

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2013/0635

BETWEEN:

HONOURABLE GASTON BROWNE
(THE LEADER OF THE OPPOSITION)

Claimant

and

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

First Respondent

and

MR. JUNO SAMUEL, MR. NATHANIEL JAMES, MR. JACK KELSICK
MR. ANTHONYSON KING, MRS. GLENDINA MCKAY, MRS. PAULA LEE
(members of the Antigua and Barbuda Electoral Commission under the
Provisions of The Representation of the People (Amendment) Act
No. 12 of 2011)

Other Respondents

Appearances:

Mr. Anthony Astaphan SC with Ms. Samantha Marshall for the Claimant
Mr. Justin Simon QC for First Respondent
Mr. Russell Martineau SC with Ms. Patricia Simon-Forde for Second Respondent

2013: December 4
 December 6
 December 18

Judgment

[1] **Cottle, J.:** By Act 6 of 2010, the Parliament of Antigua and Barbuda made provisions setting out the qualifications which would enable a person to register as an elector, and thereby vote, in the constituencies which comprise the State of Antigua and Barbuda. The Act is an amendment to the Representation of the People Act 2001. It amends Section 16 of that Act.

Section 5 (1) of the amending Act (the 2010 Act) reads as follows:

“Section 16 of the principal act is amended –

- (a) In subsection (1) (b) by repealing the word “three” and substituting the word “seven”;
- (b) In subsection (1) (d) by repealing the words “one (1) month” and substituting the words “six (6) consecutive months”; and
- (c) By inserting after subsection (1), the following subsection –

“1(A) Subject to this Act and any enactment imposing any disqualification for registration as an elector, a citizen of Antigua and Barbuda who is not resident in Antigua and Barbuda, is qualified to be registered as an elector for a constituency if on the qualifying date he –

- (a) Is 18 years of age or over; and
- (b) Has resided in the constituency for a period of at least one (1) month immediately preceding the qualifying date.”

[2] The effect of the amendment is to increase to seven years the period of lawful residence that would qualify a commonwealth citizen, other than a citizen of Antigua and Barbuda, to be an elector and register as such. Before the amendment, the period of lawful residence was three years. The amendment also now requires a period of six consecutive months residence in a constituency to qualify for registration as an elector in that constituency. The period used to be just one month.

[3] The right to vote, or rather the right to be registered as a voter in Antigua and Barbuda, is of constitutional origin. Sections 40 (2) and 40 (3) of the Constitution of Antigua and Barbuda read as follows:

“40. (2) Every Commonwealth citizen of the age of eighteen years or upwards who possesses such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe shall, unless he is disqualified by any law from registration as a voter for the purpose of electing a member of the House, 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 registered”

“40. (3) Every person who is registered as a voter in pursuance of subsection (2) of this section in any constituency shall, unless he is disqualified by any law from voting in that constituency in any election of members of the House, be entitled so to vote in accordance with the provisions of any law in that behalf.”

[4] The present Claimant has brought the instant action seeking a declaration that the 2010 Act is inconsistent with Section 40 of the Constitution. As a second string to his bow, the Claimant also contends that the 2010 Act offends Section 14 of the Constitution in that it is not reasonably justified in a democratic society while being discriminatory in effect.

[5] The Claimant also complains that the registration process being carried out is inconsistent with the constitutionally provided right to be registered as an elector in Section 40 (3). I reproduce the other pleaded complaints of the Claimant:-

- “6. Without prejudice to the generality of Declaration no. 5 above, a Declaration that
 - 6.1 The intended registration process to be carried out by and at the direction of the Commission is in breach of sections 16 and 19 of the Representation of the People Act;
 - 6.2 The failure of the Commission to hold any proper or adequate educational program has prejudiced the ability of persons to be informed registration process and to be properly registered;
 - 6.3 Persons eligible to be registered from the constituency of City East be required to register in the constituency City South contravenes section 12 (1) of the Representation of the People Act (Amendment) Act No. 11c of 2002;
 - 6.4 The inconsistent demands for documentary or additional documentary information by certain registration officers is unreasonable and oppressive and restricts or unduly fetters in the right to vote.
7. An Order that the Chairman has acted with an improper motive and/or bias in that he:

- (i) has close political affiliation and personal ties to the Minister of Finance Mr. Harold Lovell and Mr. Chaku Symmister, both members of the Antigua Caribbean Liberation Movement 'the ACLM' ~~at the same time with Mr. June Samuel.~~ The ACLM and in particular Mr. Harold Lovell and Mr. Chaku Symmister are now integral parts of the UPP and the Government of Antigua and Barbuda;
- (ii) said after the 2009 general election on a Crusader radio program with Colin O'Neil that unless the UPP gets rid of the Commonwealth citizens they will not or may not win the next election; and
- (iii) has acted unilaterally and made decisions in relation to the registration process which led to public criticism and condemnation by the deputy chairman of the Commission.

