

Privy Council Appeal No. 4 of 1996

(1) Randolph B. Russell and
(2) John G. Thompson *Appellants*

v.

(1) The Attorney General for the State of Saint Vincent
and the Grenadines and
(2) The Supervisor of Elections Ormond V. Robertson *Respondents*

FROM

THE COURT OF APPEAL OF SAINT VINCENT
AND THE GRENADINES

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 15th May 1997

Present at the hearing:-

Lord Mustill

Lord Nicholls of Birkenhead

Lord Hoffmann

Lord Clyde

Lord Hutton

·[Delivered by Lord Mustill]

1. This appeal stems from events taking place between successive elections to the House of Assembly in Saint Vincent and the Grenadines. At the first all the seats were won by candidates of a single party. As required by the Constitution the next election was held five years later, on 21st February 1994. Persons who stood as candidates against, and others who had wished to vote against, the governing party were dissatisfied with the steps taken to re-define the boundaries of constituencies in accordance with law, and to create accurate registers of persons entitled to vote in these constituencies. The outcome was litigation on two fronts. First, election petitions under section 36 of the Constitution of Saint Vincent and the Grenadines were brought by eleven of the fourteen defeated candidates with the aim of unseating their opponents piecemeal. Secondly, proceedings of a much broader scope against the Attorney-General and the Supervisor of Elections were launched under section 96 of the Constitution, involving claims for declarations, mandatory orders and damages. The claimants were two defeated candidates, Mr. R.B. Russell and Mr. J.G. Thompson, and two intending voters, Mr. C.O. Creese and Mr. G. Stewart (now deceased).

2. The first group of proceedings came to an abrupt conclusion and is not before this Board. The applications under section 96 were however strenuously contested during many days in court, with mixed success for the opposing parties, and are now the subject of an appeal by two of the claimants to Her Majesty in Council, and an application by the respondents for leave to appeal against an award of damages in favour of the two remaining claimants. In the process what was once a wide-ranging dispute has dwindled away to almost nothing. Indeed the few issues remaining alive by the end of the oral submissions could be dealt with quite briefly by the Board. Their Lordships consider, however, that it will be useful to set out the history in some detail, partly because the fragmentary questions are difficult to grasp without an understanding of their background, but also to make available, against the possibility that similar disputes arise in the future, a record of just what has and has not been decided during the passage of this matter through the courts.

I. The relevant legislation

3. Their Lordships begin with extracts from the relevant statutes, omitting certain subordinate legislation which is no longer material. First, there are the sections 27 and 33 of the Constitution which founded all the claims for relief:-

"27.-(1) Each of the constituencies established in accordance with the provisions of section 33 of this Constitution shall return one Representative to the House who shall be directly elected in such manner as may, subject to the provisions of this Constitution, be prescribed by or under any law.

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

(b) Every person who is registered as aforesaid in any constituency shall, unless he is disqualified by Parliament from voting in that constituency in any election of Representatives, be entitled so to vote in accordance with the provisions of any law in that behalf, and no other person may so vote.

33.-(1) For the purpose of the election of Representatives, Saint Vincent shall, in accordance with the provisions of this section, be divided into thirteen constituencies having such boundaries as may be prescribed by order made by the Constituency Boundaries Commission.

(2) All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to such extent as it considers expedient in order to take account of the following factors, that is to say -

(a) the density of population and in particular the need to ensure adequate representation of sparsely populated rural areas;

(b) the means of communication;

(c) geographical features; and

(d) the boundaries of existing administrative areas.

(3) A Commission shall be appointed in the following circumstances, that is to say:-

(a) whenever a census of the population of Saint Vincent has been held in pursuance of any law;

..

(4) Whenever the Commission has been appointed in the circumstances specified in subsection (3)(a) or in the circumstances specified in subsection (3)(b) of this section it shall forthwith carry out a review of the boundaries of the constituencies into which Saint Vincent is divided and may (and in the circumstances specified in subsection (3)(b) shall), by order, alter the boundaries in accordance with the provisions of this section to such extent as it thinks desirable in the light of those circumstances and the review.

