IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO.

BETWEEN	THE SUPERVISOR OF ELECTIONS	APPLICANT
AND	CANDIDATE X	RESPONDENT

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 13 APRIL 2017 and 18th APRIL 2017

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

Mr. Graham Hampson and Ms. Sulekha Tummala, Attorneys-at-Law of Hampson and Company, attorneys at law, for the Respondent.

JUDGMENT

Disqualification for election to membership of the Legislative Assembly on grounds of convictions for dishonesty – whether the Respondent's spent convictions and rehabilitation under the Rehabilitation of Offenders Law, serve to avoid the disqualification.

1. The Applicant applies in his capacity as Supervisor of Elections for a declaration as to the Respondent's eligibility for election as a member of the Legislative Assembly, in light of section 62 (1) (e) of the Constitution[1] and referencing two convictions of the Respondent by the local courts for offences of dishonesty.

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

2. The Applicant's standing to bring this application and the factual background upon which it is based, are not in dispute.

3. As to standing, that is premised first upon the Applicant's appointment as Supervisor of Elections by the Governor under section 3(1) of the Elections Law (2013 Revision) (as amended by section 3 of the Elections (Amendment) Law, 2016)[2] and secondly, upon the other provisions of section 3 of the Elections Law which prescribe wide duties and responsibilities. In relevant part these include in sub-section (1)(e), duties which require the Supervisor to "*exercise general direction and supervision over the administrative conduct of elections and enforce on the part of all election officers, fairness, impartiality and compliance with this Law*".

4. It is accepted that these duties and responsibilities include the supervision of the nomination process prescribed by section 29 of the Law and which requires[3] that only persons qualified for election under section 61 of the Constitution and not disqualified under section 62, are nominated for election.

5. The Respondent having been nominated and the Applicant having had reason (as further explained below) to believe that he is disqualified, the Applicant brings this application under section 29A(1) of the Elections Law which provides that where the Supervisor has "*sufficient evidence that a person who has been nominated as a candidate does not qualify.. or is disqualified" under the Constitution, the Supervisor "may apply to the Grand Court for a declaration as to the qualification or disqualification of that candidate*".

[2] At the date of appointment, section 3(1) of the 2009 Revision. The 2013 Revision as amended by The Elections (Amendment) Law, 2016, is hereinafter referred to as "the Elections Law".

[3] By Section 30 of the Elections Law, it is an offence knowingly to nominate someone who is not qualified and an offence for a person who knows of his/her disqualification, to accept nomination.

The question for resolution.

6. The Constitutional disqualification cited by the Applicant is prescribed by section 62(1)(e) in terms that:

> "(1) *No person shall be qualified to be elected as a member of the Legislative Assembly who –*
>
> .....
>
> *(e) subject to subsection (2)*[4]*, is serving or has served a sentence of imprisonment (by whatever name called) exceeding twelve months imposed on him or her by a court of any country or substituted by competent authority for some other sentence imposed on him or her by such a court, or is under such a sentence of imprisonment the execution of which has been suspended, or has been convicted by any court in any country of an offence of dishonesty."*

7. The relevant provision most directly cited by the Applicant as disqualifying the Respondent is that last in emphasis above, in the final phrase of section 62 (1)(e).

8. It is of significance, to be examined below, that this phrase (which I shall by convenient shorthand call "the dishonesty disqualification"), was introduced as such for the first time on 6 November 2009 when the Constitution came into effect.

[4] Which provides (of no relevance here) for the treatment of consecutive sentences and sentences in default of payment of fines.

9. Prior to 6 November 2009, (and while capital punishment was still part of Cayman Islands law)[5], criminality-based disqualification was prescribed in section 19(1)(e) of the 1972 Constitutional Order[6] which disqualified a person who:

> "(i) *is under sentence of death imposed on him by a court, or is serving a sentence of imprisonment (by whatever name called) exceeding twelve months imposed by a court or substituted by competent authority for some other offence imposed on him by a court, or is under such a sentence of imprisonment the execution of which has been suspended; or*
>
> *(ii) has been detained in prison under such a sentence of imprisonment within the period of five years immediately preceding the date of the election.*"

10. From that history, it will be seen that while prior to 6 November 2009 any conviction for an offence carrying a sentence of 12 or more months of imprisonment currently being served or already served within 5 years of the date of an election was disqualifying, the dishonesty disqualification has been introduced by the Constitution as a separate and distinct disqualification for election to membership of the Legislative Assembly. On the face of it, it is an absolute disqualification, without regard to the circumstances or severity of the offence of dishonesty, the date of its commission, the terms of sentence, or the period during which a sentence of imprisonment had been served.