The Chairman's improper motive or bias, or the real likelihood or danger of bias, has infected the decisions of the Commission or the majority of the Commission and therefore the decisions made in relation to the registration or re-registration process are unlawful;

8. An Order quashing the decision of the Commission to hold this de-registration, registration or re-registration process;
9. An injunction (including an interim injunction) restraining the Commission, its officers, servants and agents, from applying or giving effect to Act 6 of 2010;
10. An injunction (including an interim injunction) restraining the Commission, its officers, servants and agents, from carrying out and/or continuing to carry out the intended registration process, or any registration process purported under the terms of the Representation of the People At, as amended by the Representation of the People (Amendment) Act or at all;"

[6] This is not the first challenge to the legality of the Representation of the People Act. The Court of Appeal in Civil Appeal of **The Prime Minister and another v Sir Gerald Watt KCN QC ANUHCV2012/0042** held that the retrospective commencement of the Act was bad. A new date for the Act to come into force was then proclaimed. In **Honourable Lester Bryant Bird v Attorney General et al ANUHCV2012/0164** the court held that the Representation of the People

Act as amended by Act 12 of 2011 is unconstitutional, null and void "to the extent that it seeks to alter the powers functions and duties of the Supervisor of Elections."

The Claimant's Submissions

[7] Mr. Astaphan SC mounted his challenge to the legislation under three broad heads. Firstly, he says that upon proper construction of Sections 40 (2) and 40 (3) of the Constitution, the 2010 Act is unconstitutional and certainly not justifiable in a democratic society. Secondly, he says that the effect of the decision of Henry J. is to render all actions by the Antigua and Barbuda Electoral Commission (ABEC) void as the fruit of the poisoned tree. Mr. Astaphan also questions whether there is any provision in law permitting ABEC to in fact deregister all persons on the voters list and require wholesale re-registration. He adds that even if such a power exists; it cannot have retrospective effect by removing rights already vested. The issues of bias or apparent bias on the part of the Chairman of Antigua and Barbuda Electoral Commission were also raised as grounds for ruling against the 2010 Act and the registration process carried out under that Act.

[8] When construing constitutional provisions every effort should be made to do so purposively. Mr. Astaphan submits that laws governing the right to vote ought to be construed to encourage enfranchisement rather than to promote disenfranchisement. Mr. Astaphan gave background. The Claimant in his affidavit says that the United Progressive Party (UPP), which forms the present government, had alleged that the Antigua and Barbuda Labour Party (ALP), the previous governing party, had illegally registered many commonwealth citizens as voters and this had almost cost the UPP the 2009 general elections. The voters list was perceived to be "unclean". The legislation complained of is seen by the Claimant as the efforts of the governing party to remove from the register of voters those, particularly commonwealth citizens, alleged to have been illegally registered. I am not sure I understand this argument as saying that concerns such as those attributed to the present governing party parliamentarians, properly cannot be considered by them in deciding upon their legislative agenda. Similarly, I do not understand Mr. Astaphan to be suggesting that it is impermissible for parliament to prescribe qualifications for Non-Antiguans to be eligible for registration. No challenge to the legislation is mounted on these bases. Indeed, the Act now under challenge is an amending act. Before its passage there were criteria which had to be

met by commonwealth citizens who are not Antiguan, to be eligible for registration as electors. No one has suggested that the previous legislation was bad for any reason. Can it then be said that by making the requirements for registration more restrictive that this violates the constitution?

[9] Section 40 of the Constitution is entrenched. It cannot be altered by parliament unless the prescribed procedure to amend it is adopted. But Section 40 (2) does not set out the qualifying criteria for eligibility to be registered as an elector. It leaves that responsibility to Parliament. The phrase "as Parliament may prescribe" or its equivalent is to be found at many places in the constitution. Section 40 (4), 67 (4), 36 (1) and 64 (3) are examples. The phrase is ambulatory. It must mean as Parliament may prescribe from time to time, as Parliament always retains the power to enact legislation for the peace, order and good government of the state. If Parliament chooses to enact legislation which it is specifically permitted to do by Section 40 (2) of the constitution, I do not see how this can be viewed as inconsistent with the constitution at the very section that permits it. It is to be noted that no restrictions are placed as to the requirements that Parliament may lawfully prescribe under Section 40 (2) of the Constitution.

