IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 198 OF 2013

IN THE MATTER OF THE CAYMAN ISLANDS CONSTITUTION ORDER 2009 ("THE CONSTITUTION")

AND

IN THE MATTER OF A PETITION UNDER THE ELECTIONS LAW (2009 REVISION)

AND

IN THE MATTER OF AN ELECTION FOR THE ELECTORAL DISTRICT OF WEST BAY HELD ON THE 22ND MAY 2013

BETWEEN	**JOHN GORDON HEWITT**	**PETITIONER**
AND	**TARA RIVERS**	**1ST RESPONDENT**
AND	**MR. DELANO SOLOMON (Returning Officer)**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR THE CAYMAN ISLANDS**	**3RD RESPONDENT**

Appearances: Mr. Abraham Dabdoub instructed by Mr. Steve McField of A. Steve McField and Associates, for the Petitioner

Sir Geoffrey Jowell Q.C. instructed by Messrs. Graham Hampson and Paul Keeble of Hampson and Company, for the 1st Respondent

Hon. Samuel Bulgin QC, Attorney General and Ms. Reshma Sharma, Senior Crown Counsel, for the 2nd and 3rd Respondents

JUDGMENT

1. At the General Elections held on the 22nd May 2013, the 1st Respondent was returned as the second elected member of the Legislative Assembly for the electoral district of West Bay. She was sworn in on 29th May 2013 and appointed Minister of Education, Employment and Gender Affairs.

2. The Petitioner, by this election petition, seeks to overturn her election and remove her from office on the ground that she did not meet the qualifications required for election as mandated by Sections 61 and 62 of the Constitution. If successful in so having her election declared nullified, the Petitioner would seek the further declaration that Velma Powery-Hewitt – who happens to be his wife and who received the highest number of votes among the unsuccessful candidates – was duly elected and ought to have been returned without the need for a bye-election. This would be on the basis that those electors who voted for the 1st Respondent did so with notice of her disqualification and so had wasted their votes.

3. The Petition alleges two grounds of disqualification.

   First, that section 61(1)(e) of the Constitution, which provides that a candidate for election must have "*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*"; has not been satisfied by the 1st Respondent because she worked in London, England between 2006 and 2009 as a result of which she cannot, as a matter of law, be said to have resided in the Cayman Islands during that time even if she had a home here.

   Second, that section 62(1)(a) of the Constitution, which provides for the disqualification of any 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", has operated to disqualify the 1st Respondent by dint of the fact that she has renewed and used a United States passport to which she is entitled as a citizen of the United States of America by having been born in that country.

4. Those two grounds which together I refer to as the "disqualification issue" were agreed by counsel to be resolved first, with the second issue – the "wasted votes issue" – to be resolved immediately following my judgment on the disqualification issue if the need arose[1].

5. This is the judgment on the disqualification issue.

The relevant provisions of the Constitution

6. The qualifications for elected membership of the Legislative Assembly are prescribed in Section 61 of the Constitution and those conditions which disqualify a person from elected membership are prescribed in section 62.

7. Section 61 of the Constitution provides:

> *"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 domiciled and resident in the Cayman Islands; and*
>
> *(d) he or she is a qualified citizen, and either*

[1] See ***Solomon and Others v Scotland and Seymour*** ***2009 CILR 403*** which affirmed the public interest in the speedy determination of election petitions involving as they do the determination of the composition of the elected government.

(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 in which he or she was absent from the Cayman Islands in that period does not exceed* 400; or

(f) If he or she was born outside the Cayman Islands, has resided in the Cayman Islands for a period or periods amounting to not less than fifteen years out of the twenty years immediately preceding the date of his or her nomination for election, and, subject to subsection (3), in the seven years immediately preceding the date of his or her nomination for election the number of days on which he or she was absent from the Cayman Islands does not exceed 400.

(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." [Emphasis supplied.]

8. And section 61 subsection (3) – that to which subsection (1)(e) is expressed to be subject – provides:

"(3) *In ascertaining whether a person has been absent from the Cayman Islands for the purposes of subsection (1)(e) or (f), any period of absence by reason of the following shall be disregarded –*

(a) the performance of duty on behalf of the Government;

(b) attendance as a student at any educational establishment;

(c) attendance as a patient at any hospital, clinic or other medical institution;

(d) employment as a seaman aboard an ocean going vessel; or

(e) employment as a crew member on any aircraft."

9. As already mentioned, section 62 prescribes those conditions which operate as disqualifications for elected membership. There are eight such conditions but only the first of them arises for consideration in relation to the 1st Respondent. It is that prescribed in Section 62(1)(a) and reads as follows:

"62(1) No person shall be qualified to be elected as a member of the Legislative Assembly who –

(a) *is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state;*

...."

10. While it is accepted that she meets the requirements of section 61(1) (a), (b), (c) and (d); the 1st Respondent, as mentioned above, is alleged to have not met the requirements of section 61(1)(e) and to have been disqualified under section 62(1)(a).

11. The nature of the challenge to her qualification under section 61(1)(e) became fully apparent however, only well into the hearing of the petition. As it unfolded, it asserts that having been born outside the Cayman Islands of Caymanian parents who were

born within the Cayman Islands; the 1st Respondent failed to meet the further requirement of subsection 1(e) of continuous residence for a period of not less than seven years immediately preceding the date of her nomination for election, having been absent from the Islands for periods in excess of 400 days during that seven year period. And further, that her absence was not to be disregarded because it did not come within the reasons permitted by subsection (3); specifically that she was not, as she asserts, absent from the Islands in London, England for the purpose of attendance at an educational establishment.

12. Thus, the first objection to her qualification for election I will refer to as the "residence objection"; involving as it does the issue of whether the Constitution permits residence in more than one place at the same time: in this case in London as well as in the Cayman Islands.

13. The allegation of disqualification under section 62(1(a) arises as explained above in respect of the dual citizenship of the 1st Respondent.

14. While herself a Caymanian of Caymanian parentage, the 1st Respondent was born in the United States of America, and, by operation of the *jus soli* principle, acquired citizenship by virtue of her birth in that country.

15. That fact by itself would not disqualify her because section 61(2)(b) of the Constitution (as shown above in emphasis) expressly saves her right to other citizenship acquired by virtue of her birth outside the Cayman Islands.

16. Rather, it is asserted that, by virtue of her having since becoming an adult (and thus by virtue of "her own act"), renewed and used a United States passport, she is under an acknowledgement of allegiance, obedience or adherence to the United States, a foreign state, and so is disqualified by virtue of section 62(1)(a) of the Constitution.

17. This argument for disqualification, by way of convenient short-hand, I will refer to as the "passport objection".

Interpretation of Constitutional provisions

18. Both objections to the 1st Respondent's qualification must, of course, be analyzed first and foremost, within the context of the constitutional provisions themselves. This, however, is seldom the straightforward exercise of identifying and applying the literal or ordinary meaning of words, as the competing arguments in this case illustrate.

19. For his part, Sir Jeffrey Jowell sought in his arguments to place emphasis upon the democratic rights bestowed by the Constitution upon members of the electorate to choose a representative in a free and fair election. Where that democratic right has been exercised by the free expression of the opinion of the people in their choice of representative in the Legislature, the Court should, he submitted, regard itself bound to construe any ambiguity in the wording of the Constitution in favour of protecting rather than nullifying that choice. He also emphasized the constitutional democratic right of the 1st Respondent herself to participate in the electoral process, a right which should not be curtailed by an unduly broad application of exceptions to those rights which may appear in the Constitution. Such provisions, including those which would operate to disqualify a citizen from the exercise of fundamental rights, are to be given a narrow and strict interpretation, suitable and proportionate only to the aims which they serve[2].

20. Mr. Dabdoub for his part pressed for a strict interpretation of the constitutional provisions. He argued that the requirements contained in sections 61 and 62 of the

[2] Citing dictum of Lord Rodger of Earlsferry from R v Hughes [2002] 2 A.C. 259 at para. 35. See below.

Constitution are to ensure that Cayman Islands legislators have undivided loyalties to the people of the Cayman Islands and to prevent persons with loyalties, allegiance and obligations to a foreign power or state from being elected as members of the Legislative Assembly. So strictly are these provisions to be construed, he submitted, that the Constitution itself (by section 67) makes it an offence for any person to sit or vote in the Legislature, knowing or having reasonable grounds for knowing that he or she is not entitled to do so.

21. That brief summary of the competing arguments identifies the tension that exists between the expectations of the members of the electorate that their will as they expressed it in their democratic choice of candidate will be respected and their expectations nonetheless also, that those who present themselves for election have the required connections to the Cayman Islands, and are not disqualified by dint of loyalties that they might owe to any other power or state.

22. Apparent though it may be, this is not a tension that can properly be resolved, as a matter of the interpretation of the Constitution, by the laying of emphasis upon one set of rights or expectations over other rights or expectations.

23. The Court may not approach the task of interpretation of the constitutional provisions by seeking to anticipate the immediate consequences of an interpretation. Rather, the task at hand is to determine how the particular constitutional provisions are to be construed in the context in which they exist.

24. True it is, as Mr. Dabdoub observed, that sections 61 and 62 do not exist within the context of Part I of the Constitution – that which is familiarly referenced as the Bill of Rights, Freedoms and Responsibilities. These sections exist within the context of Part IV of the Constitution – that which establishes the Legislature and defines its

powers and, in the particular context of sections 61 and 62 themselves, regulates elections to the Legislative Assembly. But the obvious interplay between these provisions in Part IV and those dealing with the Fundamental Rights cannot be ignored, insofar as they might impinge upon the rights of the electorate to the free expression of their opinion in their choice of candidates and, indeed, upon the rights of citizens to participate in the democratic electoral process by offering themselves as candidates for election.

25. Those preliminary remarks underscore the importance of the correct approach to the interpretation of the relevant provisions of the Constitution.