[5] Abolished on the 10th May 1991 by virtue of S.I. No. 988, Caribbean and North Atlantic Territories, the Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991.

[6] As later amended by section 8 of the Cayman Islands (Constitution) (Amendment) Order 1993. I note *en passant,* the anomaly by the Amendment Order 1993, still then referring to "a sentence of death" after all such sentences had been abolished in the 1991 Order.

11. The question whether the dishonesty disqualification applies so as to disqualify the Respondent as someone who had been convicted and sentenced for offences of dishonesty and whose convictions would otherwise be regarded as spent in keeping with the Rehabilitation of Offenders Law (1998 Revision)[7] ("the 1998 Law") respectively in 2000 and 2007 (ie: 9 and 2 years) before the dishonesty disqualification was introduced by the Constitution on 6 November 2009, is the central question to be resolved by this application. While the words "*has been convicted*" necessarily speak in the past tense of a conviction which has occurred, it is in contention whether or not they are also meant to be retrospective in operation.

12. As a matter of the proper interpretation of the Constitution, the Solicitor General submits that it will be relevant to consider also, the import of the other provisions of section 62(1)(e). These provisions (as shown above) necessarily in part also speak in the past tense, of disqualification of a person who "*is serving or <u>has served</u> a sentence of imprisonment (by whatever name called) exceeding twelve months...*".

13. While the Respondent had not been subject to any term of imprisonment as long as twelve months for either of his two offences of dishonesty, the Solicitor General submits that these provisions (which I shall call the "imprisonment disqualification") are clearly meant to be both retrospective and prospective, and lend support to the view that the dishonesty disqualification, expressed similarly in the past tense – viz: "*has been convicted*" – is also meant to be retrospective (in respect of dishonesty convictions occurring before 6 November 2009) and prospective (in respect of such convictions occurring thereafter).

[7] First enacted on 29 May 1985 as Law 20 of 1985, now repealed and replaced since 28 March 2017 by the Criminal Records (Spent Convictions) Law 2016.

14. Mr. Hampson, on behalf of the Respondent argues to the contrary. He relies on the well-established principle, recently reaffirmed by the United Kingdom Supreme Court[8], that a statute shall not be construed as retrospective in operation unless such a construction appears expressly in the words of the statute or arises therefrom by necessary implication. He argues that the relevant words from section 62(1)(e) of the Constitution neither expressly nor by necessary implication, operate retrospectively and such a construction must be avoided all the moreso because it would operate to infringe the fundamental rights and benefits of rehabilitation of the Respondent, rights which are protected by the Constitutional Bill of Rights itself.

Factual background as presented on behalf of the Applicant

15. On 14 December 2016, pursuant to section 28(2) of the Elections Law, Writs of Election were issued for each electoral district specifying the day and place of nomination of candidates ("Nomination Day") for the general election of members of the Legislative Assembly (the "2017 General Election"). Under the said Writs of Election, 29 March 2017 was specified as Nomination Day. The 2017 General Election is scheduled for 24 May 2017.

16. On Nomination Day, the returning officers for each Electoral District received nomination papers for each candidate in the prescribed form, namely Form 18 of Schedule 2 to the Law (the "Nomination Forms"). Under the Elections Law, a candidate for election must be nominated by two persons who are registered electors of the electoral district for which the candidate seeks election. The candidate must also signify his consent to the nomination. A person who signs a nomination paper nominating a

[8] In *Spread Trustee Co Ltd v Hutcheson and Others* [2012] 1 All E.R 251. The principle is discussed extensively in the well known work: *Bennion on Statutory Interpretation*, section 97 and 98, 6th Edition, Lexis Nexis, 2013.

candidate for election and who at the date of signing is not a registered elector of that electoral district or knows that the person nominated is not qualified to be elected as a member of the Legislative Assembly, commits an offence. Similarly, a person who signs a nomination paper signifying his consent to be nominated and who at the time of signing knows that he is not qualified to be elected, commits an offence. These requirements are reflected on the face of the Nomination Form.

