 WIR 474.

Trinidad on a public road without payment of a fee. The government proposed to relocate the taxi–stand to City Gate, which was situated on land owned by the Public Transport Service Corporation (PTSC), a statutory corporation which owned and operated bus services and which was regarded by the maxi- taxi operators as a competitor. Members of the association were reluctant to move but agreed to do so after the Minister of Works and Transport assured them that they would not come under the control and management of the PTSC. For two years the taxi operators were not charged a fee operating from City Gate. However, the government introduced subsidiary legislation in 1997 giving the PTSC management and control of City Gate from 1998, with a power to charge fees for using it. From 2001 the appellants were required to pay fees.

[43] The appellants filed a constitutional motion claiming that state action had frustrated their legitimate expectations of a substantive benefit in a way which affected the enjoyment of their property rights protected by section 4(a) of the Constitution. The High Court agreed. The decision was overturned by the Court of Appeal. The Board held that there was prima facie an infringement of section 4 (a) of the Constitution and in those circumstances, it was for the government to justify the interference as being in the public interest; if they failed to do so the breach was established.

[44] Another issue raised in **Paponette** was whether the government was entitled to frustrate the legitimate expectation that had been created by its representations. The critical question was whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raised the further question as to the burden of proof in cases of frustration of a legitimate expectation. The Board held that the initial burden lies on the appellant to prove the legitimacy of his expectation. Once this has been done, the onus shifts to the authority to justify the frustration of the legitimate expectation. If the authority does not place material before the court to justify the frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of

power.[26] The government had not proved that there was an overriding public interest which justified the frustration of the legitimate expectation.

[45] The question in **de Freitas** arose out of the participation of a civil servant in demonstrations against the Government of Antigua and Barbuda. The appellant was interdicted for acting in breach of section 10(2)(a) of the **Civil Service Act**. That subsection prohibited a civil servant, in any public place, or in any document or in any other manner of communication, from publishing any information or expression of opinion on matters of national or international controversy. The appellant prayed in aid sections 12 and 13 of the Constitution which protected his right to freedom of expression and assembly. Redhead J held that section 10(2)(a) was unconstitutional as it was not demonstrated that it fell within the permissible limits prescribed by the Constitution. The matter eventually reached the Privy Council. The Board upheld the judgment of Redhead J and held that the restrictions which may consistently with the Constitution be imposed upon the freedom of expression in section 12 and the freedom of assembly in section 13 of the Constitution must be reasonably justifiable in a democratic society. The Board held that it was for the appellant to show that that the restraint, with its qualification, was not reasonably justifiable in a democratic society. The Board was persuaded that that this had been shown to be the case.

[46] In **de Freitas**, the Board adopted the three fold analysis of the criteria to be satisfied as to whether a limitation is arbitrary or excessive. The court must ask itself: "whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."[27] The Board stated that the third criterion raised the question of proportionality and noted that the blanket approach taken in section 10 imposed the same restraints upon the most junior civil servants as are imposed upon the most senior.

[26] See note 24 at paras. 34,36,37 and 38.
[27] See note 23 at para. [25].

[47] It is seen that both **de Freitas** and **Paponette** involved a breach of fundamental rights provision of the Constitution: property rights under section 4 (a) in the case of Paponette. It thus fell upon the government to justify the interference as being in the public interest. Paponette also involved the frustration of a legitimate expectation. It thus fell upon the authority to put material before the Court to justify the frustration of the legitimate expectation**. Elloy de Freitas** concerned a breach of freedom of expression and assembly under sections 12 and 13 of the Constitution. The Court was concerned with the express provision of not "reasonably justifiable in a democratic society". None of the factors which engaged the Board in **de Freitas** and **Paponette** are present in this case. It is important to observe here that the right to vote is not listed in Chapter 11 of the Constitution as a fundamental right though it is a constitutional right. In my judgment, no fundamental rights issue is engaged in the present case. Further section 40(2) of the Constitution does not speak to "justifiably required in a democratic society". Simply put, the changing of the provision with respect to the residency qualification does not attract or engage the requirement of "reasonably justifiable in a democratic society". Section 40(2) does not engage the issue of proportionality. There is no requirement for the State to show that the amendment was justifiably required in a democratic society. This ground of appeal therefore fails.

Retrospectivity

[48] The appellant posits that the issue of retrospectivity is important for the following reasons:

(i) The Chairman of the respondent Commission admitted, expressly or implicitly, that

a) The Register was 'unclean';[28];

b) The new qualifications imposed by the amending Act 2010

(i) rendered the register 'null and void';

[28] This was expressly stated in his letter in reply to the appellant and implicitly in his affidavit.

(ii) required there to be registration, or more aptly, re-registration[29] and that if someone fails to meet this new imposition they will be de-registered notwithstanding that they are already on the Register; and

c) The media reported the Chairman said that 10,000 persons would be '*shaved off*' the Register[30] after the registration, and in effect re-registration, process. He did not seek to clarify this publication or deny it when the appellant drew it to his attention;

(ii) The Attorney General submitted during the trial that the new qualifications applied to those already on the Register.