26. The basic approach must be of course, where there is no ambiguity, 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.

27. In ***Attorney General of Fiji v Director of Public Prosecutions***[3], the Privy Council, after stating that it fully accepted that words in a Constitution should receive a generous interpretation, added (at 682-683):

> *"But that does not require the courts, when writing a construction, to reject the plain ordinary meaning of words. Proper construction of a constitution, or of any other document, would be impossible if the court could not assume that the reader was reasonably intelligent and that he or she would read with reasonable care."*

[3] [1983] 2 A.C. 672

28. Accordingly, if the meaning of the words in the Constitution, when read in their context, is plain, that meaning may not be altered by the application of a generous or flexible interpretation.

29. The question then arises what approach should be taken when the words are ambiguous or undefined and so invite more than one interpretation.

30. It is especially in those circumstances that I accept that a more strict and narrow construction should be applied to provisions which would otherwise serve to unduly curtail fundamental rights, heeding the words of Lord Rodger on behalf of the Privy Council given in ***R v Hughes***[4] in a case which considered the mandatory death penalty provisions of the St. Lucia Constitution: "*Since paragraph 10 introduces these exceptions to the rights and protections which people would otherwise have under the Constitution, it must be construed like any other derogation from Constitutional guarantees. In State v Petrus [1985] LRC (Const) 699 720d-f in the Court of Appeal of Botswana, Aguda J.A. referred to Corey v Knight (1957) 150 Cal App 2d 671 and observed that "it is another well known principle of construction that exceptions contained in Constitutions are ordinarily to be given strict and narrow, rather than broad, constructions". In case of doubt, paragraph 10 should therefore be given a strict and narrow, rather than a broad, construction*".

31. That principle – that provisions whose construction could derogate from the fundamental rights or the democratic rights of the electorate should not be construed any more broadly than is plainly necessary – was applied by this Court in the context of deciding upon an election petition in ***Solomon v Scotland and Seymour*** (above).

[4] F.N. 2 above

In reflecting upon the nature of the jurisdiction given to the Court to enquire into the results of elections, it was declared at [28] that:

> *"The jurisdiction given to the Courts has been recognized in the case law to be a sensitive and special jurisdiction, delving into the regulation of Parliament itself, and has been strictly and narrowly construed by the courts."*

32. The dictum from the Privy Council (per Lord Bingham) in the case of ***R v Reyes***[5] should also be borne in mind when construing constitutional provisions the meaning of which are not plain and obvious.

33. There Lord Bingham referred to a number of decided cases from a variety of jurisdictions on the approach to the interpretation of constitutional provisions, and summarized the principles to be derived from them as follows:

> *"As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charter party. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society:* see Trop v Dulles 356 *U.S. 86, 101. In*

[5] [2002]UKPC 11, [2002] 1 AC 235 at [26].

carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion...."

34. Coming as that dictum does from a case in which the Privy Council was considering an individual human rights issue,[6] the emphasis it places upon human rights is indeed contextual. But that does not, in my view, diminish the value the dictum imparts for the approach to the construction of provisions of a written constitution dealing with other issues that ultimately redound in ways that impact not only the rights of individuals, but also the rights and expectations of society as a whole.

35. The approach to interpretation must nonetheless be "generous and purposive...in light of evolving standards of decency that mark the progress of a maturing society" and so giving effect to the public policy aims of the particular provision.

36. I am fortified in this conclusion, not only by having regard to the exhaustive study of the human rights case law undertaken in Lord Bingham's judgment in ***R v Reyes*** itself, but also from the earlier and equally authoritative dictum of the House of Lords in ***Shah v Barnet London Borough Council***[7]. There, in the not unrelated context of construction of immigration legislation it was held, among other things, that:

"Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation, if they can find in the statute, read as a whole, or in material to which they are permitted by law to refer as aids to interpretation, an expression of Parliament's purpose or policy."

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[6] On appeal from the Court of Appeal of Belize as to whether a mandatory death sentence was "inhuman and degrading treatment" and contrary to section 7 of the Constitution of Belize which protected the appellant from such treatment.

[7] [1983] 1 All E.R. 226

37. In summary, I consider that my approach to the interpretation of the Constitutional provisions at issue on this petition must seek to give effect to the real meaning of the provisions and where that meaning is not plain, to apply a purposive interpretation. In that sense, the context will be most important, including as it reflects the aspirations of the Caymanian society which the Constitution embodies. The provisions regulating the eligibility for election must be regarded as reflecting the equality and freedom of Caymanians to participate in the fullest expression of the political life of the Islands but this must be balanced against the needs of the society to have competent representatives who are loyal to the people whom they are elected to serve.

38. It will follow then, that the court is required, where the words are not plain, to have keen regard to the apparent aim which underlies a particular constitutional provision in determining how it is to be applied. And this approach also requires the court to be cognizant of the import of modern developments – avoiding the artificial strictures of what Lord Wilberforce stigmatized (in the words of Professor De Smith which he made famous[8]) as "the austerity of tabulated legalism,"[9] that could deprive a constitutional provision of its true spirit and meaning.

The residence issue

39. As indicated above, the residence issue raised by this petition gave rise to two distinct areas of debate. The first – that which was specifically alleged in the petition – raised the question of whether the 1st Respondent could have met the Constitutional requirements for continuous residence in the Cayman Islands for the seven years

[8] **de Smith, the New Commonwealth and its Constitutions (1964), p194** and see ***Mathew v State [2004] UKPC 33***.

[9] [1980] A.C. 319 at 328

immediately preceding the date of her nomination on 27 March 2013 [(section 61 (1)(f))] – even while (as she admits) she was residing in London for the purpose of attachment to the law firm of Allen & Overy between 2006 to 2009.

40. The question whether that absence (which obviously exceeded 400 days) was excused by virtue of her attendance at an educational establishment was not specifically pleaded as part of the Petitioner's challenge. Indeed, the petition contained no specific allegation that her absence was for more than 400 days and so operated to disqualify her as a candidate.

41. This lack of pleading gave rise to some lively exchanges at the Bar, with the 1st Respondent's counsel seeking to preclude any reference to her prolonged absence, citing the strict rules that govern the pleadings and the time limits relating to the filing of election petitions[10].

42. However, as the requirements of both residence and physical presence within the Cayman Islands for the seven year period are constitutional requirements to be recognized and enforced subject only to the reason for absence being allowed by the Constitution itself, her absence was not to be ignored for lack of pleading and Sir Jeffrey Jowell became obliged to address it

43. As he submitted, the first question is whether the qualification requirements of the Constitution allow for residence in Cayman as well as in another country at the same time. In the absence of any definition in the Constitution itself that prevents the application of the settled common law principles, his submission that "residence" may mean ordinary residence in more than one place at the same time is compelling,

[10] Relying on ***Maude and Others v Lowley 1874 L.R. 165*** a case dealing with a municipal election and the local case of ***Solomon v Scotland, Seymour and others*** (above) which emphasizes the importance of observing the time limits which govern the bringing of petitions to challenge elections to Parliament.

and in my view, is plainly correct. The principle developed from the cases for ascertaining whether a person is ordinarily resident in a particular place is helpfully summarized in ***Simon's Direct Tax Service*** (regarded as the leading UK loose leaf publication on tax law) atE6.110 as follows:

> *"In seeking to establish the residence status of an individual, the court at first instance will consider a number of factors, including whether the individual has a permanent home in [the relevant country], his family and/or business ties to this country, the frequency and length of any visits here, and any other factors which may be relevant in a particular case."*

44. And so well recognized is the concept of ordinary residence in more than one place, that I need refer no further than to our local Court of Appeal's Judgment in ***Wheeler v Wheeler***[11] where a number of the English cases now cited in the arguments before me had been discussed and analyzed[12]. In upholding the earlier judgment of this Court, Justice of Appeal Georges declared on behalf of the Court of Appeal that:

> *"Ordinary residence could be maintained in more than one jurisdiction if an intention to reside in each place in the ordinary course of life were shown, and its continuity is not broken by temporary and occasional periods of absence from one jurisdiction.*[13]*"*

45. The principle is readily applicable to the circumstances presented here.

46. The requirement of residence within the Islands appears twice in the relevant provisions of section 61(1) of the Constitution as noted above. Firstly, in subsection

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[11] 1996 CILR 141

[12] Including: ***Stransky v Stransky [1954] P. 428***; ***Cooper v Cadwaladar (1904) 7 F 146; Levene v IRC [1928] AC 217; Shah v Barnet LBC [1983] 1 All E.R. 225.***

[13] As taken from the headnote.

(1)(c), which requires that at the date of nomination for election, the candidate is both domiciled and resident in the Islands. Secondly, in subsection 1(e) – that provision which is under discussion here – where residence of not less than seven years immediately preceding the date of nomination is required but absences amounting to no more than 400 days during that period are allowed; with further absences to be allowed only if they come within a reason set out in subsection (3). In effect then, a requirement in subsection 61 (1)(e) of both residence and presence within the Islands.

47. Nothing in these provisions suggests that the framers of the Constitution intended to preclude the settled common law meaning of residence as allowing for abode in more than one place at the same time. On the contrary, to the extent there is any ambiguity subsection (1)(e) – in requiring both residence and presence within the Islands – contemplates the difference between the two concepts and thus that one can be a resident of the Islands, while absent from the Islands in another place at the same time.

48. Had the intention been to treat the concept of residence as meaning "exclusively resident" within the Islands, the provision could have so stated and there would have been no need to stipulate also for physical presence within the Islands. Subject then to whether the 1st Respondent's absences for more than 400 days are to be disregarded under subsection (3), she was entitled to be resident in more than one place while still meeting the requirements of subsections 1(c) and (e) of section 61; provided, as she contends, she maintained a residence in the Cayman Islands throughout the relevant period.