17. Upon receipt of the Nomination Forms the Applicant, together with other elections officers, reviewed the Nomination Forms to confirm that the persons nominating each candidate were registered electors of the relevant electoral districts. Together, they also conducted a vetting process to determine whether there was sufficient evidence to suggest that a candidate did not qualify to be elected as a member of the Legislative Assembly pursuant to section 61 of the Constitution Order or was otherwise disqualified for election pursuant to section 62.

18. As the Applicant explains, the vetting process includes a review of information relating to the candidates obtained by the Elections Office by virtue of (i) reporting obligations imposed on public officers under section 19(1), (2) and (3) of the Elections Law; (ii) the exercise of the Supervisor's powers to request information under section 19(5); and (iii) information that is disclosed proactively to the Supervisor by other persons.

Concerns in Relation to the Respondent

19. The following account comes from the Applicant's affidavit filed in support of this application.

20. On or around 23 March 2017 information came to the attention of the Applicant that the Respondent had a prior conviction for theft. As a result of that information he sent an

email to Sergeant Denise Anderson of the Criminal Records Office (the CRO) of the Royal Cayman Islands Police Service, seeking details of convictions against the Respondent. On the said 23 March 2017 he received a response to which was attached a document headed "Criminal Records Office – Antecedents" ("the Antecedents"). The Antecedents showed that the Respondent was convicted of two offences that appeared to be offences involving dishonesty, namely, an offence of theft in respect of which a suspended six month sentence of imprisonment was imposed in 1993, and an offence of handling stolen goods in respect of which a sentence of a fine and compensation was imposed in 2002.

21. In light of the above convictions, it appeared to the Applicant that the Respondent was disqualified from elected membership of the Legislative Assembly pursuant to section 62(1)(e) of the Constitution.

22. On 30 March 2017, the Applicant wrote to the Respondent advising him of the concern regarding his convictions for offences involving dishonesty. He also drew his attention to the provisions of section 30 of the Criminal Records (Spent Convictions) Law[9].

23. He invited the Respondent to respond to the concerns regarding his qualification for elected membership and to seek legal advice on the matter prior to providing a response.

24. On 31 March 2017, Hampson and Company, Attorneys at Law, responded on behalf of the Respondent. Hampson and Company contended that there are no convictions recorded in the Criminal Records of the Cayman Islands against the Respondent and that the record of antecedents was inaccurate. They stated further that the Respondent was rehabilitated under the 1998 Law and that the Criminal Records (Spent Convictions) Law, 2016 did not affect such rehabilitation.

[9] As set out below at paragraph 51.

25. On 5 April 2017 the Applicant received formal legal advice on Mr. Hampson's response.

26. Having considered the advice, the Applicant remained concerned that the Respondent is disqualified from membership of the Legislative Assembly as a result of his convictions for offences involving dishonesty.

27. The Applicant therefore brought this application.

Procedural issues

28. At an early stage of these proceedings, the Respondent, in his affidavit filed in response to the application, raised a factual dispute as to whether any convictions had ever actually been recorded against him for the offences in question. His asserted "recollection" or "belief" was that the court on each of the two occasions, had directed that no conviction should be recorded, either because of his young age (in the case of the first offence) or because of his qualified admission of guilt said by him to have been accepted by the prosecution (in the case of the second).

29. At Mr. Hampson's request, I directed that the court files be retrieved from the archives and made available for inspection and verification of the court's dispositions.

30. That process having taken place, I heard no further from Mr. Hampson on the matter and must therefore assume that the court records did not bear out the Respondent's recollections or beliefs.

31. An obligation being on the Respondent to ensure that he is eligible for election[10], and in the absence of any further evidence from him to refute the evidence of the Applicant as

[10] I regard this as implicit from section 30(2) of the Elections Law which as mentioned above makes it an offence for a person to sign a nomination form signifying his consent to being nominated as a candidate for election while knowing that he is not qualified or is disqualified under section 62 of the Constitution.

This obligation may become, in the particular circumstances presented, tantamount to an evidential burden, once the Supervisor of Elections raises sufficient evidence of a reasonable basis to doubt qualification.

summarized above, this application proceeds on the basis of what must be regarded as the facts as stated in the Applicant's affidavit as the state of the records of convictions. This has been expressly recognized by Mr. Hampson in his written submissions, subject of course, to what the proper treatment of them must be for present purposes.