...

(6) Every order made by the Commission under this section shall be published in the Official Gazette and shall come into effect upon the next dissolution of Parliament after it was made."

4. The census referred to in section 33(3)(a) is provided for by section 8(1) of the Census and Statistics Act, Cap. 195. This does not stipulate any frequency for the holding of a census, or place a limit on the time taken to publish a report.

5. Secondly, there are the provisions which are said to create means of recourse for persons aggrieved by the improper or unsatisfactory conduct of the electoral system. The first is an election petition under the Representation of the People Act, Cap. 6, the relevant provisions of which are as follows:-

"57. A petition complaining of an undue return or undue election of a member of the House of Assembly, in this Act called an election petition, may be presented to the Court by any one or more of the following persons, that is to say -

(a) a person who voted or had a right to vote at the election to which the petition relates;

(b) a person claiming to have had a right to be returned at such election;

(c) a person alleging himself to have been a candidate at such election.

58.(1) The following provisions shall apply with respect to the presentation of an election petition -

(a) the petition shall be presented within twentyone days after the return made by the returning officer of the member in respect of whose election the petition relates

...

(b) at the time of the presentation of the petition or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner -

(i) to any person summoned as a witness on his behalf; or

(ii) to the member whose election or return is complained of, or to any other person named as a respondent in the petition.

shall be given on behalf of the petitioner;

...

(2) Rules, not inconsistent with the provisions of this Act or of the Constitution, as to the deposit of security and the practice and procedure for the service and hearing of election petitions and matters incidental thereto, may be made by the Chief Justice.

59.(1) Every election petition shall be tried before the High Court in the same manner as a suit commenced by a writ or summons.

(2) At the conclusion of the trial, the judge shall determine whether the member of the House whose return or election is complained of or any and what other person was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor-General, and the return shall be confirmed or

altered, or a writ for a new election shall be issued, as the case may require, in accordance with such determination."

6. Next, there is the remedy under section 36 of the Constitution:-

"36.-(1) The High Court shall have jurisdiction to hear and determine any question whether -

(a) any person has been validly elected as a Representative;

...

(2) An application to the High Court for the determination of any question under subsection (1)(a) of this section may be made by any person entitled to vote in the election to which the application relates or by any person who was a candidate at that election or by the Attorney-General.

...

(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining such a question as is referred to in subsection (1) of this section.

...

(8) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) of this section and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining such a question as is referred to in subsection (1) of this section."

7. Finally, there is section 96 of the Constitution which creates the original jurisdiction of the High Court in constitutional questions:-

"96.-(1) Subject to the provisions of section 22(2), 38(8)(b), 102(2) and 105(10) of this Constitution, any person who alleges that any provision of this Constitution

(other than a provision of Chapter 1 thereof) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.

(2) The High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter 1 thereof) has been or is being contravened and to make a declaration accordingly.

(3) Where the High Court makes a declaration under this section that a provision of this Constitution has been or is being contravened and the person on whose application the declaration is made has also applied for relief, the High Court may grant to that person such remedy as it considers appropriate, being a remedy available generally under any law in proceedings in the High Court.

...

(5) A person shall be regarded as having a relevant interest for the purpose of an application under this section only if the contravention of this Constitution alleged by him is such as to affect his interests.

...

99.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -

...

(c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and

...

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -

(a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its

great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and

...

(6) This section shall be subject to the provisions of section 36(7) of this Constitution."

(Chapter I of the Constitution enshrines certain fundamental rights and liberties. It does not include sections 27, 33 or 36.)

8. Mention must also be made of sections 48 and 49 of the Constitution which govern the dissolution of Parliament and the subsequent holding of a general election:-

"48.-(1) The Governor-General may at any time prorogue or dissolve Parliament.

(2) Subject to the provisions of subsection (3) of this section Parliament, unless sooner dissolved, shall continue for five years from the date of the first sitting of the House after any dissolution and shall then stand dissolved.

...