49. In this respect, her evidence is clear and unchallenged. Having come home to reside permanently in the Islands with her parents at 3 years old, she lived in the district of

West Bay and spent her childhood there. In 1990, at the age of 15, she went to complete her High School education in the United Kingdom and in 1993 was awarded a Cayman Islands Government Scholarship to Brandeis University in Massachusetts, in the United States. Having taken her degree in psychology there and having returned home to work for the Government from 1997 to 2000, she ran in the 8th November 2000 General Elections as a candidate for the district of West Bay and narrowly missed winning a seat in the Assembly. She then decided to further her education and, at the age of 26 she went to study in Toronto, Canada on a Commonwealth Scholarship to pursue an MBA degree at York University. She obtained a student visa and entered Canada on 20 August 2001. Quite remarkably, while in Canada she was also able to obtain a scholarship from a Cayman Islands law firm and from 2001-2005 while pursuing her MBA, also attended at the well-known Osgoode Hall Law School and trained as a Canadian lawyer at the reputable law firm of Blake, Cassells & Graydon from 2005-2006. She kept her home in Cayman throughout and always regarded it as her primary residence. She made frequent visits home to Cayman during those years.

50. In 2006, she transferred to London, England for the purpose of undertaking the Qualified Lawyers' Transfer Test in the United Kingdom and to gain specialist experience in the practice of capital markets law; intending to return to practice in that field in Cayman. She asserts that she had no intention permanently to remain in London although for the purposes of her work and training, was required to take up residence there and so she came to rent an apartment in London.

51. She obtained attachment to the reputable law firm Allen & Overy in London as an associate trainee lawyer from 2006-2009. Nevertheless, throughout that period also

she continued to live for part of the year in West Bay, Grand Cayman, where she kept her personal belongings and personal papers and records at her family home. As she explained in her affidavit, she returned home for visits frequently and regularly during this period as well and always considered the Cayman Islands to be her home. By way of further illustration of her state of mind in this regard, she produced in evidence her income tax return to Her Majesty's Revenue Commission in which she had declared that she was "not ordinarily resident" in the United Kingdom for income tax purposes.

52. Properly construed, I am satisfied that the section 61 requirement of residence within the Cayman Islands does not preclude residence elsewhere at the same time, provided that the further requirement of subsection 1(e) of physical presence is met or provided further that any absences may be allowed in keeping with subsection 61(3).

53. Whether or not the 1st Respondent's absence during the seven year period (totaling more than two and a half years) can be disregarded, depends on the construction of subsection 61(3)(b), - that provision which allows for absence while attending as "*a student at an educational establishment*".

54. Here too, where the words are not defined and are capable of more than one meaning, a generous and purposive construction must, in my view, surely be permissible in keeping with the context in which the words appear and the legitimate policy objectives of the Constitution.

55. The policy of this requirement is to ensure that candidates for election to the Assembly who are otherwise qualified under the Constitution but who have been living away from the Cayman Islands for a significant portion of their lives, have come to establish their real attachment and commitment to the Islands. This they are

required to show by having become resident again within the Islands as well as physically present for the seven years immediately preceding their dates of nomination. For such candidates only the minimal absences of no more than 400 days are allowed.

56. Viewed in its proper context, the provision is not meant to disqualify candidates who have lived practically all their lives within the Cayman Islands but who need to be away for extended periods in order to acquire formal education, expertise or specialized training and in respect of which the period of absence will depend upon the nature of the educational undertaking.

57. Recognizing that in the modern world the nature of an educational undertaking could be as varied as the demands of the competitive environment for which Caymanians must be equipped, broad language is used by the Constitution.

58. Thus, in my view, the meaning of the words "educational establishment" is not to be confined to "colleges", "universities" or other such exclusively academic institutions. Had the framers of the Constitution so intended, such more exclusive wording could readily have been used.

59. The words "*attendance as a student at any educational establishment*" must therefore be given a broad purposive meaning, one that is suitable to ensure that the very persons who may benefit from such attendance and who otherwise meet the requirements of the Constitution, are not precluded by an artificial construct from serving the Islands as members of the Legislature, when they return to the Islands.

60. With that approach to construction in mind, I can see no reason why attendance as a trainee lawyer upon a well-established, well structured and recognized legal practitioner's training programme, organized and presented under the auspices of a

reputable international firm of lawyers, may not qualify as attendance at an educational establishment.

61. That the programme undertaken by the 1st Respondent at the firm of Allen & Overy was one such as I have just described, there should be no doubt and the Petitioner does not contend otherwise.

62. Indeed, the evidence is clear in that regard. The Allen & Overy programme is recognized and accredited by the Solicitors Regulation Authority for England and Wales, the body that administers the Qualified Lawyers Transfer Test or examination (the "QLTT"), required to be taken by overseas lawyers seeking to become qualified to practice as solicitors.

63. As the 1st Respondent explains in her First Affidavit, the QLTT programme imposed a prerequisite of two years post-qualification experience in the practice of law in a common law jurisdiction, at least one year of which must have been gained by practising the law of England and Wales.

64. In order to gain that practical experience, she managed to secure a position with Allen & Overy as an associate training in their International Capital Markets Group, engaged in commercial work which she considered would most benefit her upon her return to seek employment in Grand Cayman. Allen & Overy obtained a work permit for her and she commenced employment with them on 1st October 2006. In that position she did not sign any documentation or legal opinions on behalf of the Firm – not being fully qualified and admitted as a Solicitor in England and Wales – but worked throughout under the supervision of an Allen & Overy partner.

65. Being Caymanian and as such also a British Overseas Territories citizen, she exercised her entitlement to a United Kingdom passport in May 2007, so that Allen & Overy would not be required to obtain a further work permit for her.

66. There is evidence in the form of an Allen & Overy Training History issued on the letterhead of that firm's Global Training Division that records in detail, the intensive and specialized training the 1st Respondent undertook at the firm during the period 1st October 2006 to 31st July 2009.

67. The programme was summarized by Sir Jeffrey Jowell in the course of arguments by reference to the Training History as follows:

- 115 hours of instructions;
- 68 formal classes;
- 48 formal lectures;
- 2 seminars; and
- 10 tutorials

68. Completion of this instructional course of training and other practical experience was certified by Allen & Overy Global Training Division to the Solicitors' Regulation Authority by letter from Allen & Overy (and one from Blake, Cassells & Graydon as to the training the 1st Respondent had undertaken with that firm in Toronto) and these were accredited by the Authority as acceptable for allowing her to sit the Professional Conduct and Associates Examination which, if passed, would make her eligible to be admitted as a solicitor for England and Wales.

69. Based on that certification by the Authority, she was allowed to register for the final QLTT examination with the College of Law for England and Wales. She enrolled with the College of Law on 23 February 2009 in a course of study for preparation for

the examination. She wrote the QLTT examination on 29th April 2009 and was later notified on 8th June 2009 that she had passed.

70. As she attested in her affidavit and evidence in court, at this point having achieved her goal of gaining specialized training and qualification to be admitted as a solicitor, she considered that as her intention was to return to practice law in Cayman, there was little to be gained by obtaining formal admission to the Rolls as a solicitor of England and Wales. She was concerned that this would mean having to pay yet another set of annual fees on top of those she was already committed to pay to remain on the Rolls of the Ontario and New York State Bars.

71. After a few more months spent winding up her tenure with Allen & Overy and a bit of travel around Europe, she returned home to the Cayman Islands permanently in July 2009.

72. Practitioners in the recognized professions are typically required to undertake intensive practical training before they might be finally admitted to practice.

73. In the case of the medical profession, this period of training, termed "internship", is usually undertaken at a hospital and under a training contract of employment as intern entered into for those purposes. For those purposes, it is generally recognized and accepted that the hospital becomes an educational establishment, an institution of learning.

74. Judicial notice can also be taken of the similarly well-established training programme for accountants under the auspices of the Institute of Chartered Accountants for England and Wales (the "ICAEW"). There, in addition to formal institutional academic training, candidates are required to enter into training contracts with professional firms which are accredited as Authorized Training Employers by the

ICAEW in much the same way that the Solicitors Regulation Authority accredits the training programmes of established firms like Allen & Overy.

75. This is an important part of the real and practical context in which subsection 61(3)(b) of the Constitution must be ascribed its meaning if Caymanians, who may be away from the Islands for the purposes of gaining practical or post-graduate professional education, are not to be disqualified from service in the Assembly by virtue of their absence in pursuit of that training.

76. Solicitors and barristers have for centuries received their practical training pre-requisite to the sitting of examinations or final admission to the Roll or certification for practice at the Bar, within solicitors' firms or barristers' chambers. In the case of solicitors, these engagements, formerly termed "articles" are now termed "training contracts" under the statute that governs the profession in England and Wales. The fact that a minimum salary is prescribed by the statute cannot be regarded as negating the nature of the arrangement as one entered into primarily for the purpose of practical education; nor can that fact negate the reality that for the purposes of the arrangement, the solicitor's firm becomes, in delivery of the practical training, recognized as an educational establishment.

77. It is in this sense that I am compelled to the conclusion that the 1st Respondent, while away from the Islands form March 2006 to October 2009, was in attendance as a student – in the sense of being a trainee solicitor – at an educational establishment; first for a few months at Blake Cassells in Toronto from March 2006 to July 2006 and then at Allen & Overy, London, from 1st October 2006 until 31st July 2009.

78. I am satisfied that those periods of absence from the Islands in excess of 400 days are therefore to be disregarded for the purposes of acknowledging her residence within

the Islands for the period of seven years immediately preceding her nomination for election on the 27th March 2013. During her absences abroad over those periods, Toronto then London were places where she resided but the Cayman Islands remained her domicile and ordinary place of residence and her absence from the Islands was primarily for the purposes of attendance at practical educational establishments coming within the meaning of section 61(3)(b) of the Constitution.

The Passport Issue

79. The "vexed question of allegiance" is so regarded because it brings into question a person's sense of undivided loyalty and suitability for elected office in the legislature of his or her country.