[49] In **Sir Gerald Watt, QC** v **The Prime Minister and Juno Samuel**,[31] the Court of Appeal held:

> "…Parliament may … intend an Act to have retrospective effect. In each case, it is a matter of finding out objectively, from the words of the Act, what was the clear intent of Parliament. If the retrospectivity would have an effect that is unfair, the Court must look very hard to see if it can be sure that this is what Parliament really intended. Once the unfair effect is clearly what Parliament intended, then the court will not hesitate to give effect to the intention of Parliament. Once such intent is not clear, then the Court may presume that the statute was not intended to have retrospective effect. In this case, the wording of section 1(1) and (2) of the 2011 Amendment Act does not suggest any intention of Parliament to give the Prime Minister power to give retrospective effect to his 2012 Order bringing the Act into force. The section is entirely devoid of any suggestion that he was empowered to give it such an effect. Given the injustice of interfering with the rights of Sir Gerald then subject to litigation before the court, the language of the section would have had to have been a great deal more compelling to drive me to the conclusion that there could have been no other intention of the legislature than to empower the Prime Minister to give retrospective effect to the Act."[32]

[50] Mr. Astaphan SC submits there are no clear words of authority permitting the retrospective application of the seven (7) year residency rule imposed by the amending Act 2010. On the contrary the critical section 19 of the amending Act

---

[29] This was made in a statement to the media which was not retracted or denied.
[30] The only attempt at a denial was in his affidavit.
[31] Antigua and Barbuda High Court Civil Appeal No. ANUHCVAP2012/0042 (delivered 27th May 2013).
[32] At para. [19].

2001 (the right to remain registered) was not repealed. Consequently, the Act could not have been applied retrospectively. In any event, such retrospective intent or application would contravene section 40(3) of the Constitution. The protection guaranteed by section 40(3) of the Constitution is important to Commonwealth citizens already registered. They would have qualified under the earlier qualification law. However, the challenged registration (or re-registration) process required them to re-register on pain of de-registration under a new regime of proof, and more onerous qualification of seven (7) years residence. This, Mr. Astaphan SC submits, is an anti-democratic and unlawful assault and violation of the right to vote.

[51] Mr. Simon QC contends that the appellant's argument against the retrospective application of section 18(1) as amended by the amending Act 2010 can be debunked by the application of the rules of construction as laid down in the **Interpretation Act**[33] whose provisions "*extends and applies to every enactment passed or made before or after the commencement of this Act, unless a contrary intention appears in the Act or the enactment*":[34]. In stipulating the period when registration under the new residency qualification criteria will begin, section 18(1) as amended speaks to the "now" as clearly stated in section 36(1) of the **Interpretation Act** which reads,

> "Every enactment shall be construed as always speaking and if anything is expressed in the present tense it shall be applied to the circumstances as they occur so that effect may be given to each enactment according to its true spirit, intent and meaning."

[52] Mr. Martineau SC submits that there is also no merit in the retrospectivity point for the simple reason that the right to vote is a right which belongs to a person entitled to be registered and so registered according to the law at the time of voting (section 40(2) and (3)). The fact that the law is amended from time to time does not mean that those who were entitled to vote before the amendment and not entitled after the amendment could succeed in arguing that the amendment has

[33] Cap. 224, Vol. 5, Laws of Antigua and Barbuda, Revised Edition 1992.
[34] Section 3(1).

retroactive effect. The fact is the amendment does not apply to the earlier exercise of their right to vote but speaks to their future right to vote. I find there to be much force in this argument.

[53] Section 6 of the amending Act 2010 amends section 18 of the principal Act by repealing subsections (1) and (1A) thereof and enacting words which provide for the period when registration of voters under the new residency qualification criteria will commence. As far as is relevant the new provisions read as follows:

> "(1) On the coming into force of this section, the Governor General shall, by Proclamation, specify a period within which a person who is qualified under section 16 may apply in accordance with the Registration Regulations to be registered as an elector in the constituency in which he qualifies to be so registered.
> "(1A) The Commission shall, at the end of the period referred to in subsection (1), cause to be prepared a register of electors for each constituency and thereafter the Commission shall publish the register for each constituency as follows– (a) … and (b)…"

The relevant principles

[54] Useful guidance on the issue of retrospectivity is obtained from the judgment of the House of Lords in **Wilson v Secretary of State for Trade and Industry**[35] [2003] UKHL 40. Lord Rodger stated that:

> "188. Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties - only prospectively, with effect from the date of commencement. Although such provisions are often referred to as "retrospective", Viscount Simonds rightly cast doubt on that description in *Attorney General v Vernazza* [1960] AC 965, 975.
>
> "189. The distinction between the two kinds of provision, and the need to have regard to that distinction, were spelled out by the Court of Appeal long ago in *West v Gwynne* [1911] 2 Ch 1. In that case the plaintiffs were assignees of a lease dating from 1874. The lease contained a covenant by the lessees against underletting the premises or any part thereof without the consent in writing of the landlord. Section 3 of the Conveyancing and Law of Property Act 1892 provided that

[35] [2003] UKHL 40.