49.-(1) Subject to the provisions of subsection (3) of this section, a general election of Representatives shall be held at such time within ninety days after any dissolution of Parliament, or if the House has been dissolved by reason of a vote of no confidence in the Government at such time within thirty days after the dissolution, as the Governor-General may appoint.

(2) If, after a dissolution and before the date appointed for the nomination of candidates in the next succeeding general election of Representatives, the Prime Minister advises the Governor-General that, owing to the existence of a state of war or a state of emergency in Saint Vincent, it is necessary to recall Parliament, the Governor-General shall summon the Parliament that has been dissolved to meet,

but, subject to the provisions of subsection (3) of this section, that general election shall proceed."

II. Events and Proceedings

9. Some of the events founding this appeal were still happening when the proceedings were already under way. The rather

confusing history can most conveniently be described in stages.

1. May 1991 to February 1994

A census of population was held on 12th May 1991. It seems that a report on the census was completed by July 1993, but not approved for publication by the Cabinet until November 1993. Presumably it was published soon thereafter, and the pre-condition created by section 33(3)(a) of the Constitution for the appointment of a Constituency Boundaries Commission was then satisfied. It must have been realised that the last date permitted for the next election was rapidly approaching, but no Commission was appointed. The election took place on 21st February 1994.

2. March to June 1994

This was a period of intense litigation. Within three weeks of the election eleven unsuccessful candidates, including the present appellants, had brought election petitions under the Representation of the People Act seeking to unseat their opponents on the ground of breaches of the election rules. The respondents to the petitions in each case were the successful candidate and Mr. O.V. Robertson, the Supervisor of Elections, who is also a respondent to the present appeal. The petitions were immediately met by applications to strike them out for failure to comply with the conditions imposed by section 58 of the Representation of the People Act and the rules made thereunder. It seems that one of these applications was heard before the others, and after a hearing during April 1994 Cenac J. did indeed strike it out. Apparently, on some later date, not known to the Board, all the other petitions met the same fate.

10. Meanwhile, on 13th April 1994, just before the application to strike out the petition was due to be heard, the appellants, together with Messrs. Creese and Stewart, issued the notice of motion in the present proceedings. All four claimed a variety of relief, the gist being that both the election as a whole and the return of individual members were a nullity, because various statutes and rules had been infringed: including in particular an allegation that the failure to appoint a Constituency Boundaries Commission after the holding of the census was a breach of the Constitution. The third and fourth applicants also claimed declarations that their entitlement to be registered and vote had been infringed by breach of sundry rules.

11. The proceedings on this Notice of Motion lasted from 17th May to 7th June 1994. Whilst they were still in progress a Boundaries Commission, the absence of which was a principal ground of complaint, was appointed on 2nd June 1994.

12. The judgment of Cenac J. on the motion was delivered on 20th June 1994. Their Lordships will return to it later. In brief, the

applications of the first two applicants (the defeated candidates) were dismissed, and although it was declared that the entitlement of the third and fourth applicants to be registered and to vote had been infringed no award of damages was made.

3. July 1994 to February 1997

All the unsuccessful participants in the litigation appealed. The first appeal to be heard was against the striking-out of the election petition. On 9th January 1995 the Court of Appeal (Sir Vincent Floissac C.J., Byron and Liverpool JJ.A.) unanimously upheld the decision of Cenac J. that compliance with the procedural rules was a condition precedent to the validity of electoral petitions. On 3rd April 1995, in a judgment to which their Lordships must return, the court dismissed an application for leave to appeal to Her Majesty in Council.

13. Meanwhile a Court of Appeal, similarly constituted, had heard an appeal and a cross-appeal in respect of the orders made by Cenac J. on the motion. By a judgment of 6th June 1995 the court unanimously upheld the decision of Cenac J. to deny relief to the appellants, Russell and Thompson, although there was a difference of opinion on the reasons. The court also agreed with Cenac J. on the ruling that the rights of Creese and Stewart had been infringed, but differed from his

refusal to award damages. Instead it was held that the right to be registered and to vote was sufficiently important to be compensated by more than nominal damages, and the judgment of Cenac J. was accordingly varied to include an award of \$1000 to each of these two appellants.