80. The determination of a person's allegiance for the purposes of election to the Cayman Legislative Assembly is not simply a matter of affirmation of one's subjective sense of undivided loyalty.

81. The requirement, expressed as a disqualifying factor where it is not satisfied, is one that has a long established history in British constitutional law going back to the Act of Settlement 1701[14] and even before then, as it was developed and recognized at common law[15].

82. The recognized rationale for this ground of disqualification is the avoidance of an actual or perceived split of allegiance or divided loyalty on the part of members of parliament.[16]

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[14] Section 3 (among other things) disqualified those born outside the Kingdoms of England, Scotland and Ireland and the Dominions from holding office in the Privy Council or the Parliament, and from holding any office of trust under the Crown.

[15] Erskine May: Parliamentary Practice, 22nd Ed. Butterworths, p.40.

[16] See Carney, Gerrard, "Foreign Allegiance: A vexed ground of Parliamentary Disqualification (1999) 11(2) Bond Law Review 245.

83. The provision exists to ensure that members of the Legislative Assembly do not have dual allegiance and will not be subject to influence from any foreign government which could be inimical to the interests of the Cayman Islands.

84. The provision, which has its statutory origins in section 3 of the Act of Settlement, has filtered down into the written constitutions of the former Dominions and Colonies of Britain, although not always in identical wording[17].

85. Despite its antiquity, it is clear that the provision remains of crucial importance in the modern world to the preservation of the integrity of the political system and so it is that it is maintained in the highest legislative form in the Constitution itself.

86. However, despite its history, antiquity and importance, the meaning of the expression "*under any acknowledgement of allegiance, obedience or adherence to a foreign power*", remains unsettled.

87. A number of courts around the Commonwealth of Nations have grappled with the subject but each has done so within the particular context of local constitutional provisions and having regard, of course, to the particular circumstances of the case presented.

88. I examined several of these cases for the purpose of extracting from them such learning as I consider might appropriately be brought to bear upon the present task of the construction of the provision as it appears in the context of the Cayman Islands Constitution.

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[17] An important variation from the point of view of case precedent and so, to be noted for the purpose of analysis of the Australian cases on this issue; appears under section 44(i) of the Australian Commonwealth Constitution which more widely disqualifies a candidate from election to the Commonwealth Parliament who is:

> "(i)... under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject of a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power."

89. The most authoritative of the cases, the judgment of the House of Lords in ***Joyce v DPP***[18] and that which is sometimes cited in the modern Commonwealth cases dealing with the similar constitutional provisions, does not deal with the expression "*under any acknowledgement of allegiance, obedience or adherence*" at all. The case makes no reference to this provision derived from the Act of Settlement but rather turned upon the question whether there was jurisdiction to try an alien subject, Joyce, for treason committed by him while he was abroad in Germany.

90. The allegiance which he was regarded by the Court as owing to the British Crown, flowed from his having obtained a British Passport by misrepresenting his real nationality; by having travelled to mainland Europe on the passport and by having remained even while abroad in Germany, under the protection of the Crown which the passport ostensibly provided him, during the currency of the passport. Thus, by virtue of having obtained the British passport, although not a British subject and so not owing natural allegiance to Britain, because he continued to hold the passport he was deemed to continue to owe allegiance even while engaging in his treasonous broadcasts of propaganda from Germany.

91. As the House of Lords itself defined the question before it in ***Joyce v DPP*** (at p. 364):

> *"...it is clear that the question for your Lordship's determination is whether an alien who has been resident within the realm can be held guilty and convicted in this country for high treason in respect of acts committed by him outside the realm."*

[18] [1946] AC 347: the case of the infamous "Lord Haw Haw" who became so known from his broadcasts of propaganda from Germany during World War II aimed at undermining the British war effort.

92. Joyce was, in reality, an American of Irish ancestry and it is important to a proper understanding of his case, to recognize the public policy import of the decision taken in the immediate aftermath of World War II. It was a decision by which the jurisdiction of the court was extended beyond its territorial limits for a crime committed by Joyce in Germany and in breach of the Treason Act of 1351 which declared the common law offence of treason as actionable, whether committed against the King "within the realm or elsewhere." The British courts invoked its "Protective Principle of jurisdiction,"[19] by holding that an alien owing allegiance to the Crown can be tried by the British Courts for the crime of treason committed abroad. The House of Lords stated that no principle of international law demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary, a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws (at page 372).

93. Thus, the real principle to be derived from ***Joyce v DPP*** is very different from that for which the words of section 62(1)(a) of the Cayman Constitution stand. The principle decided by the House of Lords was that by virtue of his application for and the grant of a British passport, although an alien, Joyce was deemed to owe allegiance to the British Crown. This on the basis that the passport afforded him the protection of the

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[19] As it has come to be described in the academic treatises: See for example *An Introduction to the Public International Law* by S.K. Verma: Amazon.co.uk. See also *The Oxford Companion to International Criminal Justice* by Antonio Cassesse, Oxford University Press, at p. 474: where it is explained that under the Protective Principle of Jurisdiction at Public International Law, a state is entitled to exercise jurisdiction over aliens abroad when it is necessary to protect its security or other vital interests. Under this principle both the territoriality and nationality principle are absent. The protective principle is deemed necessary because the alien acting abroad, in a manner detrimental to a state's interests, may not be acting contrary to the law of the state where he is. Thus, International Law allows a state to act in order to protect itself.
Joyce v DPP (above) is cited in the texts as the leading British case; ***US v Yousef***, 327 F. 3d 56 (2nd Circuit 2002) dealing with terrorism is cited as a leading American case and the ***Eichmann*** case is also cited, dealing with the Israeli Courts' conviction of that Nazi war criminal for war crimes and genocide.

Crown to which he otherwise would not have been entitled and in return the Crown demanded his allegiance during the currency of the passport. His treasonous acts committed while he held a valid British passport made him liable for prosecution despite his status as an alien and despite having been committed abroad in Germany.

94. Thus properly understood, ***Joyce v DPP*** is not authority that defines the nature of a passport as being an acknowledgement of allegiance when it is issued to and used by someone who is already a citizen and so already owes natural allegiance to the state that issued the passport. ***Joyce v DPP*** is no authority for the proposition that such a citizen is placed under an acknowledgement of allegiance by virtue of the passport.

95. Yet, that is the real nature of the passport issue as it is presented in this case. The question before me may perhaps more pertinently be framed thus: "*Is the 1st Respondent, who became a United States citizen by virtue of her birth and so owes a natural allegiance to that country,*[20] *a natural allegiance which is tolerated by section 61(2)(b) of the Cayman Islands Constitution, to be regarded as being under a further acknowledgement of allegiance of a kind not to be tolerated, on account of her having obtained a United States passport*?"

96. While ***Joyce v DPP*** was heavily relied upon by Mr. Dabdoub for his proposition that a passport operates as an acknowledgement of allegiance, passages from it were also heavily relied upon by Sir Jeffrey Jowell for the contrary proposition; which is that a passport issued to a citizen who already owes allegiance, serves only as a voucher of citizenship and as a means of identification.

[20] A proposition of principle recognized in ***Joyce v DPP*** itself at P.366: an allegiance which the natural born citizen "cannot at common law at any time cast off": ibid.

97. The relevant passages, appearing in the judgment of Lord Jowitt, LC given on behalf of the Court, require being set out in full [at pp369-370):

> *"The material facts are these: that being for long resident here and owing allegiance he [Joyce] applied for and obtained a passport and leaving the realm, adhered to the King's enemies. It does not matter that he made false representation as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that when he first made the statement, he thought it was true. Of this there is no evidence. The essential fact is that he got the passport and I now examine its effect. The actual passport issued to the Appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord Alverstone C.J. in R v Brailsford [1905] 2 K.B. 730, 745:*
>
> > *"It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries.*
> >
> > *By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. <u>It is I</u>*

think, true that the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification.

But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign. The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad."[Emphases added.]

98. That passage underscores the real meaning and significance of the passport when issued to an alien such as Joyce was and identifies the significance of the kind of local allegiance he owed to the Crown while he was within the realm[21] – that which was

[21] Earlier also authoritatively recognized by the Privy Council in ***De Jager v The Attorney General for Natal [1907]*** 326 another case of treason where it was held that a resident alien within British Territory owes

extended beyond the shores of the realm by his use of the passport for travel abroad and by his reliance on it while abroad.

99. That kind of local allegiance is very distinct from the natural allegiance owed by a British subject and which is owed irrespective of whether or not he or she obtains a passport.

100. It is, for that matter, also distinct from the kind of allegiance that arises from the acquisition of citizenship by naturalization, a process that typically involves taking an oath or declaration of allegiance and so becoming "under an acknowledgement of allegiance," which then affords the reciprocal protection of the Crown.

101. Of those three types of allegiance – local, natural and acquired (that is, declared) – the present case involves a subject who owes natural allegiance by virtue of her birth in a foreign state and it is the meaning and effect of a passport issued to her by that state that arises for consideration now.

102. So far as ***Joyce v DPP*** is of persuasive authority on this subject it is of limited applicability. As discerned from the words in emphasis above, the only passage that is directly relevant, I repeat for emphasis, states:

> *" ...the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification."*

103. I will return to consider the implications of that passage. For now and for the sake of completeness, a further passage form Lord Jowitt's judgment in ***Joyce v DPP*** (at pp370-371) helps to further explain how a passport is generally to be regarded but, as

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allegiance to the Crown, and if he assists invaders during the absence of State forces for strategical or other reasons he is rightly convicted of high treason.