"Sufficient evidence"

32. In light of the assertion of the Respondent that he is entitled for all purposes of law to be regarded as rehabilitated and as someone having no convictions, it is appropriate that I should, as a preliminary matter, make some observations on the circumstances under which this application came to be made and about the evidence of the convictions upon which it is based. Indeed, a further concern raised by Mr. Hampson on behalf of the Respondent, is that the disclosure of his convictions by the CRO may itself have been an offence in contravention of section 9 of the 1998 Law, which was on the date of the disclosure to the Applicant (23 March 2017), still in effect.

33. The appropriateness or otherwise of the disclosure of the convictions to the Applicant by the CRO, is a matter which must, in my view, be considered in the context of the objectives of the Elections Law.

34. As mentioned above, the duties and responsibilities of the Applicant as Supervisor of Elections are important and wide-ranging. Materially for present purposes, and as also mentioned above, section 29A(1) provides that where there is sufficient evidence to do so, the Supervisor is entitled (and indeed may be well advised) to apply to the Grand

Court for a declaration as to the qualification or disqualification of a candidate for election to membership of the Legislative Assembly.[11]

35. In exercising this power, the Supervisor's role is investigative, administrative and discretionary, not judicial. It is limited to establishing as a prerequisite to referral to the Court, only that reasonable grounds exist – by way of "*sufficient evidence*" – to raise concern as to a candidate's qualification or disqualification for election.

36. While in the exercise of this power the Supervisor must of course act fairly, reasonably and within the scope of the statutory power itself, it is clearly in the public interest that he should seek declaratory orders where there is sufficient evidence to justify an application. The objective of section 29A is to avoid the potentially disruptive impact of issues of qualification or disqualification arising after an election. The section therefore contemplates the obtaining from the Court of a definitive judicial ruling on the status of a nominated person, prior to the actual elections.

37. In dealing with the Respondent's concern, the term "*sufficient evidence*" must be afforded its natural or ordinary meaning in the absence of an express statutory definition[12]. I therefore accept, as the Solicitor General submits, that the term requires no more than that the Supervisor must possess or be aware of evidence which suffices to arouse or to justify reasonable and genuine concern as to the status of a nominated

[11] This provision was introduced by amendment to the Elections Law effective 23 November 2016, by Law 45 of 2016 to allow for pre-emptive applications for declarations as to qualification or disqualification for election. Prior to this the Elections Law allowed only for election petitions to challenge the outcome of elections on constitutional grounds (deemed "undue election or undue return of a member") or other grounds of corrupt or illegal practices, proscribed by the Elections Law itself.

[12] And in the absence also of any other relevant interpretation criterion pointing away from the natural or ordinary meaning. As Lord Reid explained in *Pinner v Everett* [1969] 1 WLR 1266 at 1273:

> "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."

See also *Bennion on Statutory Interpretation,* Sixth Ed., Section 195, page 508.

person's qualification or disqualification for election to the Legislative Assembly. The requirement cannot be conclusive evidence. Such a requirement would involve the Supervisor having to make full enquiries for arriving at an evaluative judgment, including where appropriate, having to allow the nominated person a full opportunity to respond. Such a process in this context would be inconsistent both with the Supervisor's investigative and administrative role and with the adjudicative role ascribed to the Court.

38. Rather, and as the Solicitor General submits and I accept, the threshold requirement of "sufficient evidence" is likely to be met where the Supervisor, having reviewed the material before him (including any information which, under section 19 of the Elections Law, he is entitled to seek from public entities) and having assessed the same against the requirements of sections 61 and 62 of the Constitution and any representations by the nominated person in response to his queries, is satisfied that there is a reasonable concern as to qualification for elected membership of the Legislative Assembly which should be referred to the Court for resolution.

39. In the circumstances of this case, I accept that knowledge of the Respondent's convictions would immediately have given the Applicant reasonable concern about the Respondent's status as a candidate for election. And, in light of the limiting effect of section 7 of the 1998 Law upon the Respondent's right to be regarded as rehabilitated (to be discussed more fully below), I accept that the Applicant's concern would have been reasonable even if the Respondent was *prima facie* entitled to the convictions being regarded by the Applicant as spent. As will be apparent below, it is precisely because of the limiting effect of section 7 as read with section 62 of the Constitution, that the question of disqualification arose in the first place.