14. In respect of this judgment, in contrast to the one concerning the election petitions, the Court of Appeal granted Messrs. Russell and Thompson leave to appeal to Her Majesty in Council. Finally, on 6th December 1996 the Attorney General for the State of Saint Vincent and the Grenadines and the Supervisor of Elections, against whom the awards of damages had been made by the Court of Appeal, lodged a petition seeking special leave to appeal to Her Majesty against that award.

III. Remedies sought and granted

15. This account must now be enlarged by a summary of the remarkable mutations undergone by the appellants' claims for relief, and of the reasoning which formed the decision of the courts in Saint Vincent and the Grenadines.

16. It is convenient to begin with the election petitions which although not directly before the Board are an important part of the background. It seems that the complaints made by the unsuccessful candidates overlapped with, but were substantially narrower than, those which underlie the present appeal. The grounds on which the petitions were struck out are immaterial, but there is significance in the reasons given by the Court of Appeal for refusing leave to appeal to Her Majesty. These proceeded on the unspoken assumption that although the complaints were made by an election petition under section 57 of the Representation of the People Act, they all fell squarely within section 36 of the Constitution. From this starting point the Court of Appeal reasoned as follows:

(i) Reading section 99(6) with section 36(8), and correcting a printing mistake in section 99(6), the general right of appeal to Her Majesty is excluded in cases which fall within section 36.

(ii) Even without section 99(6) the general right of appeal must yield to section 36(8) which, in the words of the Chief Justice, "... is the specific and leading provision governing the question of appeals to Her Majesty in Council from decisions of this Court on appeals from final decisions of the High Court determining the validity or otherwise of elections and appointments to Parliament".

(iii) This result was consonant with a long course of judicial authority discouraging appeals to Her Majesty from the decisions of lower courts on such matters. In particular the instant case was virtually on all fours with *Arzu v. Arthurs* [1965] 1 W.L.R. 675.

17. The second assault on the preparation for and conduct of the 1994 Election in the shape of the Notice of Motion, was much more ambitious, and included potential voters as well as disappointed candidates.

18. There is no alternative to quoting the claims for substantive relief in full:-

"1.A DECLARATION:

(i) That a census of the population of the inhabitants of Saint Vincent and the Grenadines having been held and completed in 1991 it was obligatory to appoint a Constituency Boundaries Commission prior to the holding of elections in Saint Vincent and the Grenadines and/or the failure to appoint a Constituency Boundaries Commission in the circumstances constituted and is a contravention of Section 33 of the Constitution.

(ii) The holding of elections on the 21st February, 1994 to fill vacancies in the House of Assembly without a review of the boundaries of the Constituencies into which Saint Vincent and the Grenadines is divided is a contravention of the Constitution.

(iii) That no Constituency Boundaries Commission having been appointed and no review of the existing boundaries of the constituencies into which St. Vincent and the Grenadines is divided having been carried out in those circumstances the

elections held on 21st February, 1994 of members to serve in the House of Assembly for each of the fifteen (15) constituencies in the State of Saint Vincent and the Grenadines constituted and is a contravention of the Constitution and are null and void and of no effect whatsoever.

(iv) That the elections held on 21st February 1994 being in contravention of the Constitution all candidates who were declared elected in each of the fifteen (15) constituencies were not legally returned.

(v) That the Applicants Curtis Osbourne Creese and Gideon Stewart and all other persons of the age of eighteen (18) years and upwards and not otherwise disqualified were and are entitled to be registered and to vote at elections duly and/or lawfully conducted and/or held on 21st February, 1994 or any other date after the 21st February, 1994.

(vi) That the entitlement of Curtis Osbourne Creese and Gideon Stewart and all other persons of the age of eighteen (18) years and upwards and not otherwise disqualified to be registered and to vote at the elections which were held on 21st February, 1994 has been infringed.

