IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. G 61 OF 2017

BETWEEN	THE SUPERVISOR OF ELECTIONS	APPLICANT
AND	NICKOLAS DACOSTA	RESPONDENT

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 18 APRIL 2017 and 19th APRIL 2017

APPEARANCES: Miss Jacqueline Wilson QC, Solicitor General; Miss Reshma Sharma, Deputy Solicitor General and Miss Dawn Lewis, Senior Crown Counsel, for the Applicant.

Mr. Anthony Akiwumi and Mr. Vaughan Carter of Etienne Blake, attorneys at law, for the Respondent.

JUDGMENT

Candidate for election prima facie disqualified under the Constitution for possessing other citizenship by descent – whether exemption for foreign citizenship acquired by birth means that disqualification of foreign citizenship acquired by descent "absurd".

1. The Supervisor of Elections (the "Applicant") brings this application seeking declaratory relief, the essence of which is to state the legal position of the Respondent as it relates to his eligibility to stand as a candidate for election to the Legislative Assembly. Three issues of the Respondent's eligibility are raised by the Applicant.

2. The first issue of eligibility (which I shall call the "citizenship issue"), is whether, in light of subsections (1)(d) and (2)(a) of section 61 of the Constitution[1], the Respondent is not qualified for election because he possesses another citizenship – that of the United States of America – which he acquired by descent through his father, himself a dual citizen of both the United States and the British Overseas Territories, by connection with the Cayman Islands.

3. On behalf of the Applicant, the Solicitor General in her very helpful submissions, submits that the citizenship issue is one that requires resolution by the application of a purposive construction of the constitutional provisions, to arrive at what must have been the true intention of the Framers. She does not advocate for an overly strict or literal construction that would lead to an incongruous or absurd result.

4. Needless to say, Mr. Akiwumi on behalf of the Respondent endorses that approach to construction and in his very helpful submissions, seeks to identify the incongruity or absurdity that would result from a construction of the constitutional provisions as being intolerant of foreign citizenship, in the particular circumstances of the Respondent.

5. The second issue of eligibility, not unrelated to the first, is that of allegiance as it arises under subsection 62(1)(a) of the Constitution, to disqualify a candidate who "*is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state*".

6. This issue arises, not only incidentally on account of the Respondent's foreign citizenship but separately on account of his having sought and obtained appointment in the State of Florida as a Notary Public, while he resided there and for which purpose he was required to and did swear a form of oath of office. The issue is whether the terms of that oath are

[1] The Cayman Islands Constitution Order 2009, Schedule 2 ("the Constitution") .

tantamount to the kind of acknowledgement of allegiance, obedience or adherence which section 62(1)(a) deems to be disqualifying.

7. The third issue of eligibility – and one which I am pleased to note was no longer pressed by the Applicant beyond the start of these proceedings – was whether the Respondent had failed to meet the requirements of domicile and continuous residence within the Islands, prescribed by subsection 61(1)(c) and (e) of the Constitution as a qualification for election. I am told that the Applicant accepts that the Respondent meets those requirements. And so, this being no longer an issue, I need say nothing further about it.

Background

8. On 28 March 2017 the Respondent submitted to the Elections Office his nomination as a candidate for the Electoral District of Cayman Brac West and Little Cayman, in the 2017 General Election.

9. By letter dated 30 March 2017 the Applicant informed the Respondent that a formal complaint to the Respondent's qualification to be an elected representative of the Legislative Assembly had been received from the law firm Dinner Martin Attorneys[2] ("DMA"). The complaints raised in the letter, in summary, alleged the following matters:

(i) the Respondent fails to meet the requirements of section 61(2) of the Constitution in that having been born in the Cayman Islands, he holds dual Cayman and U.S citizenship;

(ii) the Respondent holds allegiance to a foreign power, namely, the United States as evidenced by the following:

[2] DMA's letter to the Supervisor of Elections is dated 28 March 2017. It did not disclose the identity of any client on whose behalf the firm may have been acting.

(a) he holds voting rights within the U.S; and

(b) in his capacity as a current serving Notary Public in the state of Florida, he has sworn an oath of allegiance (that set out in the Florida Notary Public application form).

(iii) the Respondent has not relinquished his U.S residence, thus raising questions as to his compliance with the requirements of section 61(1)(e) of the Constitution. In support of this assertion, DMA referred to:

(a) the Florida Notary Public application form wherein legal residence is stated as a condition to appointment as a Notary Public; and

(b) the Respondent's LinkedIn profile which refers to his residence in the U.S. from September 2012 to December 2014; and

(iv) the Respondent is likely domiciled in the U.S where he holds official office contrary to section 61(1)(c) of the Constitution.

10. By letter to the Applicant dated 31 March 2017, the Respondent's attorneys, Etienne Blake, addressed the allegations raised in the DMA letter and provided certain supporting documentation.