I read it, only serves to confirm that in the hands of someone who is already a citizen, a passport operates essentially as a voucher or "outward title" of citizenship and as a means of identification:

> *"To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges. A well known writer in international law has said (see Oppenheim, International Law 5th Ed. Vol. 1 p.546) that by a universally recognized customary rule of the law of nations, every state holds the right of protection over its citizens abroad. This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the state will exercise its rights lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document, the holder may demand from the state's representatives abroad and from the officials of foreign governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power."*

104. Nothing from these passages necessarily implies that a person who acquires a passport by virtue of citizenship becomes under an acknowledgement of allegiance, obedience or adherence simply by virtue of that acquisition. Rather, it is implicit from the passage that allegiance is already deemed naturally to be owed and acknowledged by virtue of citizenship. This is as the dictum from ***Joyce v DPP*** itself reaffirms, and for such a citizen, the passport is at best an "outward title of the rights" of citizenship. Moreover, for a citizen, no right to protection abroad is derived from a

passport as such. Protection is derived from the fact of being a citizen of the state that issues the passport and that protection is owed and given whether one has a passport or not. Protection is the reciprocal obligation owed to the citizen in return for the natural or acquired allegiance owed to the state. Thus, apart from being a voucher and means of identification for the citizen, a passport conveys no real legal significance and no rights or obligations are derived or flow from it that do not derive or flow from the fact of citizenship itself.

105. Reliance on ***Joyce v DPP*** as authority for the proposition that acquisition of a passport by a citizen who acquires it as an ordinary incident of citizenship is tantamount to an acknowledgement of foreign allegiance sufficient to disqualify a candidate, appears uniquely among all the cases reviewed, in the Jamaican case of ***Vaz v Dabdoub***[22].

106. In that case, while the courts did not expressly find that the Jamaican Constitution disqualified a candidate for election who holds United States citizenship, it was decided nonetheless that the United States passport possessed by Mr. Vaz placed him under an acknowledgement of allegiance, obedience or adherence to the United States, such as to disqualify him from being elected. The decision in ***Vaz v Dabdoub*** relied upon ***Joyce v DPP*** as well as Australian and Caribbean cases which I will come to examine below.

107. However, as the foregoing analysis of the decision in ***Joyce v DPP*** illustrates, the principle that it decided is rather more narrowly confined and did not pronounce upon

[22] See unreported judgment at First Instance in the Supreme Court: Claim No. 2007 HCV 03921, delivered on April 11 2008, per McCalla CJ at p.25; in the Court of Appeal C.A. 45/2008 and C.A. 47/2008, written judgment delivered on March 13 2009; per Panton P. at pp14 and 20; per Smith JA at pp48-40 and per Harrison JA at –73-74. Mr. Vaz held Jamaican citizenship as well as United States citizenship acquired at birth by descent through his mother. The Jamaican Constitution requires candidates for election to be Commonwealth citizens and makes no specific saving of other citizenships.

the nature of the allegiance owed by someone who is a citizen of the country whose passport he or she obtains.

108. A number of the Australian cases and two further Commonwealth Caribbean cases were relied upon by Mr. Dabdoub before me in support of his interpretation of the words in section 62(1)(a) of the Constitution. But none of them, on careful reading, supports the proposition that the mere acquisition or use of a foreign passport is tantamount to the disqualifying acknowledgement of allegiance, obedience or adherence to a foreign state or power of which section 62(1)(a) of the Constitution speaks.

109. I begin with the Australian cases, some of which are cited in the Commonwealth Caribbean cases as well. As already noted, the Australian Constitutional disqualification is more widely framed than section 62(1)(a) of the Cayman Islands Constitution and imposes three distinct bases for disqualification:

(i) A blanket disqualification of foreigners and those Australians who hold dual-citizenship;

(ii) A blanket disqualification of anyone under any acknowledgement of allegiance to a foreign state or power; and

(iii) a blanket disqualification of anyone who is entitled to the rights or privileges of a subject or a citizen of a foreign state or power.

110. And so, on the face of it the Australian provision would preclude anyone who may be entitled to the privileges such as a passport of a foreign citizenship, even if one is not separately regarded as being under an acknowledgement of allegiance by virtue of that entitlement.

111. Among the Australian cases cited, ***Sue v Hill***[23] is the only one that makes reference to a foreign passport as part of the factual matrix; but the case did not turn in any decisive way upon that fact. It was decided on the basis that Mrs. Hill, while an Australian citizen at the time of her nomination for election, remained a citizen of Britain – Britain being regarded by the majority of the Court as a foreign state or power. Mrs. Hill had continued to hold and travel on her British passport even after acquiring Australian citizenship until she obtained her Australian passport and although willing to renounce her British citizenship, no procedure recognizable under Australian law allowed her to do so before the date of her nomination for election. Not having managed to renounce before that date, she was found to be disqualified under the first tenet of section 44(i); that is: because of still being the subject of a foreign state or power, Britain. No reference was made to her United Kingdom passport as a factor in any of the decisions of the judges[24].

112. Accordingly, for the reason also that ***Sue v Hill*** was relied upon in ***Vaz v Dabdoub*** for the proposition that possession of a foreign passport is in and of itself a disqualifying factor[25], I am compelled, respectfully, to differ.

113. The other Australian cases cited in the arguments take the present discussion no further.

114. In ***Sykes v Cleary, Delacretaz and Kardamitsis***;[26] Cleary was held to be disqualified under section 44(iv) of the Australian Constitution because he continued to hold an

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[23] (1999) 199 CLR 462; [1999] HCA 30.

[24] Reference was made to the British passport only as part of the factual matrix in the case as stated by the Court of Appeal for decision by the High Court (at p.465) but no reference to it in the decisions of the majority or dissenting opinions of the High Court itself; respectively per Gleeson CJ, Gummow and Hayne JJ at 503; per Gaudron J at 525,529; per Kirby J at 557 and Callinan J at 572.

[25] See F.N. 18 above and per McCalla CJ at first instance at pp30-31; per Smith JA on appeal at pp50-51.

[26] (1992) 176 C.L.R. 77.

office for profit under the Crown in the teaching service of the State of Victoria at the time of his nomination for election[27].

115. The other two respondents Delacretaz and Kardamitsis, were held[28] to be disqualified under section 44(i) by virtue of its blanket intolerance of dual citizenship, because they had not taken appropriate steps to renounce their foreign citizenships at the time of nomination. Although naturalized Australians, they were both disqualified under section 44(i) because they remained subjects or citizens of a foreign state or power; Switzerland and Greece respectively.

116. Apart from in the case of Kardamitsis – where it is referenced simply in passing as part of the background matrix of fact[29] – no reference is made to the possession of a foreign passport and it was not at all mentioned as a disqualifying factor in the decision of the High Court.

117. The other Australian cases cited in the arguments before me arose from more idiosyncratic circumstances involving imaginative challenges to eligibility under the first part of section 44(i) of the Australian Constitution, that which disallows foreign allegiance. For various reasons section 44(i) was not fully considered by the High Court in those cases or insufficient argument or evidence was adduced by the petitioners[30]. At all events and as already mentioned, none of those cases turned upon

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[27] The equivalent disqualification of section 62(1)(b) of the Cayman Constitution

[28] By the majority per Mason CJ, Toohey J and McHugh J, at p108

[29] At bottom of p.104.

[30] ***Maloney v McEacharn*** (1904) (unreported) – upon the challenge that an Australian who served as an Honorary Consul to Japan was disqualified for being under an acknowledgement of foreign allegiance. The High Court appeared to have rejected the arguments – declaring the election void on the basis of postal vote irregularities while not referring to that section 44(i) argument.

Sarina v O'Connor (1946) (unreported); and ***Grittenden v Anderson***, Unreported Judgment of the High Court, 23 August 1950, noted in (1977) 5 1 ALJ 171; it was alleged that the 1st Respondents were Catholics under a foreign allegiance to the Pope. The 1946 petition was withdrawn. In relation to the 1956 petition, Fallager J

the question of possession of a foreign passport being regarded as placing the holder under an acknowledgement of allegiance, obedience or adherence.

118. Australian academic writers have analyzed the cases from the point of view of discerning what acts or formalities might operate to place a person under an acknowledgement of allegiance, obedience or adherence to a foreign state or power, within the meaning of section 44(i) of the Australian Constitution.

119. Only one of the number of treatises presented in the arguments before me, posited the view that possession of a foreign passport might serve to invoke disqualification under the section.[31]

120. This proposition was presented in earlier editions of this work by the authors Lumb and Moens with reference to ***Joyce v DPP*** (above) as authority for the proposition.[32] However, by the time of the Fifth Edition[33], ***Joyce v DPP*** is cited only by way of comparison and in the Sixth Edition, the case is no longer cited[34] for the proposition. Lumb and Moens in this edition posit, instead, that "*the (disqualifying) act must be one which clearly established allegiance to the foreign country*"; a proposition which,

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dismissed the argument on the basis that section 116 of the Australian Constitution precluded the imposition of a religious qualification for entering Parliament.

These foregoing summaries of cases are taken form "**Dual Citizenship; Foreign Allegiance and Section 44(ii) of the Australian Constitution** by Sara O'Brien, Background Paper, No. 29 Dept of Parliamentary Library, Canberra, December 1992.

Nile v Wood (1987 –88) 167 CLR 133: petitioner Nile argued, among other things, that Wood's public protest activities against ships of a friendly nation visiting Australia indicated allegiance, observance or adherence to a foreign power. It was held that section 44(i) related only to a person who had formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who had not withdrawn or revoked that acknowledgement.

[31]"**The Constitution of the Commonwealth of Australia Annotated**": by Lumb, RD and Moens G.A. Butterworths, Australia, Sixth Edition 2001. Another Australian writer; Gerard Carney appears to have adopted the earlier (but later disavowed) citation of ***Joyce v DPP*** by Lumb & Moens: **See Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification** [1997] Bond Law Rev. 16; (1999) 11(2) Bond Law Review 245

[32] Fourth Edition by R.D. Lumb, Butterworths, Australia 1986, page 69.

[33]Fifth Edition 1995, at page 97.