"In all leases containing a covenant … against … underletting … the land or property leased without licence or consent, such covenant … shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent…."

In 1909 the plaintiffs applied to the defendant landlord for his consent to a proposed underlease of part of the premises but he replied that he was prepared to grant a licence only on condition that he should receive for himself half of the sum by which the rent of the underlease exceeded the rent payable under the lease. The plaintiffs sought a declaration that the defendant was not entitled to impose the condition. The question was whether section 3 of the 1892 Act applied to a lease executed before the commencement of the Act. The Court of Appeal held that it did.

"190. Cozens-Hardy MR said this, [1911] 2 Ch 1, 11:

"It was forcibly argued by Mr Hughes that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. 'Retrospective operation' is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Section 46 of the Settled Estates Act 1877 … is a good example of this. Section 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. Upon the whole I think section 3 is a general enactment based on grounds of public policy, and I decline to construe it in such a way as to render it inoperative for many years wherever leases for 99 years, or it may be for 999 years, are in existence."

Buckley LJ observed, [1911] 2 Ch 1, 11 - 12:

"During the argument the words 'retrospective' and 'retroactive' have been repeatedly used, and the question has been stated to be whether section 3 of the Conveyancing Act 1892, is retrospective. To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective.

> Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.
>
> Numerous authorities have been cited to us. I shall not travel through them. To my mind they have but little bearing upon this case. Suppose that by contract between A and B there is in an event to arise a debt from B to A, and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon v Durden* (1848) 2 Ex 22 and in *Knight v Lee* [1893] 1 QB 41. But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning."

"191. Similarly - simplifying the complexities - in *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 SCR 271 an oil exploration company was entitled to deduct certain drilling and exploration expenses when computing its income for tax purposes, but it did not do so. In 1962 the legislation was changed to disallow such deductions. Subsequently, a successor company none the less sought to deduct those accumulated expenses and invoked the presumption against legislation having

retrospective effect. The majority of the Supreme Court of Canada rejected the argument. Dickson J said, at pp 279 - 280:

> "The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as the appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute."

"192. Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future. So, as Dickson J went on to point out in *Gustavson Drilling* [1977] 1 SCR 271, 282 - 283, with special reference to tax legislation:

> "No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed."

Discussion and conclusion

[55] From the above exposition of the law, which I entirely agree with and adopt the following principles are clear: There is a common law presumption that a statute is

not intended to operate retrospectively. The presumption can be rebutted if it clearly appears that it was the intention of Parliament to produce the result in question. There is a difference between retrospective operation and interference with existing rights. Retroactive provisions alter the existing rights and duties of those whom they affect but not all provisions which alter existing rights and duties are retroactive. Provisions which affect existing rights prospectively are not retroactive. There is no presumption that an Act is not intended to interfere with existing rights. Does the amending Act 2010 have a retrospective effect? It appears to me that there is nothing in its language that is suggestive of retroactivity or retrospectivity. Although the amending Act 2010 affected or altered existing rights, such alteration is clearly prospective, operating as from the date of its commencement. The matter was put in proper perspective by Mr. Martineau SC, when he stated that "…the amendment does not apply to the earlier exercise of their right to vote but speaks to their future right to vote."

[56] Critically, it is important to distinguish between retrospective operation and interference with existing rights. The amending Act 2010 was not deemed to have come into force at a date prior to its enactment. Although the amending Act 2010 affects past transactions, it does not operate retrospectively in the sense that it affects rights as of a past time. What is apparent is that there has been an interference with an existing right – sanctioned by the Constitution itself- in respect of registration and voting. The amending Act 2010 in effect alters existing rights prospectively and as such is not retrospective; accordingly, the argument against retroactivity or retrospectivity is inapplicable. Further, "there is no general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future". "No one has a vested right to continuance of the law as it stood in the past". For all of the above reasons, the appeal on the retrospectivity ground fails.

Registration and de-registration

Appellant's submissions

[57] Mr. Astaphan SC contends that quite apart from section 40(3) of the Constitution and section 19 of the amending Act 2001, there exists no authority to require any person already registered to re-register or be de-registered.