11. Not being satisfied that qualification for election was established, the Applicant applied to the Grand Court (the "Application") on 5 April 2017 for declarations regarding the Respondent's eligibility to stand for election to the Legislative Assembly pursuant to section 29A of the Elections Law (2013 Revision) as amended.[3]

[3] By the Elections (Amendment) Law 2016. The duties and responsibilities of the Applicant in his capacity as Supervisor of Elections under section 29A of the Elections Law are the subject of discussion in two other judgments delivered on applications he brought at around the same time as the present application. See *The Supervisor of Elections v Candidate X,* Unreported Judgment of the Grand Court dated 18th April, 2017; and *The Supervisor of Elections v Alric Lindsay,* Unreported Judgment of the Grand Court dated 20th April 2017, Cause No. G 60 of 2017.

12. I now turn to deal with the citizenship issue. It requires the setting out of the relevant constitutional provisions in full:

> *"61 (1) Subject to section 62, a person shall be qualified to be elected as a member of the Legislative Assembly if, and shall not be qualified to be so elected unless –*
>
> *(a) he or she is a Caymanian; and*
>
> *(b) he or she has attained the age of 21 years; and*
>
> *(c) he or she is, at the date of his or her nomination for election, domiciled and resident in the Cayman Islands; and*
>
> *(d) he or she is a qualified citizen; and either*
>
> *(e) he or she was born in the Cayman Islands or was born outside the Cayman Islands in the circumstances mentioned in subsection 2(b), has resided in the Cayman Islands for a period of not less than seven years immediately preceding the date of his or her nomination for election and, subject to subsection (3), the number of days on which he or she was absent from the Cayman Islands in that period does not exceed 400.*
>
> *(f) ....*
>
> *(2) For the purposes of subsection (1)(d), a qualified citizen is a British Overseas Territories citizen by virtue of a connection with the Cayman Islands, who either –*
>
> *(a) at the date of his or her nomination for election possesses no other citizenship and is pursuing no claim to any other citizenship for which he or she may be eligible; or*
>
> *(b) was born outside the Cayman Islands, has or had at least one parent or grandparent who was born in the Cayman Islands and is a Caymanian (or if deceased would if alive have been a Caymanian at the date of nomination for election), and who at the date of his or her nomination for election possesses no other citizenship save for any right he or she may have to some other citizenship by virtue of his or her birth outside the Cayman Islands;*

and in this subsection the words "other citizenship" do not include British citizenship acquired by virtue of the British Overseas Territories Act 2002."

13. Notwithstanding that the Respondent satisfies each and every other requirement of section 61 in that he is a Caymanian over 21 years, born in the Cayman Islands of Caymanian parents, domiciled and resident in the Islands for the requisite continuous periods and is a British Overseas Territories citizen by virtue of his connection with the Cayman Islands; the citizenship issue raises the question whether he fails to qualify as a qualified citizen as required by subsection 61(1)(d) because he possesses another citizenship, that of the United States, which he acquired by descent through his father.

14. That would unfortunately be the result if the words of section 61(1)(d) and (2)(a) are given their strict natural or ordinary meaning.

15. It would be a result, says the Respondent, the purpose of which would not be readily discernible to an objective observer and should be considered not to have been intended by the Framers of the Constitution especially in light of the tolerance of dual citizenship which subsection 61(2)(b) affords to other qualified Caymanians who acquired foreign citizenship by the happenstance of birth in another country.

16. That subsection 61(2)(b) operates in that more benign way was recognized by the judgment of this court in *Hewitt v Rivers*[4] a judgment which is now cited and relied upon by both the Solicitor General and Mr. Akiwumi in their common advocacy for a purposive and fair construction of subsection 61(2)(a).

17. It must be acknowledged immediately however, that the construction applied in *Hewitt v Rivers* on the issue of dual citizenship was readily arrived at and in no small measure invited by the words themselves of subsection 61(2)(b) where it is stated, in stark contrast

[4] Judgment delivered in Cause No, 198 of 2013 on 9 August 2013; reported at 2013 (2) CILR 262

to those of subsection 61(2)(a) here – that a candidate may possesses no other citizenship "*save for any right he or she may have to some other citizenship by virtue of his or her birth outside the Cayman Islands.*"

18. Moreover, the purposive approach to construction taken in *Hewitt v Rivers* did not arise exclusively in respect of the issue of dual citizenship. It arose also on account of the assertion by the petitioner Mr. Hewitt, that the respondent Ms. Rivers having since acquisition of United States citizenship by birth become an adult, had renewed and used a United States passport, (and thus by virtue of "*her own act*") had become disqualified under section 62(1)(a) of the Constitution for having come under an acknowledgement of allegiance, obedience or adherence to that country[5].

19. It was held in this respect, taking the purposive view of the constitutional provision that the mere acquisition and use of the passport was not disqualifying and was in no sense a further acknowledgement of allegiance than that owed as a natural incident of citizenship itself.