[10] Section 14 of the Constitution of Antigua and Barbuda provides:

- "(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7), and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions or affiliations, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.

- (4) Subsection (1) of this section shall not apply to any law so far as the law makes provision –
- (a) for the appropriation of public revenues or other public funds;
 - (b) with respect to persons who are not citizens; or
 - (c) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any others such description, is reasonably justifiable in a democratic society.
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to qualifications (not being qualifications specifically relating to race, place of origin, political opinions or affiliations, colour, creed or sex) for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established by any law for public purposes.
- (6) Subsection (2) of this section shall not apply to anything that is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.
- (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 8, 10, 11, 12 and 13 of this Constitution, being such a restriction as is authorized by paragraph (a) or (b) of subsection 3 of section 8, subsection (2) of section 10, subsection (4) of section 11, subsection (4) of section 12 or subsection (2) of section 13, as the case may be.

(8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law."

[11] This constitutional provision is meant to prevent the enactment of legislation which is discriminatory either of itself or in its effect. As I understand the complaint of the Claimant, the impugned legislation permits different persons in Antigua and Barbuda to be treated differently on the basis of their place of origin. This, according to the Claimant, is impermissible. In my view, the general prescription against discrimination is not absolute. Subsection (4) restricts the applicability of subsection (1) in so far as it deals with legislation which makes provision with respect to persons who are not citizens of Antigua and Barbuda. There are many sound reasons why different treatment may be accorded to persons who are citizens as opposed to those who are not citizens. One obvious and unchallenged example is the legislation which requires a non-citizen to obtain a license in order to hold land. No similar restriction is placed on a citizen's right to hold land. With the greatest of respect to this submission by Counsel for the Claimant, it appears to have no foundation. The very section of the constitution that provides for non-discrimination, expressly allows for different treatment to be meted out to non-citizens. The Section 14 complaint fails.

[12] I turn to examine the arguments concerning the effect of the judgment of Henry J in **Bird v AG et al** ANUHCV2012/0164. Mr. Astaphan submits that the Learned Judge found that the registration process was null and void because it was carried out under a regime whereby the Supervisor of Elections had been unlawfully stripped of her responsibilities as Chief Registration Officer as provided for under Section 67 of the Constitution.

[13] It is accepted that the effort to alter the power functions and duties of the Supervisor of Elections and Chief Registration Officer, fell afoul of the constitution. The powers, functions of duties of the Supervisor under Section 67 of the Constitution are entrenched and cannot be affected by ordinary legislation. What I have searched for without success, is a clear indication of what functions have been carried out during the just concluded registration exercise that should only have been done by the Supervisor of Elections. It is accepted that thus far the Supervisor has played no part in the

registration exercise. The 2001 Act, Act 17 of 2001, amending the Representation of the People Act Cap 379 at Section 2 defines election officer as follows:

“...election officer” includes the Supervisor of Elections, the Assistant Chief Elections Officer, returning officer, election clerk, presiding officer, poll clerk, registration officer and any other person having any duty to perform under this Act or the regulations relating to the registration of electors, the proceedings on polling day and the counting of the votes.”

Section 3 establishes the Antigua and Barbuda Electoral Commission (ABEC). Section 6 gives to the ABEC the responsibility for general direction control and supervision of the preparation of the voters list. The section reads:

- “6. (1) The commission shall be responsible for the general direction, control and supervision of the preparation of the voters’ register and the conduct of elections in every constituency and enforcing with respect to all election officers, fairness, impartiality and compliance with the electoral law.
- (2) The Commission shall be responsible for the selection and appointment of election officers and prescribing the duties of such officers.
- (3) It shall be the duty of the Commission to –
- (a) prescribe the qualification for the selection and appointment of all officers of the Commission;
 - (b) develop and design training programmes for persons appointed to be election officers, including such programmes shall ensure that the functions of the Commission are carried out in an independent and impartial manner;
 - (c) design a continuous non-partisan voter education programme for voters;
 - (d) regulate the conduct of election officers.
- (4) The Commission shall, in the exercise of its functions act impartially and independently of any political or governmental influence and shall not be subject to the direction or control of any other person or authority. The Commission shall

conduct its affairs in a transparent manner, consistent with good election management practice.

(5) The Commission shall:

(a) prepare and furnish to the Minister, as soon as practicable after June 30 in each year, a report on the operations of the Commission during the year that ended on June 30; and

(b) as soon as possible after polling day in a general election, prepare and furnish to the Minister a report, with special reference to the operations of section 83 of the Act with respect to that election.