[58] Section 18(2) of amending Act 2001 provides:

> "There shall be continuous registration of all persons qualified to be registered as electors in each constituency **immediately after** the publication of the register of electors, under subsection (1)…." (my emphasis)

[59] Mr. Astaphan SC also relies on the following sections of the amending Act 2001 and regulations of the **Registration Regulations** of 2002[36] ("the Registration Regulations"): **The provisions of amending Act 2001-** sections 15, which creates a statutory right to vote; sections 16, 17, which provide for disqualifications; sections 18 (2) and (5) which provide for continuous registration; section 19 which speaks to the right to remain registered; sections 23 to 25, which provide for the creation, maintenance and replacement of the Register post 2001; and section 27 which deals with, the effect of the register. With respect to **The Registration Regulations:-** regulation 27 and in particular sub-regulations (3), (6) and (7), which deals with the requirement of ID cards and right to a renewal after 10 years; regulation 21 which confers a right of an elector to appeal to the Commission if dissatisfied with a decision of a registration officer; regulation 28, which concerns continuous registration; regulation 29, which requires the register to be maintained by the Commission and regulation 39, which concerns the obligation of the Commission to 'maintain' the register;

[60] Mr. Astaphan SC contends that by Act No.17 of 2001 (the amending Act 2001) and the Registration Regulations, Parliament provided for continuous registration and the annual renewal of the Register after continuous registration after the process set out in sections 21 to 25 were complied with only. The Parliament did

[36] The Representation of the People (Amendment) Act No. 11 of 2002-Second Schedule.

not provide for re-registration or de-registration of persons duly registered. Indeed such re-registration conflicts with several of the substantive provisions of the amending Act 2001 and the Registration Regulations. There was and is therefore no authority vested in the Commission to have required persons already registered to re-register under the process challenged by the appellant.

[61] Mr. Astaphan SC points out that section 16 (4) of the **Representation of the People Act** (which is not amended by the **Representation of the People (Amendment) Act 2010**) provides:

> "For the purposes of this section a person is deemed to have lived in Antigua and Barbuda for a continuous period of the time specified in this section."

Section 16(7) of the **Representation of the People Act** (which is not amended by the amending Act 2010 provides:

> "In calculating for the purpose of this Act any period of residence in Antigua and Barbuda, **account shall not be taken**-
> (a) of any period during which a person was not lawfully resident in Antigua and Barbuda;" (my emphasis)

[62] Section 6 of the amending Act 2010 provides as follows:-

> "Section 18 of the principal act is amended
> a) by repealing subsection (1) and the substituting of the following:-
> "(1) On the coming into force in this section, the Governor General shall, by Proclamation specify a period within which a person who is qualified under section 16 may apply in accordance with the Registration Regulations to be registered as an elector in the constituency in which he qualifies to be so registered.":
> b) by repealing subsection (1) A and substituting the following:-
> "(1A) The Commission shall, at the end of the period referred to in subsection (1), cause to be prepared a register of electors for each constituency and thereafter the Commission shall publish the register for each constituency as follows:-
> (a) in respect of the period immediately subsequent to the commencement of this section, the Commission shall publish the register no later than such date as the Governor-General, after consultation with the Commission, shall by Proclamation specify; and
> (b) after the date specified by the Governor-General by Proclamation under paragraph (a), at intervals of not

more than six months, but no later than 30th June and 31st December in each year."

[63] Section 19 of the **Representation of the People Act** (which is not amended by the amending Act 2010 provides:

> "A person registered in accordance with this Act **shall remain registered** unless and until his name is deleted from the register because
> (a) he has died; or
> (b) an objection to his registration has been allowed; or
> (c) he has become disqualified for registration as an elector under this Act or any other enactment imposing disqualifications for registration as an elector." (my emphasis)

Mr. Astaphan SC argues that there were no amendments to sections 18(2), (5) or 19 of the amending Act 2001 and therefore the right to remain registered remained in its pristine form.

The Registration Regulations

[64] The relevant Registration Regulations are:

> "27.(3) Any person who loses his identification card or whose identification card is rendered unusable, may apply, in the prescribed form (Form J in the Annex) to the Registration Officer for the constituency in which he resides, for a substitute document, that is to say a special identification card, approved by the Commission.
> (6) An identification card shall be valid for ten years.
> (7) On the expiration of an identification card an elector shall apply to the Registration Officer for the Constituency in which he resides for a replacement.
>
> "28.(1) Continuous registration of electors who are qualified under the Act shall take place in accordance with these regulations immediately after the publication of the register of electors pursuant to subsection 18(1) of the Act with respect to the registration of electors for each constituency consequent on the re-registration of electors supervised by the Commission.
>
> "29.(1) The Commission shall cause the register of electors to be properly maintained at all times by the timely inclusion of persons who have registered under the continuous registration process."

Court's assessment

[65] The Court agrees with the submission of Mr. Simon QC that section 40 of the Constitution does not confer on a person an entitlement to be registered for the purpose of voting ad infinitum or in perpetuity. Subsection (3) restricts the entitlement to vote to "*every person who is registered as a voter in pursuance of subsection (2) of this section"*; and under subsection (2), as has been noted above, Parliament is empowered to prescribe the qualifications relating to residence or domicile as it sees fit and from time to time. Prior to the enforcement of the amending Act 2010, Parliament spoke to a three (3) year residency qualification; today the residency qualification is seven (7) years.

