IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. G 60 OF 2017

BETWEEN	**THE SUPERVISOR OF ELECTIONS**	**APPLICANT**
AND	**ALRIC LINDSAY**	**RESPONDENT**

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 19th APRIL 2017 and 20th APRIL 2017

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

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

REASONS FOR RULING

Candidate's absences from the Island for more than 400 days during the 7-year period immediately preceding nomination day – whether such absences, if not expressly exempted under Section 61(3) of the Constitution, are invariably and automatically disqualifying.

1. In respect of the Respondent's eligibility to stand for election, the Supervisor of Elections ("the Applicant"), seeks declaratory relief from the Court in two respects:

   (i) as to whether the Respondent's absences totaling more than 400 days during the 7-year period immediately preceding nomination day, operated to make him ineligible to stand for election;

(ii) as to whether the Respondent met the requirement, as a person born outside the Islands, of having or having had a parent or grandparent who was born within the Islands.

Both questions of eligibility arise in respect of the requirements of Section 61 of the Cayman Islands Constitution Order 2009 (the "Constitution") which will be considered in detail below.

Background

2. On 28 March 2017 the Applicant through the Elections Office, received the form nominating the Respondent as a candidate for the Electoral District of George Town South in the 2017 General Elections.

3. The Applicant explains in his affidavit, filed in support of this application, that he had previously been made aware of the Respondent's absence from the Islands over the past years from telephone conversations he had with the Respondent in July 2016 regarding his qualification to be registered as an elector. While the requirements for registration as an elector and as a candidate are not exactly the same, in some respects not needing to be considered now, they are similar and it appears that it was acknowledged by the Applicant that the Respondent qualified as an elector. Nonetheless, upon receipt of the Respondent's nomination form, the Applicant recalled his telephonic conversations with the Respondent and called for his Travel History records from the Immigration Department. The Applicant noted from the Travel History that the Respondent had been absent from the Islands for 797 days within the 7-year period immediately preceding nomination day. This involved the literal totting up of the many arrivals into and departures from the Islands during those years, including the breaks of varying duration

from a few days to a few weeks at a time. The Applicant argues that the total absences of 797 days over 7 years (or 2557 days) justifies the bringing of this application because it suggests that the Respondent does not meet the requirements of section 61(1) of the Constitution where it provides (especially in subsection (1)(e)) as follows:

> "(1) *Subject to section 62, a person shall be qualified to be elected as a member of the Legislative Assembly if, and shall not be qualified to be so elected unless –*
>
> *(a) he or she is a Caymanian; and*
>
> *(b) he or she has attained the age of 21 years; and*
>
> *(c) he or she is, at the date of his or her nomination for election, domiciled and resident in the Cayman Islands; and*
>
> *(d) he or she is a qualified citizen; and either*
>
> *(e) he or she was born in the Cayman Islands or was born outside the Cayman Islands in the circumstances mentioned in subsection (2)(b), has resided in the Cayman Islands for a period of not less than seven years immediately preceding the date of his or her nomination for election and, subject to subsection (3), the number of days on which he or she was absent from the Cayman Islands in that period does not exceed 400.*

(2) *For the purposes of subsection (1)(d), a qualified citizen is a British Overseas Territories citizen by virtue of connection with the Cayman Islands, who either –*

(a) [not applicable here] ... or

(b) was born outside the Cayman Islands, has had at least one parent or grandparent who was born in the Cayman Islands and is Caymanian at the date of nomination (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.

(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."

4. In light of the background mentioned above, the first question raised by the Applicant is whether the Respondent's absences of more than 400 days (797 days) during the 7-year period immediately preceding nomination day, disqualify him under subsection (1)(f), the Respondent not being able to rely upon any of the exemptions of subsection (3).

5. The Applicant was also made aware that the Respondent was born outside the Islands and that his mother was not a Caymanian by birth. His mother having subsequent to his birth become married to a Caymanian and the Respondent adopted by them, the question whether his adoptive father was Caymanian by birth arose for consideration under subsection 61(2)(b); all in the context of whether the Respondent met the requirements of subsections 61(1)(e) and (2)(b) of the Constitution, as set out above.

6. By the time this matter came on for hearing, the Applicant was no longer concerned about this second question of eligibility, it having been demonstrated to his satisfaction that the Respondent's adoptive father was indeed a Caymanian, born within the Islands.

7. This then left the first as the only question to be addressed by this Court.

8. Having read the papers and heard the able arguments by counsel on both sides, I am satisfied that the first question - when viewed as it should in isolation as the only obstacle standing between the Respondent and his otherwise manifest entitlement to stand for election - was not grounded sufficiently in evidence to have justified an application to this Court for orders declaratory of the Respondent's ineligibility.

9. Having earlier expressed that conclusion ex tempore at the conclusion of the hearing, I now give the reasons.

10. My considered view is that in order that absences for more than 400 days may be regarded as operating to disqualify, the absences must always be assessed and carefully considered in the particular constitutional context in which this disqualifying criterion appears. Viewed in that way, one sees that it is meant to address a particular concern; namely: that a candidate who was born outside the Islands and so has come subsequently to establish his attachment and commitment to the Islands, has not brought that attachment and commitment into doubt by his pronounced absences of more than 400 days within the specified number of 7 years immediately preceding his nomination for election. As was explained by this court in *Hewitt v Rivers and others*[1], the objective of subsection 61(2)(b) and (3) 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.*

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. Recognising that, in this 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."