40. In all the circumstances presented, I am satisfied that the Applicant had "*sufficient evidence*" to bring this application.

41. A further concern was nonetheless raised by Mr. Hampson on behalf of the Respondent. This was that the taking of this application in open court and without the evidence being protected from publication, would result in the fact of the convictions being resurrected in the public domain and so the negation of the Respondent's right to be regarded as fully rehabilitated of the offences which must be regarded as spent, whatever the outcome of this application.

42. I was of course, immediately sympathetic to this obvious concern. However, being mindful also of the public interest in these proceedings remaining open to the public, including through the Media representative who had been present from the outset, I ordered the embargo of the publication of the evidence and directed that the Respondent shall be referred to in any publication of the case, not by name but as "Candidate X". Hence also, the heading of this judgment.

The relevant provisions of the 1998 Law and the Criminal Records (Spent Convictions) Law, 2016 (hereinafter "the CR(SC) Law") which repealed the 1998 Law.

43. As mentioned above, it is accepted that for the purposes of the 1998 Law, the Respondent's convictions would generally have been regarded as "spent"[13]. And so, he was entitled to be treated as a "rehabilitated person" within the meaning of the 1998 Law in respect of the first offence in 2000 and, in respect of the second offence, in 2007[14].

44. In this regard section 4(1) of the 1998 Law provided:

[13] As defined by section 2 (2) of the 1998 Law to mean a conviction in respect of which a person is to be regarded as a rehabilitated person.
[14] Section 6 of the 1998 Law prescribed the respective rehabilitation periods for offences. Section 5 prescribed those serious offences or sentences for offences, which were excluded from rehabilitation.

(1) *"Subject to sections 7 and 8, a person who has become a rehabilitated person for the purposes of this Law in respect of a conviction shall be treated for all purposes in law, as a person who has not committed, been charged with, prosecuted for, convicted of or sentenced for the offence which was the subject of that conviction; and, notwithstanding any other law but subject as aforesaid –*

(a) No evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in the Islands to prove that any such person has committed, been charged with, prosecuted for, convicted of or sentenced for the offence which was the subject of a spent conviction; and

(b) A person shall not, in any such proceedings, be asked and, if asked, shall not be required to answer any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions of that person or any circumstances ancillary thereto.

(2) Where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority-

(a) The question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and

(b) The person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Any obligation on any person by any rule of law or by the provisions of any agreement or arrangement to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's).

(4) A conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any occupation or employment.

(5) For the purposes of this section and section 7, the following are circumstances ancillary to a conviction -

...."

45. It was clearly the intention and effect of those provisions of the 1998 Law to change the status of an individual who had offended and had been rehabilitated to that of a person who had never offended, with very far-reaching and positively rehabilitating

consequences[15]. These included, as shown in sub-section 4(4) above, the preclusion of a spent conviction being regarded as grounds for denial of appointment to any office.

46. However, as the 1998 Law itself recognized, its rehabilitative effects were not absolute or unlimited. For present purposes, this was most directly illustrated by section 7 (1)(d) which provided that:

> *"Nothing in section 4(1) shall affect –*
>
> ....
>
> *(c) The operation of any law by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable under section[6]."*

47. Thus, a person however otherwise to be regarded generally as rehabilitated for the purposes of the 1998 Law, could not insist on a conviction being regarded as spent, if the conviction would by operation of law, be regarded, among other things, as a disqualification.

48. Such is the effect of section 62 of the Constitution in its treatment of a conviction for dishonesty as a disqualification for election to membership of the Legislative Assembly.

49. That effect is indisputably prospective as of 6 November 2009, the date of the coming into effect of the Constitution. There can be no doubt and there is no contention that since

[15] Mr. Hampson in his written submissions ,very helpfully explained and examined these by reference to the proposals contained in "Living it down: the Problem of Old Convictions", the report of a committee set up by Justice, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders. These proposals were accepted by the U.K. Parliament and formed the basis for the Rehabilitation of Offenders Act 1974, the Act upon which the 1998 Law was patterned.

that date and so for the purposes of the imminent elections in May 2017, a conviction for dishonesty operates as a disqualification.