[34] FN. 26 above, at paragraphs 171-172

if correct as I consider it to be, would render the purely administrative process of obtaining a passport insufficient.

121. In the Trinidad and Tobago case of ***Chaitan v The Attorney General and Others***[35], the Court of Appeal grappled with a number of issues including the question whether two Trinidad and Tobago citizens had become disqualified for election to parliament by dint of having acquired foreign citizenships by naturalization – the first, Canadian citizenship and the second, United States citizenship.

122. The majority of the Court of Appeal decided that each respondent had become under such disqualification, first, as a matter of the interpretation of the plain words of the Constitution and (per Nelson JA as one of the majority) by reference to the judgment of Brennan J. in the Australian case of ***Sykes v Cleary*** (above) which decided the similar issue under section 44(i) of the Australian Constitution[36]. This was because, in the view of Nelson JA, the phrase "*under a declaration of allegiance to [a foreign] country*" as it appears in section 48(1)(a) of the Trinidad and Tobago Constitution, embraces the three categories identified in section 44(i) of the Australian Constitution and referred to by Brennan J. in ***Sykes v Cleary***.

123. Thus, in effect, he regarded the phrase in the Trinidad and Tobago Constitution as embracing even a situation where a person is entitled only to the rights or privileges of a subject or citizen of a foreign power, arguably including a passport.

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[35] Court of Appeal Trinidad and Tobago (unreported) 31 July 2011. In one of three very full judgments.

[36] Nelson JA held (at p173) that the disqualifying words in section 48(1)(a) of the Trinidad and Tobago Constitution (similar to section 62(1)(a) of Cayman's) covered the three categories of disqualification in section 44(i) of the Australian Constitution as identified by Brennan J in ***Cleary v Sykes:*** the first where, as a matter of fact, the person has acknowledged allegiance to a foreign power; the second covered persons who by reason of their status as subjects or citizens of a foreign power owe a duty of allegiance to that foreign power according to the law of the foreign power and the third related to those who, though not foreign nationals, are under the protection of a foreign power or enjoy its privileges as if they were subjects or citizens of the foreign power.

124. While that conclusion may be understandable in the context of the Trinidad and Tobago Constitution (which was construed as being as completely intolerant of foreign citizenship for qualification for election as the Australian section 44(i) was similarly construed to be); adopting that view to the interpretation of the Cayman Islands provisions in section 62(1)(a) of the Constitution, would produce an immediately incongruous result because of the saving of foreign citizenship acquired by birth expressly provided in section 61(2)(b) of the Cayman Constitution.

125. Assimilating that approach taken to construction is therefore not an approach I am able to adopt: it is plain that under the Cayman Islands Constitution there is no automatic disqualification simply on account of a foreign citizenship acquired by birth.

126. The case of ***Chaitan*** is further distinguishable on its facts as the case involved respondents who had placed themselves under oaths of allegiance respectively to Canada and the United States, in order to acquire their citizenships by naturalization and so were disqualified, in any event, for having done so voluntarily. By implying that they would have been disqualified in any event simply by virtue of their enjoyment of any of the privileges of the foreign citizenship, however acquired or however acknowledged, it appears that Nelson JA's delivery was at least to that extent, *obiter*.

127. Next, in the survey of the Commonwealth Caribbean cases, ***Baldwin Spencer v Yearwood and Others***[37] from the High Court of Justice of Antigua and Barbuda arises for consideration. In that case, Mr. Yearwood, who had acquired Canadian citizenship by naturalization, was found to be disqualified for appointment to the

[37] Civil Suit No. ANUHCV 2003/0139, written judgment delivered 23 June 2003, per Mitchell J.

Senate on the basis that he had "*by virtue of his own act*" placed himself under an "*acknowledgement of allegiance, obedience, or adherence*" to a foreign state, Canada. An attempt by Yearwood to renounce his Canadian citizenship had not been effective by the time of his appointment to the Senate and so his appointment was declared nullified and he was ordered to vacate his seat in the Senate of Antigua and Barbuda.

128. That case is, of course, immediately distinguishable from the case at bar: not even the Petitioner in this case before me contends that by having acquired United States citizenship by birth the 1st Respondent placed herself under an acknowledgement of allegiance to the United States.

129. The acknowledged and accepted implication of acquisition of citizenship by birth is that she does owe a natural allegiance to the United States but, unlike some of the other Constitutions I have reviewed in this judgment[38]; the Cayman Constitution expressly tolerates her owing that allegiance because it did not come about by "virtue of (her) own act."[39]

130. The true extent and meaning of this tolerance, when considered in light of the disqualification prescribed by section 62(1)(a) of the Constitution, is ultimately the issue which must be grappled with in the present case.

131. The last regional case to be considered is that most recently on the subject coming from the Supreme Court of the Turks and Caicos Islands in ***Selver v Smith, Missick and Others***[40].

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[38] Those of Australia and Trinidad and Tobago, for example.

[39] The Judgments in ***Dabdoub v Vaz*** regard the Jamaican Constitution as operating implicitly in the same way but as discussed below, the Cayman Constitution expressly saves foreign citizenship acquired by birth from being a disqualification for election.

[40] Petition No. CL 237/12, written judgment delivered on 9th January 2013.

132. The question in ***Selver v Smith*** was whether the respondent, a Dr. Smith, who was born in the Turks and Caicos but later migrated to the United States of America and there acquired citizenship by naturalization, had become disqualified for election to the House of Assembly of the Turks and Caicos Islands (the "TCI") having by "*virtue of his own act*"...become "*under an acknowledgment of allegiance...to a foreign state*".

133. Dr. Smith, although having returned to the TCI and taken the Oath of Allegiance to Her Majesty The Queen as Sovereign in the right of the TCI, continued nonetheless to hold and travel upon his United States passport. His evidence was that he felt that by having taken the Oath of Allegiance to the Queen, he had "*negated his allegiance to the United States*".

134. It was held[41] that his oath of allegiance to the Queen was clearly only a potentially expatriating act which was ineffective to renounce his United States citizenship. Further, that in any event, he acknowledged his allegiance to the United States when he travelled on his passport in July 2012, subsequent to the taking of the oath in the TCI. That he was for those reasons disqualified from being elected a member of the House of Assembly.

135. While the decision of the Court in that case clearly and, it seems to me correctly, turned on the fact that Dr. Smith had, by virtue of his act in acquiring a foreign citizenship by naturalization which he had not renounced, become disqualified for election; I am exercised by the further observation of the Court as to the effect of the use of his United States passport.

[41] Per Ramsay-Hale J. at paragraph 13

136. No authority is cited in the judgment for the latter proposition that the mere use of the passport effectively placed the subject under an acknowledgement of allegiance to the United States.

137. It seems the Learned Judge may have based her finding in that regard upon the evidence of the attorney described at paragraph 11 of her judgment as the "US expert on Immigration matters"; to the effect that *"while someone who had a US passport but never used it may not owe allegiance to the United States, a person who renewed or travelled on a US passport would".*

138. That is yet a further variation on the theme – one that distinguishes merely between the latent possession of a passport and the renewal and use of it. That seems an illogical and slight distinction on which to base an acknowledgement of allegiance for the purposes contemplated by the Constitution.

139. A somewhat different proposition was at the center of the debate between the two expert witnesses on United States law in this case before me and whether or not I might accept any proposition that turns upon the mere renewal, possession or use of a passport (the combined effect said in the present case to have operated to place the 1st Respondent under the disqualifying acknowledgement of allegiance); may depend on what I make of the experts' evidence on the subject of United States law.

Evidence of United States Law

140. Resort to evidence of United States law is appropriate where what is in issue are questions as to the incidences of United States citizenship.

141. Lord Cross of Chelsea in ***Oppenheimer v Cattermole***[42] stated the principle in these terms:

> *"Our law is, of course, familiar with the concept of dual nationality...and the English law which is to be applied in deciding whether or not Mr. Oppenheimer was a German national at the relevant time is not simply our municipal law but includes the rule which refers questions whether a man is a German national to the municipal law of Germany."*[43]

142. The question that engaged the experts before me may be framed as follows:

> *"Does the obtaining, possession or use of a United States passport operate as a matter of United States law, to place a person who obtained citizenship by virtue of birth under an acknowledgement of allegiance to the United States?*

143. The experts were surprisingly opposed on this question notwithstanding that one might expect the law to be clear on so mundane a matter.

144. Professor Cole's[44] opinion was, in summary, that neither the obtaining, possession nor use of a passport has the effect posited on behalf of the Petitioner. He explained

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[42] [1996] A.C. 249, at pp278-279.

[43] This statement of principle is also in keeping with International Law as declared by the International Court of Justice in ***Nottebohm's*** case ***Liechtenstein v Guatemala*** [1944] ICJ 13, declaring the doctrine of *"real and effective nationality" and which accords with Article 2 of the* ***Convention on Certain Questions Relating to the Conflict of Nationality Laws,*** *signed at The Hague, 12 April 1930, 179 League of Nations Treaty Services 89, at pp 99, 101. Article 2 provides: "Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that State."*

See also ***Sykes v Cleary*** *(above) per Brennan J at pp111-112 cf Gandron J at pp176-177: "a (domestic) court will not apply a foreign citizenship law which does not conform with established international norms or which involves gross violation of human rights.*

[44] The 1st Respondent's expert witness on U.S. Law. His credentials on United States Constitutional and Immigration law and his expertise were unchallenged. He is a professor of law at George Town University and a member in good standing of the bars of the Supreme Court of the United States and various other States Supreme Courts and municipal federal courts of appeal. He is a graduate of Yale University and Yale Law

that this is so because all citizens owe allegiance by virtue of citizenship; whether citizens seek passports or not, they owe the exact same allegiance to the United States as those who seek and obtain passports. Using a United States passport creates no additional allegiance or obligation beyond the allegiance that comes from being a United States citizen by birth. A passport is a normal right or incident of citizenship under United States law. Citizenship is a constitutional right if you are born in the United States and the right to a passport as an incident of citizenship cannot be denied except for national security reasons or by reference to a set of specified disqualifying criminal acts that an applicant might have engaged in.