[66] As Mr. Simon QC correctly submits, persons (even though previously registered) who do not fall within the new residency criteria are not entitled to be registered, and a re-registration process is but one method of ensuring that all persons registered to vote are so entitled based on the new residency criteria. In any event, section 18(1) as amended does provide for a registration period by way of a Proclamation by the Governor General to usher in the new residency criteria. As Mr. Simon QC states, some 48,109 persons were so registered, and the electoral lists have been published. The next process will be the Claims and Objections period, following which the Register of Electors will be published.

[67] Mr. Simon QC points out that continuous registration pursuant to section 18(2) will now follow the completed re-registration process, and persons who failed to register during the re-registration process, or who have since met the new qualification criteria will then be able to exercise their right to register, if they so desire. Further, the past exercise of the right to vote in prior elections, based on an earlier less onerous residency criteria is of no moment, as compliance with the new lawful criteria must now be enforced going forward.

[68] Under the principal Act, the right to remain registered is provided unless and until the person's name is deleted from the register for specific reasons including *"(c) he has become disqualified for registration under this Act or any other enactment*

imposing disqualifications for registration as an elector." In my judgment, Commonwealth citizens who were registered but fail to meet the new qualification of seven (7) years lawful residence cannot now claim the right to remain registered. They have in fact become "disqualified for registration" by virtue of the amending Act 2010, and therefore disqualified "under this Act". For all the above reasons, the appeal in relation to this ground fails.

Bias

[69] The appellant contends that there is the real likelihood of bias on the part of the Chairman of the Electoral Commission and that bias infected the Commission. In support of his case he relies on the cumulative effect of the following:

a. the Chairman's association or affiliation with the Minister of Finance and Chairman of the United Progressive Party (UPP);
b. the Chairman's common cause or shared interest with the UPP in cleaning a '*corrupted register*' of illegally registered Commonwealth citizens in spite of the clear findings of the Tribunal of Inquiry;
c. the hostility expressed in the Chairman's letter to the appellant as the Leader of the Opposition;
d. the public statements made by the Chairman in relation to
    (i) 10,000 persons will be 'shaved' or taken off the register, a statement he never denied when the appellant drew his attention specifically to these comments prior to the trial but only sought to deny in his affidavit in reply;
    (ii) the manner or application of the seven (7) year residence rule to persons already registered, and threat to de-register persons who did not meet this rule even if already qualified;
e. the open dispute between the Chairman and Deputy Chairman which showed:
    (i) there existed a rush to commence the re-registration process;
    (ii) it was the Chairman and not the Commission who decided to advise the Governor General to issue her proclamation. At best, it

showed public antagonism as the Deputy vigorously refuted the Chairman's attempt to deny the Deputy's charge;

(iii) the failure of the Chairman to tender the minutes he referred to on radio into evidence; this notwithstanding he knew that the appellant was relying on this public dispute.

[70] Mr. Astaphan SC cited **Vance Amory v Thomas Sharpe QC et al**,[37] where the Court of Appeal held that the context and the cumulative effect of the facts of the case are important in any matter concerning bias. Mr. Astaphan SC argues that there are two significant aspects of the context in this case, in consequence of the obvious point that where politics is concerned, political affiliations and hostility must surely always put the Court 'on guard', and astute to ensure that the conduct of those charged with upholding democracy is fair. The first is therefore that it directly affects the right to vote and free and fair elections. The second is that the respondents must function within the framework of the rule of law. The respondents' decisions may adversely affect if not violate the constitutional right to vote and remain registered, and lead to possible disenfranchisement; facts and consequences of critical importance when considering the question of bias[38].

[71] Mr. Astaphan contends that a person and in particular a Chairman appointed on the advice of a Prime Minister may therefore be disqualified on the ground of the real likelihood of bias because of his conduct and common interest with an interested party, or because of his friendship or affiliation with persons who share the interest of removing Commonwealth citizens from the Register. This is because these matters will create in the mind of the reasonable by-stander the real likelihood of bias on the part of the Chairman. In that regard Mr. Astaphan QC refers to the cases of **Re Pinochet (No 2)**,[39] **, Attorney General v Caribbean**

[37] St. Kitts and Nevis High Court Civil Appeal No. HCVAP2009/013 (delivered 27th August 2012).
[38] See also Halstead v The Commissioner of Police (1978) 25 WIR 552.
[39] [1999] 2 WLR 272 at page 281 (e) to 282 (f), 283 (c) to 284 (b), 291(b) to (c) and 293 (a) to 294 (c).