2. AN ORDER:

(i) That a Constituency Boundaries Commission be appointed forthwith in accordance with the provisions of the Constitution to carry out a review of the Constituencies into which Saint Vincent and the Grenadines is divided.

(ii) That as soon as a review of the Constituencies into which Saint Vincent and the Grenadines is divided is carried out that fresh elections be held in each of the fifteen (15) Constituencies thereafter in accordance with law."

19. It is important to recognise that, according to the judge's notes of argument on the motion, the appellants reiterated two central submissions. First, that the

consequence of the failure to appoint a Boundaries Commission was to make the entire election process a nullity, so that none of the candidates purportedly elected had actually been returned. Second, that the proceedings were in their entirety brought, and rightly brought, under section 96 and not under section 36. The long and careful judgment of Cenac J. did not in the event deal with the first issue, since he dismissed the claims of Messrs. Russell and Thompson on the ground that having chosen to proceed under section 96 they were required to prove a "relevant interest" as defined by section 96(5), and that since in the opinion of the learned judge this required proof of an interest personal to the applicant and now only enjoyed in common with other members of public they had failed to establish *locus standi*. As to the second issue, the learned judge considered that section 36 creates an exclusive jurisdiction over all disputes concerning an election in the widest sense of the word and that properly understood all the relief claimed fell within this compass. In effect therefore so far as these applicants had valid grounds for complaint they should have proceeded by election petitions. (This is of course what they had unsuccessfully tried to do in the concurrent proceedings). Furthermore the appellants would have to satisfy the court that irregularities were such as to cause them to lose to their rival candidates.

20. Turning to Messrs. Creese and Stewart the judge found as a fact that they had been wrongfully deprived of their rights to vote under section 27 of the Constitution, and he made a declaration accordingly. Evidently he considered that in principle they would have been entitled to damages under section 96(3), and that they had a "relevant interest" and hence standing to claim under section 96, but concluded on the evidence, without detailed reasons, that no award should be made.

21. Their Lordships have not been able to discover from the papers why it was that the supposedly exclusive nature of the election jurisdiction under section 36 did not rule out the claims of Creese and Stewart under section 96 even more clearly than in the case of Russell and Thompson. Their right to proceed under section 96 does however seem to have been explicitly conceded by the respondents in their notice of cross-appeal to the Court of Appeal and their Lordships can take the matter no further.

22. In the Court of Appeal the leading judgment was delivered by Sir Vincent Floissac C.J. After summarising the litigation he said this:-

"In the meantime, a Constituency Boundaries Commission has been appointed. Notwithstanding that appointment, a few live issues survive under this appeal. In order to resolve those issues, it is necessary to determine (1) whether subsections

(3)(a) and (4) of section 33 should be construed as being mandatory in the sense that failure to comply therewith should be declared to have nullified the general election held on 21st February 1994; (2) whether the jurisdiction conferred by section 96 of the Constitution was the appropriate jurisdiction for the entertainment of the appellants' Notice of Motion in so far as it relates to the alleged invalidity of the general election and (3) whether Creese and Stewart are entitled to damages for infringements (if any) of their constitutional rights (if any) to have been registered and to have voted at the general election."

23. It will be seen that the scope of the litigation had by now been greatly curtailed. On the first of these remaining issues the Chief Justice, with whom Byron J.A. agreed, returned a negative answer because -

(i) the nullification of an election would defeat the constitutional object of section 33 and

(ii) if the argument had been correct, it must logically follow that these appellants could have instituted proceedings in advance of the election to prevent it from being held until the boundaries had been reviewed by a Commission. They had not done so, and thereby "tolerated" the election actually held.

24. Liverpool J.A. agreed in the result, but differed in holding (i) that a reasonable time for appointing a Commission could not start until 17th November 1993 when the census result was known, (ii) that it had not yet expired, (iii) it was possible to order fresh elections when the circumstances leading up to and surrounding the holding of a poll were so fraught with irregularities that it could not be said to be a true expression of the collective will of the electorate, but (iv) that was not the case on the present facts.