145. As Professor Cole went on further to explain; that in applying for or renewing a United States passport, a citizen must not be required to prove or acknowledge allegiance to the United States. One could in fact harbour a sense of animosity towards the United States or its Government of the day but would nonetheless be entitled to be a citizen if born in the United States and to a passport as an entitlement of citizenship as well.

146. He said that it was, however, not always the case that one was not required to acknowledge allegiance in order to get a United States passport. For more than a hundred years before the decision in the seminal case of ***Woodward v Roger*** in 1972[45], in order to get a passport a citizen, even one born in the United States, had to profess allegiance to the United States. That practice of the United States Government was successfully challenged in the ***Woodward*** case where the practice

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School, has written several books and articles on U.S. Constitutional law and has appeared in several cases before the U.S. Supreme Court.

[45]United States District Court for the District of Colombia, Civ. A. No. 42-71, June 26, 1972; 16 Fed. R. Serv. 2d (Callaghan) 241.

was decided by the Washington District Court to be both unlawful and unconstitutional. The respondent Secretary of State Roger appealed against the decision of the District Court to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the District Court's judgment and there was no further appeal to the United States Supreme Court by Secretary of State Roger. The ***Woodward v Roger*** decision has therefore come to be regarded as settled law ever since and accepted and applied as such by the United States Government. Accordingly, since 1972, there is no requirement that one who is already a citizen must acknowledge any allegiance to the United States in order to get a passport.

147. Reference was however made to the statement of facts to which applicants for United States passports must declare upon the face of the application forms (whether for issuance or renewal of passports).

148. Professor Cole sought to distinguish between that form of declaration and the form of oath of allegiance that appertained and appeared on the form of application until 1972. He opined that the declaration is nothing more than a statement of a set of facts about things which the applicant has not done in the past which, if done, could operate as expatriating acts and so disentitle one to the issuance of a United States passport. The statement does not include and may not include – given the state of the law since ***Woodward v Roger*** – any form of oath or acknowledgement of allegiance. This, I am compelled to observe, is obvious from the wording of the form of declaration itself as it appears to me[46].

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46 "I have not, since acquiring United States citizenship, been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; accepted or performed the duties of any office, post or employment under the government of a foreign state or political subdivision thereof; made a formal renunciation of nationality either in the United States, or before a diplomatic or consular officer of the United

149. For instance, the statement that "*I have not, since acquiring United States citizenship, been naturalized as a citizen of a foreign state*"; can in no sense be read as an affirmative acknowledgement of allegiance to the United States but is an assertion of fact that one has not done that thing that could be regarded as an expatriating act.

150. While such acts may be regarded as antithetical to one's allegiance owed to the United States as a citizen, by denying that they have been committed one is doing no more, it seems to me, than confirming the status quo – the ongoing right to citizenship. That entitlement, as Professor Cole explained, is not dependent upon one, in this context, being required to take an oath or otherwise pledge allegiance. It would appear therefore to be misconceived to regard the declaration required by the passport application form as imposing such a requirement or as placing one under an acknowledgement of allegiance, obedience or adherence – the very thing which, as ***Woodward v Roger*** decided, would be in breach of one's constitutional right.

151. That that is the state of the law in the United States since the ***Woodward*** case was decided, is also apparent from the plain reading of the case itself, as being entirely in keeping with Professor Cole's understanding of it.

152. The oath which was required of the plaintiffs in ***Woodward v Roger*** and declared to be unconstitutional, was in this form:

> *"...I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and*

States or in a foreign state; or been convicted by a court or court martial of competent jurisdiction of committing any act of treason against or attempting by force or overthrow, or bearing arms against the United States, or conspiring to overthrow, put down, or to destroy by force, the Government of the United States."

that I take this obligation freely, without any mental reservations, or purpose of evasion: So help me God."

153. That oath was required by the federal officials purportedly in reliance on Chapter 22 USCS section 212 which reads:

> *"No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."*

154. As the transcript of the judgment reports, Mr. Woodward and others as the passport applicants, brought the action seeking declaratory judgments against the federal officials by which they challenged the constitutionality of Chapter 22 USCS section 212 itself, because it purported to require all passport applicants to swear allegiance to the United States in order to receive a passport. The conclusion of the court, that which has remained the law in the United States ever since, is clear. It states:

> *"The requirement of the Secretary of State and the Director of Passport Office that United States citizens swear to or affirm the contents of an Oath of Allegiance as a prerequisite to the issuance of a United States passport is unauthorized by law and violates rights protected by the Fifth Amendment of the United States Constitution"*[47].

155. And as to how the Fifth Amendment right was infringed, the court further explained[48]in these terms:

> *"Indeed, the only result of requiring execution of an Oath as a prerequisite to foreign travel is to prohibit foreign travel to those persons who find a public affirmation of loyalty repugnant to their*

[47] At page 13 of 13.
[48] At paragraph 41, page 12 of 13.

integrity and conscience. No serious national purpose is served by singling out those people and curtailing their Fifth Amendment (freedom of movement) right to travel.

In short, given the necessity of passports for foreign travel, the mandatory requirement that all applicants for United States passports swear to or affirm an Oath of Allegiance is an unconstitutional abridgment of the Fifth Amendment right of our citizens to travel abroad."

156. Given the clarity and effect of the law as so declared in ***Woodward v Roger***, Professor Rowe's[49] contention that the form of declaration that has replaced the Oath of Allegiance on the passport application form is tantamount to the same thing, cannot be accepted. Acceptance of that contention would be tantamount to a recognition of the re-imposition of the acknowledgement of allegiance that so offended the sensibilities of the successful applicants in the ***Woodward*** case and all those who have obtained United States passports in the more than forty years since, as to the integrity of their Fifth Amendment rights and indeed, as to the integrity of their freedom of conscience not to have to publicly swear or affirm to thoughts or beliefs which they may not hold or wish to express[50].

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[49] The Petitioner's expert on United States law, whose expertise to testify on United States law was, like Professor Cole's, not challenged. He is an attorney-at-Law and member of the Florida Bar and The Federal General Bar of the Middle District of Florida. He is also admitted to the Bar of the Supreme Court of Jamaica as an attorney-at-law in that country. In his affidavit, he is described as Professor of Law at the University of Miami School of Law but at time of giving evidence described himself as an Adjunct Professor of that School of Law.

[50] Given the nebulous nature of an oath or affirmation, concerns for the First Amendment right by the Government delving into the applicant's thoughts and belief, even though the freedom to believe is "absolute"; were also engaged and were not lost upon the Court in ***Woodward v Rogers*** where that other absolute right, as defined in ***Cantwell v Connecticut, 310 U.S. 296, was*** also discussed (at paragraph 42).

157. As Professor Cole observed and as is apparent from a reading of it – the judgment of the District Court in ***Woodward v Roger*** is a well reasoned and well written exposition of United States law. It reviews extensively the earlier case law on the subject and a number of the cases discussed in the judgment itself were cited and discussed before me by the expert witnesses. I need not traverse them all here[51].

158. Two of them were however of some immediate relevance to the present discussion. In ***Aptheker v Secretary of State***[52], the United States Supreme Court rejected the Government's contentions that the applicant's passport could be revoked on national security grounds because he was a member of a communist party. The Supreme Court reaffirmed the principle that the right to a passport is not to be restricted by the unduly restrictive policies of Government as "*The right to travel is a part of the liberty of which the citizen cannot be deprived without due process under the Fifth Amendment. Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of American heritage. Travel abroad, like travel within the country, may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in the American scheme of values*".

159. No one can sensibly argue that freedom of movement is any less so in the British or Caymanian sense of value; or that the enjoyment of that freedom may be any more

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[51] They include: ***Trop v Dulles, Secretary of State et al 356 U.S. 8 ,*** *(citizenship not a license that expired upon misbehavior – there desertion from the army while abroad);* ***Afroyim v Rusk, Secretary of State 387 United States. 253; Kent v Dulles*** *357 U.S. 116* (right to travel is a right of U.S. citizenship that cannot be deprived without due process of law); ***Kawakita v United States:*** **343 U.S. 717:** The mere fact that a U.S. citizen asserts the right of citizenship of another state (Japan) did not mean that he renounced his right to U.S. citizenship and so remained liable for treason committed by his abuse of U.S. prisoners of war in Japan during the war.

[52] 378 U.S. 500; ***Blumen v Haft 78 F.2d 833*** – where it was held, simply, that the tendering of a Polish passport by the applicant when he entered the United States was proof of his allegiance to the Polish government and a declaration or admission of the fact that he is a subject of Poland. The case did not address the question whether the passport placed the applicant under an acknowledgement of allegiance.

circumscribed by the requirement of any affirmation or acknowledgement of allegiance, obedience or adherence, under any existing provision of Cayman or British law.[53]

160. The 1st Respondent testified in these proceedings that as a United States citizen she is required to use her United States passport when traversing the frontiers of that country. A requirement that she surrenders the passport would therefore be tantamount to a requirement that she surrenders her United States citizenship acquired at birth, notwithstanding that her entitlement to that citizenship is preserved or saved by section 61(2)(b) of the Cayman Islands Constitution.