Communications Network Limited,[40], **In re P**,[41], **Constituencies Boundaries Commission v Urban Baron**,[42] and **Vance Amory v Thomas Sharpe QC et al**.[43]

[72] Mr. Astaphan SC states that the further question for the Court concerns the effect of the Chairman's real likelihood of bias on the other members of the Commission. They filed no evidence. Mr. Astaphan SC contends that there ought to be no question that the Chairman would have discussed his position and the decisions with the other respondents, and voted on the decisions which led to this registration process. In the circumstances, Mr. Astaphan SC submits that a finding of a real likelihood of bias on the part of the Chairman carries the inevitable consequence that the other respondents were affected and the decision to commence the registration process ought to be struck down. In support, Mr. Astaphan SC referred to the cases of **Constituencies Boundaries Commission v Urban Baron**, **Vance Amory v Thomas Sharpe QC et al** and **In re Medicaments and Related Classes of Goods (No 2**).[44]

[73] The respondents posit that the evidence falls short of the requirement for both actual and apparent bias and that the case on bias must fail. Mr. Martineau SC, (with whom Mr. Simon QC agreed) contends that the actions of the Chairman and the Commission in pursuing the registration process cannot be evidence of bias or improper motive since it was in execution of their duty under the Act. Further, membership of an organization is not evidence of bias. The UPP's Chairman's demand that the Commission remove persons from the Register and in particular Commonwealth citizens is no evidence of bias of the Commission; there is nothing linking the Commission's Chairman to what the Chairman of the UPP did. So too the fact that senior members of the UPP complained bitterly about unqualified Commonwealth citizens being improperly registered. The fact that a Tribunal found that the allegation of illegal registration was not true, cannot be evidence of

[40] (2001) 62 WIR 405.
[41] [2005] 1 WLR 3019 at paragraphs [83] and [84].
[42] (1999) 58 WIR 153.
[43] See note 36.
[44] [2001] 1 WLR 700 at paragraphs 85 and 86, page 726 to 727.

bias of the Chairman when there is no evidence that he conspired with or caused the UPP to make those allegations.

[74] In addition, the other respondents deny the allegations that the Chairman is a close political ally of the Prime Minister; that the Chairman said at least 10,000 names could be shaved off the voters list; and that the Chairman acted unilaterally in relation to the registration process. Further, the Chairman has denied that he is the political ally of any politician in Antigua and Barbuda.

[75] Mr. Martineau SC also points out that Mr. Lovell, Mr. Symmister and the Prime Minister are not on trial by the Commission. The Commission is not like a Judge or Tribunal with those persons being parties before the Commission. The changes relating to Commonwealth citizens were made by Parliament and not the Commission. The Chairman and the Commissioners take an oath[45] which requires them to act impartially and do right to all manner of people without fear of favour, affection or ill will.[46] The statutory nature of the Chairmanship is that it is a gift to the Prime Minister after consultation, so too two other members. The Deputy Chairman is a gift to the Leader of the Opposition, so too another member.[47]

Discussion

[76] The leading authority on the issue of apparent bias is **Porter v Magill**[48] where the essential principle was stated by Lord Hope at paragraph 103:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

According to Lord Dyson in **Belize Bank Ltd. v Attorney General**[49] this test "requires the court to make an assessment or judgment in the light of all the

[45] See section. 3(8) of the Representation of the People (Amendment) Act 2011.
[46] See Third Schedule of the Constitution Order 1981.
[47] Section 4 of the 2011 Act.
[48] [2002] 2 WLR 37.
[49] [2011] UKPC 36 at paragraph 64.

circumstances of whether the fair-minded and informed observer would conclude that there was a real possibility of bias."

[77] "The characteristics of the fair-minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious".[50] Full knowledge of the material facts and fair-mindedness also part of his attributes.

[78] The appellant was required to show whether the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the Chairman was biased. The state of knowledge of the fair-minded and informed observer is relevant. "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."[51]

[79] The question whether the circumstances of appointment to a Board will give rise to an appearance of bias depends critically on the particular facts surrounding the individual appointment and that this question cannot readily be answered by analogy to other cases."[52] The test for apparent bias involves a fact sensitive exercise of judgment.[53]. This court should be slow to interfere with the exercise undertaken by the court below and should only do so if satisfied that the decision was clearly wrong.

[80] In applying the above principles to the present case, the fair-minded and informed observer would be aware of the statutory nature of the Electoral Commission and manner of appointment of the Chairman and other members of the Commission.

---

[50] Per Lord Bingham in R v Abdroikov [2007] 1WLR 2679, 2688 at para 15.
[51] Per Lord Hope in Gillies v Secretary of State for Work and Pensions (Scotland) [2006] 1 WLR 781 paragraph 17.
[52] At para 48 of Belize Bank Ltd v Attorney General [2011] UKPC 36.
[53] At para 82 of Belize Bank Ltd.

The Commission consists of seven (7) persons all appointed by the Governor General. The Chairman is nominated by the Prime Minister after consulting with the Leader of the Opposition. The Deputy Chairman is nominated by the Leader of the Opposition after consulting with the Prime Minister. Two members are nominated by the Prime Minister and one member is nominated by the Leader of the Opposition. Neither of the other two remaining members is nominated by the Prime Minister or Leader of the Opposition. The informed observer would therefore recognise that the majority of the members of the Commission are not nominees of the Prime Minister. The fair-minded and informed observer would also be aware that changes relating to Commonwealth citizens were made by the Parliament and not the Electoral Commission. This is the basis on which a fair-minded observer would have to make his assessment of the issue of apparent bias.