25. On the second issue, the learned Chief Justice assumed (without deciding), that before a general election a person with *locus standi* could apply to prohibit the holding of a general election before a review of the constituency boundaries if the failure of such review contravened section 33. But afterwards the High Court would have no jurisdiction under section 96 to determine any question as to the validity of the election, this being excluded by section 96(7). In the present case "the ultimate and crucial question required to be determined was whether persons had been validly elected as Representatives", and that fell within the special and exclusive jurisdiction assigned to the judiciary by section 36 of the Constitution. The Chief Justice added that section 96(7) ensured that the constitutional jurisdiction is not available as a means of circumventing the strict substantive and procedural rules

which govern the parliamentary jurisdiction or as a means of gaining ultimate access to Her Majesty in Council under the guise of seeking to enforce a constitutional provision. The other members of the court agreed.

26. Finally, as regards the cross-appeals relating to Creese and Stewart the court proceeded on the assumption that a claim based on an infringement of section 27 is justiciable under section 96, and went on to hold that damages were recoverable for such an infringement through the medium of section 96(3). The quantum of damages awardable should be such as to acknowledge the significance and sanctity of the right without at the same time creating a precedent for abusive or unreasonable exploitation. Taking note of the fact that the infringements were the result of innocent inadvertence an award of \$1000 each would be fair and reasonable compensation.

IV. The Proceedings before the Board

27. On the appeal by Messrs. Russell and Thompson to their Lordships' Board the case was so entirely transformed as to be almost unrecognisable.

28. In the first place much confusion was caused by the assertion in the appellants' printed case that - "These proceedings do not seek to impugn the validity of elections which have occurred because of the breach of the Constitution ...". A glance at the Notice of Motion and the judgments delivered in the local courts is enough to show that as an account of the prior proceedings this was totally incorrect, and since the identification of the relief now claimed bore virtually on whether the dispute fell within section 36 or section 96 their Lordships were obliged to press the appellants' counsel for clarification. After considerable uncertainty it eventually emerged, and was explicitly confirmed, that the appellants no longer sought to contend in these proceedings that the election was invalid. This meant that the declarations sought as items (ii), (iii) and (iv) fell away. As to the orders sought, item (i) was already academic, since the Boundaries Commission had not only been appointed but had actually reported a few days before the formal order was made granting leave to appeal to the Board. Item (ii), calling for fresh elections on completion of the review by the Boundaries Commission, was disclaimed in the appellants' printed reply to the respondents' case. Thus, for the appellants, Russell and Thompson, all that remains is the claim in item (i) of the declaration, amounting (as rephrased by the appellants in their printed case) to "declaratory relief that there had been a failure to comply with the requirements of the Constitution in not

appointing a ... Commission when one should have been". Even here, there is a curiosity, for the local courts have concentrated so entirely on the assertions about the nullity of the election and the consequent unseating of the successful candidates, together with the justiciability of these complaints under section 96, that very little separate consideration was given in the abstract to the duty to appoint. Indeed it seems that Floissac C.J. and Byron J.A. were willing to assume that the duty existed and had been broken, their decision being confined to rejecting the proposition that the duty was "mandatory" in the sense that if broken it invalidated a subsequent election, a proposition which the appellants, by abandoning their claim for nullity, have now deprived of all point; whereas Liverpool J.A. held expressly that the duty did exist, but had not been broken on the facts. The appellants are therefore appealing against an adverse ruling which was never made, and on which the Court of Appeal appears to have been in their favour.

29. The second striking feature of the present appeal was the adoption by the respondents in their printed case of the construction placed on section 33(3)(a) by Liverpool J.A. which was as follows:-

"As to the other orders sought, it seems to me that the provisions of section 33 of the Constitution must be given a purposive construction. I would therefore hold that a Commission must be appointed in the sense that there is no discretion whether or not to make an appointment once the circumstances enumerated in section 33(3) have been met, and that such an appointment must be made within a reasonable time after a census has been held. In order to give meaning to this provision, however the holding of a census for the purposes of section 33 of the Constitution is to be interpreted broadly. The Commission must therefore be appointed as soon as the tools with which it must perform its functions are available to it."