20. It must be further acknowledged as explained also in Hewitt v Rivers itself[6], that the discretion afforded the court in its pursuit of the right and just outcome by the application of a purposive construction, is not unfettered. The discretion is limited by the equally settled principle of construction that "*where there is no ambiguity the basic approach of the court must be to give the words of the Constitution, their ordinary literal meaning. It is clear from the case law that the imparting of a generous construction to words of the Constitution (like those of other legislation) is allowed only where the words themselves do not plainly demand some other strict construction.*"

[5] As explained at paragraph 16 of the judgment (page 6 of the unreported)
[6] At paragraph 26, page 9 of the unreported judgment.

21. More particularly, the Court may not approach the task of interpretation of the constitutional provisions simply by seeking to anticipate the immediate consequences of an interpretation. Rather, the task at hand, including by the application of a purposive construction, is to determine how the particular constitutional provisions are to be construed in the context in which they exist[7].

22. And so, unfortunate though in this case the outcome of disqualification of an otherwise fully qualified Caymanian may seem, such an outcome may not be determinative in and of itself of the construction to be taken of subsection 61(2)(a). The subsection must be ascribed its natural or ordinary meaning by the court, save only where that meaning when viewed in the broader context of the Constitution itself, would result in manifest absurdity[8].

23. The question to ask therefore becomes whether the natural or ordinary construction would wrought an absurdity by resulting in an otherwise qualified born Caymanian being disqualified on account of other citizenship acquired by descent and so through no voluntary act of his own, even while other citizenship acquired by birth in a foreign country and so equally involuntarily, would not be disqualifying.

24. In seeking an answer to this question, the court may not simply apply its subjective view of what would be absurd. The contextual framework of the Constitution must always be respected in seeking objectively to discern what the Framers would have had in mind.

25. Approached in that manner, it must be accepted that the Framers, in the context of seeking to assure the undivided loyalty of their legislators to the Caymanian people, may have taken a different view of foreign citizenship acquired by descent than of foreign

[7] *Hewitt v Rivers*, op cit at paragraph 23.
[8] See also *Bennion on Statutory Interpretation* 6th Ed. Sections 312 and 313

citizenship acquired by happenstance of birth. The Framers, without entering into the realm of absurdity, may have been concerned over the risk of divided loyalties seen as more likely to be fostered by a foreign citizenship acquired by descent, with all of its parental, familial and perhaps even generational affiliations, attachments and implications.

26. When viewed in the light of such an illustration, it is not given to this court to construe subsection 61(2)(a) as absurd; so as to avoid its natural or ordinary meaning, in effect by rewriting the subsection as including for the saving of foreign citizenship acquired by descent, what the Attorney General in *Hewitt v Rivers* is reported as having described as "*a carve out*", for the saving of foreign citizenship acquired by birth[9].

27. In order to arrive at the prescribed "*carve out*", the Framers of the Constitution must have applied their minds to the question whether any exemption should be available for the attenuation of the otherwise blanket intolerance of foreign citizenship to be imposed by the Constitution. None other was created and it is not open to this court simply to assume that they did not then also consider foreign citizenship acquired by descent and that the failure to provide an express exemption for it has resulted in absurdity.

28. Regrettable though I consider the result to be, I am compelled to conclude that the Respondent is not qualified for election, he not being a qualified citizen as required by subsection 61(1)(d) and defined by subsection 61(2)(a), on account of his foreign citizenship acquired by descent. I am compelled to and so declare.

29. That being my conclusion on the first issue, there is no need to consider the second; viz: whether the appointment of the Respondent as a Notary Public of the State of Florida as the result of his own active application for appointment, placed him under the

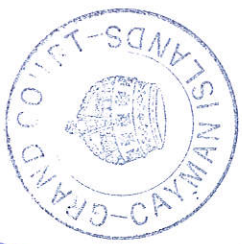
[9] At paragraph 180 of the unreported and reported judgments.

disqualifying acknowledgement of allegiance, obedience or adherence of which subsection 62(1)(a) speaks.

30. I think it is just as well that I need not decide this issue, given the absence of any expert evidence on what are the implications of the appointment as a matter of Florida or United States law. As discussed in *Hewitt v Rivers*[10], and in passing with counsel in these proceedings, without that kind of evidence, it would have been difficult, if not impossible, for this court to determine the significance of the appointment for the purposes of the analysis required subsection 62(1)(a).

31. Finally, on the question of costs, I make no order, leaving each party to bear his own costs, this being what I consider to be a fair dispensation in the circumstances of the case.

32. There will be no order as to costs.



Hon. Anthony Smellie
Chief Justice

Oral Judgment delivered on 19th April, 2017; Written Judgment issued on 17th May. 2017

[10] At paragraphs 140-142 of the unreported judgment, on the law applicable to the question of the effect of obtaining a United States passport, citing, *Oppenheimer v Cattermole* [1996] A.C. 249 and "*Nottebohm's* case", *Liechtenstein v Guatemala* [1944] ICJ 13. By analogy here, any question whether a person's allegiance to a foreign state will be affected by having become a Notary Public of that state should, it seems to me, be determined by reference to the law of that state.