[81] I accept that the statements or views expressed by or attributed to the Chairman of the UPP about the removal of Commonwealth citizens from the register (although denying that he said 10,000.00 would be shaved off the voters list) are relevant factors to be to be taken into account in making the assessment. They are matters which would cause the fair-minded and informed observer to reflect most carefully. But in making the assessment or judgment as to the real possibility of bias, he would also take further matters into account as well. These would include the fact that there is nothing linking the Chairman of the Commission to the UPP's Chairman's demand that the Commission remove persons from the Register and in particular Commonwealth citizens. That would not be evidence of bias of the Commission. So too the fact that senior members of the UPP complained bitterly about Commonwealth citizens. The fact that a Tribunal found that the allegation of illegal registration was not true, cannot be evidence of bias of the Chairman when there is no evidence that he conspired with or caused the UPP to make those allegations. In the circumstances, the fair-minded and informed observer, having considered all the facts would not conclude that there was a real possibility of bias. There is accordingly no reason to allow this ground of appeal.

The absence of the Supervisor of Elections in the Re-registration process

[82] The appellant posits the view in his submissions and as a ground of appeal that the judgment of Henry J in Claim No. ANUHCV2012/164 delivered on 6th November 2013, has the consequential result of making the re-registration process conducted under the authority of the amending Act 2010 null and void due to the fact that it was conducted by an "imposter" in the position of Chief Registration Officer instead of the Supervisor of Elections. The appellant also says that Cottle J in deciding the case at bar rejected the findings of the earlier judgment. The respondents say that this is not the case as shown by a proper reading and understanding of the decision.

[83] The High Court judgment in Claim No. ANUHCV2012/164 held that section 67 of the Constitution was an entrenched provision of the Constitution and that:

> "… .Consequently, its alteration or amendment thereof by a majority of the Member[s] of the Parliament is in breach of the provisions of section 47 of the Constitution which prescribe the procedure for amendments to the entrenched provisions."[54]

A declaration was granted in the following terms:

> "2. A declaration that the Representation of the People (Amendment) Act No. 12 of 2011 to the extent that it seeks to alter the powers, functions and duties of the Supervisor of Elections contravenes sections 47 and 67 of the Constitution and is unconstitutional, null and void".

[84] Among the many changes effected by the **Representation of the People (Amendment) Act 2011**[55] ("the amending Act 2011), the following had to be expunged as a result of the Order: (1) section 8 which removed the posts of Chief Executive Officer and Chief Registration Officer from the functions, powers and duties of the Supervisor of Elections under section 9 of the principal Act; (2) section 9 which enumerated the powers and duties of the "new" Chief Registration Officer; (3) section 10 which created the position of Chief Administrative Officer to replace that of Chief Executive Officer; and all other sections which purported to limit the functions, powers and duties of the Supervisor of Elections.

[54] At para 65.
[55] No. 12 of 2011.

[85] The Supervisor of Elections accordingly reverted to her previous office status and to exercise the duties and functions provided by section 9 of the principal Act as amended by section 9 of amending Act 2001.

[86] Section 9(1) provides that,

> "For the purposes of this Act, the Supervisor of Elections appointed under section 67 of the Constitution shall be the Chief Executive Officer of the Commission and shall, at the direction of the Commission, perform duties conferred upon him under this Act in an impartial, fair and efficient manner".

[87] Subsection 9(2) provides that,

> "The Supervisor of Elections shall be the Chief Registration Officer, and for the purposes of an election shall be the Chief Elections Officer and shall on the written instructions of the Commission –
>
> a) issue to election officers such instructions as are necessary for ensuring effective execution of the provisions of the Act;
>
> b) execute and perform all other functions which by this Act or the regulations and rules are conferred or imposed upon him".

[88] Mr. Simon QC points out that the Chief Registration Officer is a creature of statute and accordingly, it is to the relevant legislation and accompanying regulations that one must look for a definition of the role and duties of that office. In the exercise of her duties as Chief Registration Officer, the Supervisor of Elections cannot venture outside of the parameters prescribed in the legislation. The amending Act 2001, in establishing the Electoral Commission, removed the general supervisory and implementation role of the Supervisor of Elections in her capacity as Chief Registration Officer–a position which had previously not been statutorily established and hence not mentioned or specifically defined in the principal Act. The amending Act 2001 which has been held to have been passed with the required constitutional majority[56] in fact expressly made the Electoral Commission the overriding authority in many respects.

[89] Thus, section 6 of the amending Act 2001 provides:

[56] see paragraph [32] of Henry J's decision in ANUHCV2012/164.

> "(1) The Commission shall be responsible for the general direction, control and supervision of the preparation of the voters' register and the conduct of elections in every constituency and enforcing with respect to all election officers, fairness, impartiality and compliance with electoral law.
> (2) The Commission shall be responsible for the selection and appointment of election officers and prescribing the duties of such officers".