50. The provisions of the CR(SC) Law which came into effect as of 28th March 2017, introduced a new regime by which convictions when spent may be expunged from criminal records on application to the Expungement Board, rather than regarded as spent automatically by operation of law as was deemed to happen under the 1998 Law. This new regime does not alter the position for present purposes.

51. As section 4 of the CR(SC) Law explains:

> "*The primary object of this Law is to implement a scheme to limit the effect of a person's conviction for a range of offences if the person, having received that person's sentence, subsequently completes a period of crime-free behavior and on completion of that period, the conviction shall be regarded as spent and subject to some exceptions, a person is eligible to apply for the expungement of the criminal record.*"

52. Where the prescribed crime-free period has expired[16], a conviction regarded as spent and its record expunged; the rehabilitative effect is explained by sections 26, 27 and 28 of the CR(SC) Law. The effect is explained in terms similar to section 4 of the 1998 Law.

53. Of specific relevance to the issue of disqualification for elected membership, there are the provisions of section 30 of the CR(SC) Law which preserve and continue the limitation in that regard placed upon rehabilitation by section 7(1)(d) of the 1998 Law, in these terms:

> "*For the avoidance of doubt, the provisions of this Part [(including sections 26 -28)] shall not operate to prevent a person from being*

[16] As prescribed in Schedule 3 pursuant to sections 16, 24 and 38.

disqualified to be elected as a member of the Legislative Assembly pursuant to section 62(1)(e) of Schedule 2 of the Cayman Islands Constitution Order, 2009."

54. Other limitations are also continued, such as the ongoing requirement under section 33 that a rehabilitated person, when seeking membership of certain professional bodies (such as the legal profession); or appointment to certain important public offices or to the management of certain institutions such as residential facilities for the care and protection of children; or licence to become engaged in business for the provision of fiduciary services or firearms or (again) when seeking to be elected to the Legislative Assembly – if requested to do so, shall disclose particulars of an expunged criminal record[17].

55. Moreover, section 34 of the CR(SC) Law provides that it is a criminal offence for a person who is required to disclose the particulars of an expunged conviction under section 33 to fail to do so.

56. For the sake of a complete analysis, it must also be noted that section 50 of the CR(SC) Law preserves in the following terms, "rights or benefits" acquired under the 1998 Law which it repealed:

"(1) *The Rehabilitation of Offenders Law (1998 Revision), hereinafter referred to as the "repealed Law", is hereby repealed.*

(2) The rights and benefits of any person where those rights or benefits –

(a) were acquired under the repealed Law; and

(b) existed immediately prior to the commencement of this Law, shall not be adversely affected by this Law."

Analysis

[17] Section 33 of the CR(SC) Law as read with Schedule 4.

57. As already noted above, there is no question but that the Respondent's convictions for dishonesty are to be regarded as spent and that he acquired the status of a rehabilitated person generally for all purposes in law as stipulated in section 4 of the 1998 Law before 6 November 2009 and so before the Constitution came into effect. And it follows therefore, in keeping with section 50 of the CR(SC) Law, that his rehabilitated status continues unaffected and undiminished.

58. But, as also noted above, that does not mean that the appurtenant "rights and benefits" of rehabilitation were ever or will ever be unlimited.

59. Indeed, the legislative policies of both the 1998 Law and the CR(SC) Law are based on a philosophy that recognizes that while rehabilitated persons must be allowed to overcome past delinquencies for which they have atoned, there are competing public interests of such importance that those interests will continue to require the disclosure and citation of otherwise spent convictions or expunged records.

60. Among such public interests identified for example in passing above, is the protection of vulnerable children against abuse where a person who seeks to be put in charge of their care and protection had a criminal history, especially it may be assumed, a history of child abuse. Another is the public interest in ensuring that only persons of trustworthy character are appointed to certain important public offices or admitted to certain professions of trust. Yet another important public interest, is that in ensuring the due administration of justice and which is recognized in the limitation that requires that a spent conviction or expunged record may be disclosed in evidence on the direction of the court, "if the interests of justice so require"[18].

[18] Section 7(1)(e) and (2) of the 1998 Law and section 27 (2) of the CR(SC) Law.

61. Ensuring that only persons of the highest integrity shall be elected as members of the Legislative Assembly, is the important public interest demonstrably intended to be safe-guarded by section 62(1)(e) of the Constitution. And this is apparent, not only from the present provisions of the Constitution but also from the way in which they have evolved.