[1] 2013 (2) CILR 262, at 279 – 280, paras 55 to 57

11. Accordingly, a purposive approach must be taken to the construction of the words so as to give due regard to the objectives of the constitutional provisions as recognized above.

12. I therefore emphasize the need for there to be real concern about the disqualifying effect of the absences especially where like here, the candidate has lived practically all his life within the Islands and is otherwise fully qualified.

13. It must also be noted that this requirement of physical presence appears as the last of a veritable taxonomy of criteria, all of which may be satisfied and a candidate deemed eligible but for the perceived disqualifying effect of the impugned absences. The absences of more than 400 days must therefore be of such kind as to appear reasonably to have brought the required attachment and commitment to the Islands into doubt.

14. Here, by contrast, when one examines the Respondent's Travel History relied upon by the Applicant, what immediately appears is a consistent pattern of the Respondent travelling regularly to and from the Islands during the period in question.

15. That by itself, far from showing a pronounced pattern of absence such as to bring into doubt his attachment and commitment to the Islands, can be regarded as being positively demonstrative in those regards. On top of that, the most cursory of enquiries by the Applicant would have revealed what the evidence has established in this case. This is that the Respondent maintained a home here throughout and had established and maintained a practice of directorship and fund management services in which he continued to be engaged, even while away from the Islands. The Respondent is qualified both as a lawyer and as an accountant.

16. In a letter to the Respondent of March 30 2017, the Applicant had raised the issue of the Respondent's absences in the following terms: "*regarding your*

qualification/disqualification: Absence from the Jurisdiction: A review of your immigration travel history shows that you have been absent from the jurisdiction for a period of approximately 797 days within a 7 year period immediately prior to Nomination Day. In your case, section 61(1)(f) of (the) Schedule to the Constitution requires that absence from the Islands must not exceed 400 days within 7 years immediately preceding the date of your nomination for election. The Elections Office has no evidence that you fall within the exemptions listed in subsection (3) for the period of absence."

17. Thus it appears that the Applicant having formed and expressed the view that the Respondent did not meet the requirements of section 61(1)(f) of the Constitution, sought to put the burden of proof upon the Respondent to provide evidence that he came within the exemptions of subsection (3)[2].

18. In his affidavit in response, the Respondent sought to address this concern. He explained that the primary reason for his periods of absence abroad was his assiduous attempt to become fluent in the Spanish language in order to be able to promote his fund management service throughout Latin America. He explained that he had at first attended at the Intercultural Centre of Languages in Costa Rica where he acquired the foundation, this was then followed by several intensive immersions in countries where the Spanish language is widely spoken, including Honduras and Belize. He had been advised and understood that after reaching an intermediate-to-advanced level of speaking, one can only truly become fluent in a foreign language if one commits to a physical presence for

[2] While it may otherwise have been inappropriate for the Applicant to place the evidential burden upon a candidate who appears *prima facie* to be qualified, the Applicant's letter to the Respondent was sent following the telephone call from the Respondent in which the Respondent had himself raised the question of his absences, wondering whether they would be of concern to the Applicant. As to the reversal of the evidential burden more generally: see *Supervisor of Elections v Candidate X* Unreported judgment of this Court, 18th April 2017 at pp 9 – 13.

an extended period and that it was also important to obtain knowledge of customs and culture. Further, that while on these sojourns abroad, he continued with formal training through an overseas study program in Spanish offered by the La Pontificia Universidad Catolica Madre y Maestra of the Dominican Republic.

19. The Respondent was emphatic that the enhancement of his linguistic skills was more than just a passing interest but was essential to his plans for the development of his professional business. As explained in paragraph 9 of his affidavit:

> "*This intimate knowledge and fluency in the Spanish language was central to my business and career development because I wished to extend my business interests into Latin America and to communicate in the language of prospective clients.*"

20. He acknowledged that while only some 89 days (7 May 2010 – 4 August 2010) involved his attendance at an educational establishment[3] (the Dominican University), the other various periods of absence during the relevant 7-year period (which he itemizes at paragraph 10 of his affidavit) were times "*during which I also continued to conduct business activities in the Cayman Islands (and) were attributable to my education and advanced studies in the Spanish language.*"

21. This evidence relating to the reasons for the Respondent's absences abroad and to his ongoing conduct of his professional business within the Islands even while abroad, was unrefuted. Accordingly, while only the aforementioned 89 days qualify for exemption within the expressed rubric of section 61(3) of the Constitution, it must be acknowledged that the beneficial objectives pursued by the Respondent during his absences abroad are

[3] Such as would qualify for exemption under Section 61(3) of the Constitution.

of a kind with those for which section 61(3) would grant exemption. And it is therefore significant that the language employed by section 61(3) is inclusive, not exclusive.