[90] The term "election officer" is defined in section 2 to include "*registration officers and any other person having any duty to perform under this Act or the regulations relating to the registration of electors";* while the term "registration officers" is defined as "*a registration officer appointed under section 20 to be registration officer for a constituency or a person acting in that office".*

[91] Importantly, section 20(1) of the amending Act 2001 provides for the Commission to appoint registration officers and registration clerks as may be necessary for each constituency; section 21(4) provides for the Commission to publish the register of electors for each constituency within stipulated periods; and, section 21(4) (a) provides that the Commission shall cause to be prepared and published a preliminary list of electors for each constituency within a stipulated time frame.

[92] With respect to the functions, powers and duties of the Chief Registration Officer as specifically or expressly stated in the amending Act 2001, Mr. Simon QC directed the Court to section 21 and stated that this is the first mention of the Chief Registration Officer (CRO), in respect of the following:

(a) persons whose names do not appear in the preliminary register and claim to be qualified are to apply to the CRO;
(b) persons who object to a name in the preliminary register shall apply to the CRO to have the name removed; and
(c) the CRO is empowered to make additions and deletions in accordance with the decision of the Electoral Commission;

but importantly, section 21(5) provides that *"the Commission may in the exercise of its functions under this section give directions to the Chief Registration Officer who shall comply with those directions".*

The second and only other mention of the Chief Registration Officer in the amending Act 2001 is in section 23 which deals with the revised register.

[93] A review of the Registration Regulations made under the amending Act 2002 as amended by Statutory Instrument No. 12 of 2003, and Statutory Ins**t**rument No. 36 of 2013, reveals that the Chief Registration Officer's functions are limited to the following:

- Reg. 6(6) – to be notified of persons who move to reside from one constituency to another;
- Reg. 6(7) – to make necessary changes in the registers of both constituencies;
- Reg. 9(3) – to be informed by the political parties of their respective scrutineers;
- Reg. 13(4) – original certificate of registration to be forwarded to her/him by the registration officers;
- Reg. 13(6) – to place duplicate certificates in alphabetical and numerical order; and
- Reg. 16 – claims and objections are to be delivered to the registration officers or the Chief Registration Officer.

Court's assessment

[94] I agree with Mr. Simon's submission that the appellant has failed to enumerate the legislative duties of the Chief Registration Officer in support of his claim that the re-registration exercise was a sham and therefore null and void because of the absence of the Supervisor of Elections' involvement in the process in her role as Chief Registration Officer. The appellant cannot indicate with specificity any such role precisely because there is none. The legislation goes so far as to provide that it is the Electoral Commission that prescribes the duties of the registration officers whom it alone appoints, and maintains general control and supervision over the preparation of the preliminary and revised registers.[57]

[57] - see AG Herbert Charles v Judicial and Legal Service Commission 61 WIR 471, para. [12] to [18].

[95] Mr. Martineau SC points out that there is no evidence to show that in the re-registration exercise so far, anyone usurped the functions of the Supervisor of Elections. Under section 9(1) of the amending Act 2001 as well as the amending Act 2010, the Supervisor of Elections acted under the directions of the Commission. This is consistent with section 67(2) of the Constitution. This is not confined to general direction. If therefore the registration is carried out by registration officers at constituencies then, not only is that the procedure provided for in the amending Act 2001 (section 20) but it is consistent with section 9(1) of the amending Act 2001. If therefore the Commission in carrying out the re-registration process under the 2010 Act follows the procedure of using registration officers in constituencies, there is nothing unlawful about that. General direction and control of the preparation of the register is given to the Commission (not the Supervisor of Elections or Chief Registration Officer) under both Acts. In any event, if there is any illegality in the re-registration process (which is denied) because wrong officers were used, it could not be the intention of Parliament that that should vitiate the process where the process was carried out by the Commission through persons appointed by the Commission which has the overall power to direct the process.[58]

[96] The amending Act 2001 says that the Supervisor of Elections shall be the Chief Registration Officer but does not say what he or she does (section 9(2)). Significantly, section 20 says that the Commission shall appoint a registration officer for each constituency who shall carry out his duties in an impartial, fair and efficient manner, so that it is the Commission who is responsible for them. Accordingly, with no specific statutory duties assigned to the Supervisor of Elections in relation to registration and with the Commission being the appointee of registration officers it could not be the intention of the Act that if the wrong person is appointed Chief Registration Officer the registration process is void. For all the above reasons, this ground of appeal fails.

[58] Supra.

[97] The appellant had advanced a ground of appeal alleging the denial of a fair hearing. There is no merit in this ground. The learned judge considered all the matters that were before him, made the requisite findings and dismissed the matter.

Disposition

[98] For the reasons indicated in this judgment, the appeal stands dismissed. On the issue of costs, I am not of the view that the first respondent acted unreasonably in bringing this appeal. In the circumstances, I would make no order as to costs. It is accordingly ordered that the appeal is dismissed with no order as to costs.

Davidson Kelvin Baptiste
Justice of Appeal

I concur. **Louise Esther Blenman**
Justice of Appeal

I concur. **Gertel Thom**
Justice of Appeal [Ag.]