62. As discussed above, there were earlier provisions which, while regarding a sentence of imprisonment of 12 months or longer as disqualifying, nonetheless afforded a l*ocus poenitentiae* for requalification after 5 years. But the imprisonment disqualification is now since 6 November 2009, made absolute and the dishonesty disqualification then introduced, is also made absolute.

63. The disqualification is one which can be neither avoided nor attenuated by the rehabilitative effect of a relevant conviction or sentence having become spent or expunged from the records. In other words, for the purposes of a disqualification by operation of law, a spent conviction does not result in a disqualification also becoming spent and this was so even under the 1998 Law which, in section 7(1)(d), expressly recognized that a disqualification, disability, prohibition or penalty, could extend beyond the period of rehabilitation applicable to the related conviction.

64. Thus, the policy of the legislation treats the subjects of rehabilitation and disqualification as distinctly different concepts. The former is intended for the protection of the redeemed offender, the latter for the protection of the wider public interests. The rights and benefits acquired by dint of rehabilitation do not include a right to avoid a limitation of disqualification imposed by operation of law.

65. Such has always been and continues to be the status of the Respondent as a rehabilitated offender both under the 1998 Law and now under the CR(SC) Law.

66. And it is just as well to note that disqualification by operation of law as a limitation on rehabilitation was not created by the Constitution in November 2009. What the Constitution did in that regard was change the basis for disqualification by way of the specific introduction of the dishonesty disqualification, and by making both the dishonesty disqualification and the imprisonment disqualification absolute.

67. Although the dishonesty disqualification was not in operation during the Respondent's period of rehabilitation, his rehabilitation was always subject to limitation by a disqualification imposed by operation of law. That limitation applied under the 1998 Law and continues to apply, by operation of law, as the law happens to be from time to time. The fact of a conviction having become spent does not avoid it.

68. Accordingly, in my view, no real question arises of the Constitution operating retrospectively, so as to infringe a vested right of the Respondent. The Respondent never had a right to avoid a disqualification which exists by operation of law – here by operation of the Constitution, as the Supreme Law – simply on the basis of his convictions having become spent.

69. It is a disqualification which certainly limits his rehabilitation in the sense that he is denied that opportunity of other citizens to seek elected office in the Legislative Assembly but that is an inevitable consequence of the philosophy and operation of the legislative regime as it has stood from the beginning and still stands.

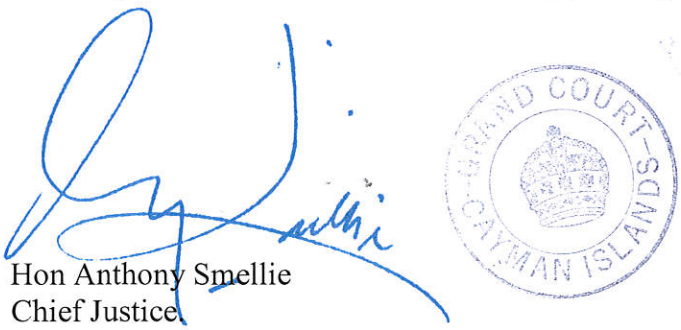
70. The Respondent now seeks candidacy for election under the regime of the Elections Law and in keeping with the Constitution as they presently stand. While the Respondent has acquired the status of being generally rehabilitated by virtue of his convictions having become spent, he never acquired the right to avoid a disqualification imposed by

operation of the Constitution for the purposes of the imminent elections in May 2017 or future elections. Not any more so than he (or any other convicted person) would be entitled to avoid any of the other limitations imposed upon rehabilitation, such as discussed above.

71. While no disqualification then imposed by operation of law appears to have applied to the Respondent during his period of rehabilitation under the 1998 Law, I am satisfied that he is not entitled to avoid that which is now imposed relative to his convictions by operation of law and that he is disqualified by virtue of it.

72. I so declare.

73. In keeping with the public interest nature of this application to which the Respondent was entitled to respond and was not unreasonable in his response, I make no order as to the costs of the application. This means that each party will bear his own costs and is in effect, the order as to costs which the Applicant proposed in his Originating Summons.



Hon Anthony Smellie
Chief Justice

18th April 2017