I am therefore convinced that the Constitution admits of a broader construction being taken to the question of absences as a disqualifying factor under Section 61(1)(e) and this approach would be only consistent with the approach taken by other legislative schemes which may be regarded as being in *pari materia* with the Constitution.

The concept of absences as a disqualification is not new. It has existed since the 1972 Constitution in a different form,[4] in the Immigration Law of the Islands[5] and in the British Nationality Act[6] for many years – all being legislative schemes which, as we see from Section 61 itself of the Constitution,[7] should be regarded as being in *pari materia*.

It will be seen from that legislative context and history that absence as a disqualifying factor has required of a very sparing and careful application.

Nothing about the inclusive wording of subsection 61(3) of the Constitution suggests that a different approach is required to the periods of absences which would operate here to disqualify an otherwise qualified candidate for election to the Legislative Assembly.

22. An unduly rigid approach which would involve the Supervisor of Elections calling for the travel history of every declared candidate who happened to have been born outside

[4] See section 18 where the requirement was expressed as one of residence in the Islands for a period or periods totaling not less than five years out of the seven years immediately preceding the date of nomination.

[5] See the definition of "legal and ordinary residence" in sections 2 and 22 of the 2015 Revision which in general terms, allow absences from the Islands "for the purposes of education, health or business". These provisions have been in the Immigration Law since at least 2003.

[6] Cf section 4 where a disqualifying period of 450 days' absence is prescribed for acquisition of British Dependent Territories citizenship but the Secretary of State (by subsection(4)) is given a discretion to waive that disqualification "in the special circumstances of any particular case".

[7] Section 61(1)(a) makes reference to the status of being Caymanian, a status defined by the Immigration Law. Section 61(1)(d) makes reference to the condition of being a qualified citizen, a condition defined by the British Overseas Territories Act 2002 which must itself be read for these purposes with the British Nationality Act 1981.

the Islands,[8] for an arithmetic tabulation of every day of absence from the Islands over the course of the 7 years preceding a nomination day, would be both an impracticable and unreasonable application of the broad language of the Constitution. Such an approach would also fail to heed the venerable advice given by Lord Wilberforce in *Minister of Home Affairs v Fisher*[9] that in striving for its correct construction, one should avoid "*the austerity of tabulated legalism*" that could deprive a constitutional provision of its true meaning.

23. It is a matter of common knowledge that Caymanians regularly travel to and from the Islands for work, business or leisure such that many days or even weeks or months of absences for such reasons will often occur without any discontinuity of one's ties or commitment to the Islands.

24. Even though all such absences may not be expressly exempted by subsection 61(3) of the Constitution, it would in my view, be absurd and inconsistent with the purposive aim of the Constitution as discussed above, to construe section 61(f) as regarding such absences for such reasons totalling more than 400 days, as automatically or invariably disqualifying.

25. Rather, in considering whether they affect a candidate's eligibility, it must be within the discretion given to the Supervisor of Elections by the Elections Law, and having due regard to all the circumstances, to treat absences for such beneficial purposes as work, leisure or business abroad, as not coming within the kind of pronounced absences contemplated by the Constitution. In other words, going to and from the Islands regularly in the ordinary course of one's life for such beneficial or necessary purposes, should not,

[8] One takes judicial knowledge of the well-known fact that many Caymanians have been born overseas for medical or family connection reasons.
[9] [1980] A.C. 319, at 328

in my view, be automatically regarded as amounting to the kind of "absence" regarded by the Constitution as disqualifying.

26. Primarily for these reasons, I do not regard there to have been "sufficient evidence" within the meaning of the Section 29A Elections Law, to justify the engagement of the process of the Court in this case for declaratory relief denying the candidacy of the Respondent.

27. As I have already explained, in reality, there was no other ground as there was no real issue about the Respondent's parentage.

28. I therefore declare that there is no ground to establish that the Respondent is disqualified from standing for election.

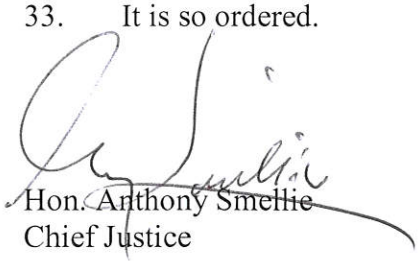
29. As to the issue of costs, while I am sympathetic to the wish of the Supervisor and those advising him to seek as much clarification as possible on real matters of doubt as to qualification or disqualification to stand for election, this second issue of absence as a potentially disqualifying consideration could have been resolved, as I have explained, by the Applicant, as a matter of the proper exercise of judgment and discretion.

30. In sum, in my view, this application should not have been brought. It was nonetheless brought and came to involve significant legal industry on both sides for its presentation.

31. As the successful party, the Respondent is entitled to his costs. The Solicitor General did not suggest, other than that the costs should follow the event in this case.

32. While the Supervisor has not acted so unreasonably as to warrant an order for indemnity costs, as he is a public officer acting on behalf of the public, the public purse should bear the ordinary costs of the Respondent, to be taxed if not agreed.

33. It is so ordered.



Hon. Anthony Smellie
Chief Justice

April 20, 2017

Reissued with addition in paragraph 15 on August 8, 2017