30. The first part of this formulation differs little from the first declarations which the appellants have sought all along. A major issue has thus disappeared from the case.

31. The dispute was further narrowed during the hearing of the appeal when, in response to an enquiry from the Board, counsel for the respondents accepted that the court could grant relief under section 96 against the Government for a breach of section 33(3), if the relief was sought before the holding of an election. Their Lordships are satisfied that this concession was rightly made. As regards jurisdiction there is no question of a potential conflict between sections 36 and 96, since the former is concerned only with challenges to the election, appointment or

continuation in office of members of the House, and proceedings to enforce section 33 could not have this effect.

32. The dispute having at this very late stage contracted so remarkably there is little left for the Board to decide. As their Lordships see it, only the following issues remain alive -

1. Is section 33(3) "mandatory", in the special sense used in the courts below, i.e., is the appointment of a Boundaries Commission a condition precedent to a valid election?

Their Lordships answer this question in the negative. They have fully in mind the importance to the effective exercise of the right to vote of constituency boundaries which are properly balanced in accordance with section 33(2). Nevertheless the conclusion sought to be drawn, that a fresh delineation of the boundaries must be completed before an election can be held, is impossible to sustain in the face of sections 48 and 49 of the Constitution. It would plainly be absurd to hold that a breach of section 33, persisting until the expiry of the five-year period, could leave the State with no Government and no effective means of electing a successor. The adoption of a stop-gap interim remedy, such as was imposed by the Supreme Court of British Columbia in *Dixon v. British Columbia (Attorney-General)* (1989) 59 D.L.R. (4th) 247 is not in their Lordships' view an option under the Constitution. The only alternative would be to imply into section 48(2) a provision on the basis of "... or for such additional term as may be necessary to enable a Constituency Boundaries Commission appointed pursuant to section 33(3) hereof to complete its review and make the necessary orders". As a matter of practical politics such a term would be unthinkable, the more so since it would make nonsense of the Governor-General's power to bring about a dissolution "at any time".

2. What if any relief can be granted against the Government in respect of a current breach of section 33(3)?

Since it is now conceded that on appropriate facts a declaration that the Government is in continuing breach of section 33(3) can properly be granted the only question is whether a further remedy, and in particular mandamus to compel the appointment of a Boundaries Commission, can be added. In the course of argument counsel for the respondents submitted that under the law of Saint Vincent and the Grenadines mandamus would not lie, especially since the appointing person is the Governor-General. Counsel went on, however, to add that the Government would in practice abide by any declaration which might be made. In

these circumstances their Lordships have thought it unnecessary to consider mandamus, since the remedy sought in order (i) of the relief listed in the Notice of Motion was made redundant by the appointment of a Boundaries Commission at an early stage of the litigation. Accordingly they express no opinion on a question of constitutional law which may on another occasion prove to be important and controversial.

3. Is it permissible after the holding of an election for the court to grant declaratory relief in respect of a breach of section 33(3) alleged to have taken place before the election?

The only issue of principle here is whether such a declaration could ever properly be granted. At first this caused their Lordships some concern lest a declaration obtained under section 96 might be used as a stepping stone towards the unseating of elected members, or of the elected House as a whole, which is the exclusive preserve of section 36. Since, however, they have held that a breach of section 33(3) could not without more vitiate an election, they do not envisage how such a risk could materialise in practice.

33. It does not however follow that an application for such a declaration should necessarily be entertained. The remedy is always discretionary, and there are questions about which the court will wish to be satisfied. Thus, for example, although failure to apply for relief before the election took place will not, as their Lordships see it, be a formal bar to a remedy, the court will no doubt wish to know why no application was made at a time when it might have had some direct practical effect. Again, the court will take into account whether any practical effect still remains, in the shape for example of political capital which might be made of a demonstration that the Government in power had been in default. Equally, the court will be alert to make sure that such a procedure will not be allowed to outflank the comprehensive jurisdiction over election disputes which the Court of Appeal has held to reside exclusively in section 36.