161. The United States Supreme Court case of ***Haig v Agee***, ***Secretary of State***[54] is also instructive for the definition it provides from the Supreme Court of what a passport really is in law:

> *"A passport is a document, which from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document by which the bearer is recognized in foreign countries, as an American citizen and which by usage and the law of nations, is received as evidence of the fact."*[55]

162. That fact of citizenship does involve of course – as the court there also proceeded to explain – the passport as a travel control document being both proof of identity as a citizen and proof of allegiance to the United States – the kind of implicit natural

[53] See footnote 57 below.
[54] 453 U.S. 280
[55] At Holding 6 p2 of 22

allegiance that citizenship itself imbues and by which the passport reciprocally implies that the Government vouches for the bearer and for his conduct.[56]

163. That definition of a passport, is entirely in keeping with the position at British and Cayman law; under neither of which is a citizen required to subscribe to any oath or affirmation of allegiance in order to obtain one.[57]

The Section 62(1)(a) disqualification

164. With the foregoing survey of the American and Commonwealth case law in mind, I must now turn to the specifics of the Cayman disqualification provision. As has been discussed, the disqualification for election to the Assembly stipulated in section 62(1)(a) has a distinct legislative and constitutional history going back to the Act of Settlement 1701 and even before that, at common law.

165. In seeking to discern the true meaning of the words "*under the acknowledgement of allegiance, obedience or adherence*" as they appear in the modern context of the Cayman Islands Constitution, one must avoid an interpretation that would leave them shorn of their true historical and still current intent and purpose; that purpose which is to ensure that legislators owe their undivided loyalties to the Cayman Islands.

166. The intention of the words is not to ensure that those legislators who may happen to hold other citizenship by birth, do not enjoy any of the rights or privileges which are the ordinary incidents of such citizenship. Had that been the intention of the framers of the Constitution, they could readily have adopted words like those in the wider disqualification provision of section 44(i) the Australian Constitution which also

[56] At Holding 7 p2 of 22.

[57] See respectively the British Nationality Act 1981 and the Cayman Islands Passport Law and the prescribed application forms ; and see definition of "passport" adopted in ***Joyce v DPP*** (above at paragraph 102).

disqualifies those candidates who become "*entitled to the right, privileges or immunities of a subject of any foreign state or power*".

167. Distinctly different from that being the case here, ever since the constitutional amendment in 1987[58], the Caymanian people have been tolerant of the notion that their elected representatives may hold foreign citizenship provided it is acquired only by birth and so not voluntarily and provided, and as section 62(1)(a) is meant to ensure, they do not by their own acts come to acknowledge allegiance, obedience or adherence to the foreign state or power of that other citizenship.

168. Coming under that kind of acknowledgement, as the case law discusses, is something that one could do in a number of different and distinctly recognizable ways, all carrying the unmistakable mark of allegiance, obedience or adherence and more significantly and substantively so than the mere acquisition or use of a passport might imply, being itself merely a normal incident of the relationship of citizen and state.

169. As the textbook writer opined:[59] this ground of disqualification should require a clear acknowledgement – one which would serve in the present context to disqualify those persons, who though Caymanians, have clearly transferred their loyalty to a foreign country.

170. As Sir Jeffrey Jowell submitted, at common law, there is a clear distinction between owing allegiance (which as discussed above in the context of treason, every subject and every resident alien is deemed to do), and acknowledging allegiance (which is the subject of a specific oath taken for instance by members of Parliament, judges and certain public officials, but not required of citizens in the ordinary course of life). As

[58] S.I. 1987 No. 2199, The Cayman Islands (Constitution) (Amendment) Order, 1987: Section 2, replacing section 18 of the 1972 Constitution as earlier amended by Amendment Order of 1984 (S.I. 1984 no. 126) Caribbean and North American Territories.
[59] Lumb and Moen op. cit. p69.

is clear from the evidence of Professor Cole, the same distinction exists in United States law. It is a distinction that is also obvious as a matter of language.

171. Acknowledgement of a foreign allegiance could be found to be the case, for example, where a candidate has voluntarily, by naturalization, taken on foreign citizenship; or enters the armed forces of a foreign state under oath or affirmation required for those purposes; or assumes an office of a foreign state that requires similar formality.

172. Those are not exhaustive examples. Nor is it to be suggested that the disqualification takes effect only where there is some formality employed for becoming under an acknowledgement of allegiance, obedience or adherence to foreign power or state.

173. It may well be that the familiar words "obedience" and "adherence" are meant to cover those circumstances which do not involve formalities and where one might nonetheless clearly demonstrate a transfer of loyalty to a foreign state or power. History has shown, for example, that one might find an acknowledgement of "adherence" in the actions of those persons who give aid and comfort to the enemies of the Crown.

174. But no one could sensibly suggest that any such concerns arise from the mere holding of a foreign passport acquired openly and publicly as an ordinary incident or privilege of a foreign citizenship.

175. The word "obedience" although apparently not yet considered in case law, has an ordinary English meaning: compliance with the commands of another.

176. The word "adherence", as Sir Jeffrey Jowell submits, has a particular legal meaning in the context of adherence to a foreign power. In ***R v Casement***[60], the English Court

[60] [1917] 1 L.B. 98 at 108 and 141-142.

of Criminal Appeals relied on Lord Coke's definition of "adhering to the King's enemies"; when the Court said:

> *"This is here explained, viz. in giving aid and comfort to the King's enemies within the realms or without: delivery or surrender of the King's castles or fortes by the King's captains thereof to the King's enemies within the realm or without for reward, etc."*

177. There is no suggestion in this case, nor could there properly have been, that the 1st is under any acknowledgement of any relationship that could fall within the foregoing meaning of "obedience" or "adherence". In reality, the challenge has therefore been all about whether the renewal and use of her United States passport fall within the meaning of "acknowledgement of allegiance".

178. I return to the consideration that the framers of the Cayman Islands Constitution have retained in the current section 61(2)(b) the saving of foreign citizenship acquired by birth – a saving that was first carved out in the 1987 Amendment, for the purposes of qualification for election to the Legislative Assembly.

179. In so doing, they must now be taken as wishing to reflect the equality and freedom of all Caymanians including those born in other countries, to participate in the fullest expression of political life even when this is balanced against the needs of the society to have competent and loyal representatives in its Legislative Assembly.

180. This "carve out" as it was described by the Attorney General during the proceedings, was created notwithstanding the history that earlier in the 1970s involved a successful

election challenge to the qualification of Mr. James Manoah Bodden on account of his unrenounced naturalized United States citizenship[61].

181. With such a controversial frame of reference, one might expect that were the possession and use of a United States passport to be in and of itself regarded as a sign of split allegiance and as a disqualifying factor by the Caymanian people, words like those already identified from the Australian Constitution[62]would have been adopted. In that event, acceptance of a United States passport as an entitlement to a right or privilege of a citizen of a foreign power would have expressly operated as a disqualification.

182. In the present state of the Cayman Islands Constitution, the Petitioners proposed interpretation of section 62(1)(a) would, despite the express saving provision of section 61(2)(b), require this court to find that while seeking to protect the public from individuals who might genuinely be unable to serve the Cayman Islands competently and honestly without divided allegiances, the framers of the Constitution also, incongruously, decided to prohibit anyone from serving who had made use of a purely administrative benefit of a foreign citizenship to which they are to be freely entitled and in return for which they had to express no promises of allegiance and so be taken as acknowledging none in return.

183. From the exhaustive examination of the case law in the arguments and its analysis in this judgment, no rule of law or precedent has emerged to bind or persuade me to the conclusion, that by renewing or using her United States passport, it can be suggested that the 1st Respondent had been placed under and remained under an

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[61] Unreported decision of the Grand Court discussed in ***Solomon v Scotland and Seymour*** (above).

[62] Section 44(ii): "*...is a subject or a citizen or entitled to the right or privileges of a subject or a citizen of a foreign power".*

acknowledgement of allegiance to the United States as a foreign state, at the date of her nomination or election.

184. Those disqualifying words of the Constitution, operating as they would, not only to deprive the 1st Respondent of her right to participate in the fullest expression of the political life of her country, but also to deprive the electorate of its clear choice of candidate must – as the Privy Council advised in ***R v Hughes***[63] – be construed strictly and in keeping with the particular objectives of the provision. The provisions in section 62 contain exceptions to the qualification for elected membership, by way of disqualifications. Where there is ambiguity or uncertainty in their meaning – as in this case where the notion of being under an acknowledgement of allegiance arises for construction – the principles of construction call for a strict and narrow interpretation. The construction to which I am led by the principles does not allow me to accede to the petition.

Conclusion

185. I am compelled to the conclusion that the 1st Respondent remained domiciled and ordinarily resident in the Cayman Islands while she also resided abroad for the purposes of obtaining her full professional qualifications and that the time so spent abroad must be disregarded by virtue of section 61(3) of the Constitution. I am also satisfied that the 1st Respondent, in renewing and using her United States passport as an ordinary incident of her United States citizenship acquired by birth and a citizenship she is allowed to keep by virtue of section 61(2)(b) of the Constitution, has not placed herself under any acknowledgement of allegiance, obedience or

[63] Above; at paragraphs 20 and 32.

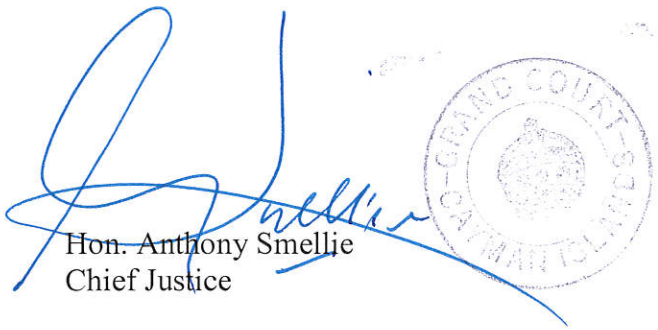
adherence to a foreign state or power, within the meaning of section 62(1)(a) of the Constitution.

186. The petition therefore fails on both grounds and the relief sought in it is refused.

Wasted votes: the need for a bye-election

187. It follows that this secondary issue does not arise for determination and so the declarations sought in that regard must also be refused.

188. The determination of the petition shall be certified by the Court the Governor accordingly and in keeping with Section 89(2) of the Election Law.



Hon. Anthony Smellie
Chief Justice

August 9, 2013