4. Should this Board now grant a declaration that section 33(3) has been infringed?

Plainly not. There is an unresolved issue on this question, on which the only express pronouncement in the local courts was that of Liverpool J.A., who considered that there was no breach. It would be out of the question for their Lordships to make originating findings of primary facts, with incomplete materials and without the knowledge of local conditions to weigh up the content of the implied

obligation and whether it had been complied with. If such a declaration is to be granted it is a matter for the courts of Saint Vincent and the Grenadines.

5. Do the appellants have locus standi to bring these proceedings under section 96?

The question must be placed in the special context of this litigation, in the light of the views already expressed and the narrowing of the issues since the motion was launched. The election is over; a declaration is all that is left; this is capable in principle of falling within section 96, and is capable of being granted notwithstanding that in the particular circumstances their Lordships are not minded to grant relief. When one adds to this the fact that the appellants are defeated candidates who might well have been able to make political capital from any declaration obtained it is, in their Lordships' opinion, plain (with due respect to the local courts, who were looking at the matter when the shape of the litigation was quite different) that their interests were indeed affected by the contravention alleged.

34. Strictly speaking there is no reason for their Lordships to enter any further into the question of *locus standi*. To minimise future controversy it may however be helpful to observe that a breach of section 33 infringes the constitutional rights of all citizens eligible (or who will become eligible) to vote in the next election. They see no reason to confine the remedy for the grievance thus resulting to any particular category of citizen, and indeed their Lordships have tried in vain to formulate a workable basis on which the right to apply for relief might be limited. The courts will not of course tolerate being swamped with unnecessary or harassing proceedings, but the grant of declaratory relief is always discretionary, and moreover the court has an overriding power to prevent abuse of its process. These should prove sufficient to keep the jurisdiction within proper bounds.

V. The Respondents' application for leave to appeal

35. The respondents to the main appeal have petitioned for special leave to appeal against the finding that the rights of Messrs. Creese and Stewart under section 27 had been infringed and against the awards of substantial damages. Their Lordships intimated at the hearing of the petition that leave would be refused. The application comes far too late and any appeal would depend on a detailed reappraisal of contested issues of fact, where there are concurrent findings in the claimants' favour. The Board needs say no more about this, and will naturally state

no opinion on the various issues of principle which were raised. They do, however, offer the suggestion that if a similar claim should arise again the court might wish to revisit (a) the line of English authority subsequent to *Ashby v. White* (1703) 2 Ld. Raym. 938, which may be thought to suggest that damages would not lie against the holder of a public office for breach of duty otherwise than in the case of malice (see, for example, Wade & Forsyth, *Administrative Law*, 7th Edn., (1994) at page 790) and (b) whether the claimant in question had attempted to make use of the mechanisms furnished by the Representation of the People Act and the regulations thereunder to remedy any wrongful omission from the register. These are, of course, no more than suggestions. It will be for the courts of Saint Vincent and the Grenadines to approach proceedings under section 27 in whatever way they think fit.

36. It remains to consider the appropriate form of order in the unusual circumstances of this appeal. Although the appellants obtained, through the medium of the respondents' printed case and subsequently in the course of argument, concessions that section 33 has the effect set out in the formulation of Liverpool J.A. quoted above, and also that the court can in principle grant relief under section 96 for a breach of section 33 if the relief is sought before an election, in the event no actual remedy has been awarded. This being so, the appeal must be dismissed and their Lordships will humbly advise Her Majesty accordingly. As to costs, whilst the respondents have successfully resisted the appeal the appellants have obtained the valuable concessions just mentioned which would not have been obtained if the appeal had not been brought. For that reason, their Lordships consider that each side should bear its own costs of the appeal to Her Majesty. In the light of the history summarised above they see no reason to interfere with the orders for costs made in the courts below.

37. Their Lordships will humbly advise Her Majesty that the respondents' petition for special leave to appeal ought to be dismissed with costs.