(6) (a) The Minister shall cause a copy of a report furnished by the Commission pursuant to subsection (5) (a) to be laid in the House of Representatives at the sitting following the receipt of the report.

(b) The Minister shall cause a copy of a report furnished by the Commission pursuant to subsection (5) (b) to be laid before each House of Parliament at the meeting next following the receipt of the report.

By virtue of Section 9 the powers and duties of the Supervisor of Elections are set out. The section reads:

“9. (1) For the purpose of this Act, the Supervisor of Elections appointed under section 67 of the Constitution shall be the Chief Executive Officer of the Commission and shall, at the direction of the Commission, perform the duties conferred upon him under this Act in an impartial, fair and efficient manner.

(2) The Supervisor of Elections shall be the Chief Registration Officer and, for the purposes of an election be the Chief Elections Officer and shall, on the written instructions of the Commission –

(a) issue to election officers such instructions as are necessary for ensuring effective execution of the provisions of this Act;

(b) execute and perform all other functions which by this Act or the regulations and rules are conferred or imposed upon him.

(3) Upon the issuing of a Writ of Elections, the Commission shall appoint an Assistant Chief Elections Officer.

(4) The Assistant Chief Elections Officer shall assist the Supervisor of Elections and shall, subject to any general or specific directions of the Commission, have power to perform any of the functions which the Supervisor of Elections is by this Act required to perform in relation to Elections."

[14] It is to be noted that in carrying out her functions as Chief Registration Officer, the Supervisor of Elections is bound to follow the written instructions of the ABEC. In the actual registration process, the work was carried out by registration officers appointed by the ABEC under Section 20 of the Act (2001). There are functions which are the especial province of the Supervisor of Elections under the 2001 Act. For example, under Section 23, it is the Supervisor who makes additions to the Registers of Electors. Because the Commission has yet to publish the Register, there has been no action taken by any other person or authority to usurp this duty of the Supervisor.

[15] Despite my careful search, I can find no evidence of any wrongful usurpation of any function or duty of the Supervisor such as would require the registration process carried out thus far to be vitiated. As I see it, the ABEC has the general responsibility for the preparation of the preliminary register and the Supervisor of Elections has obligations to ensure that all needed additions to that register are made to produce a final voters list.

[16] Counsel for the Claimant argued forcefully that the challenged legislation is bad because it has retrospective effect. It takes away from some commonwealth citizens a right to which they had hitherto being entitled and which may have indeed vested. This is an interesting argument but as it turned out it is of no more than academic interest. No evidence has been led before this court to show that any commonwealth citizen has in fact been disadvantaged by the operation of the 2010 Act. All those persons who at the time of coming into force of the 2010 Act who met the then existing criteria of three years residence at the time of the last General Elections in 2009 are likely to again meet the new requirements as at the 2014 scheduled elections. It must be borne in mind that a right to vote is a right to vote at an election. If no election is being held, there is no opportunity to exercise a right to vote. Any questions of denial of any such rights are moot in the

absence of an election. This underscores the logical fallacy in the suggestion that the qualifying legislation is of retrospective effect. The legislation prescribes the needed qualifications which are required at the time the right to vote is to be exercised. The fact that a person voted at one election does not by itself mean that that person will have a right to vote at any future election. The question of his eligibility is to be addressed at the point when the right to vote is to be exercised. In the circumstances of this case, where there is no evidence of any commonwealth citizens actually having been disenfranchised and where the timing of the legislation and the date for the next scheduled elections makes it likely that any voters who were so qualified to be registered in 2009 are almost certainly qualified to be registered in 2014, I find that there is no merit in this complaint against the 2010 Act.

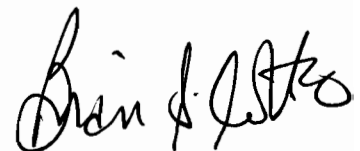
[17] The pleadings revealed allegations of bias. As I understand the evidence, the Claimant and his witness, Mr. Hurst, says that the Chairman of the Antigua and Barbuda Electoral Commission has close personal and political ties with some ranking members of the ruling party. It is said that some of the utterances of the Chairman betray his personal opinions as being similar to those ascribed to the hierarchy of the UPP. Mention is also made of a radio broadcast which revealed a difference in views of the Chairman and his Deputy as to decisions arrived at by the ABEC. The Deputy Chairman said that the decisions had been taken by the Chairman while the Chairman said they had been the decisions of the Commission. Counsel says that the effect of this public disagreement could lead a reasonably well informed member of the public to apprehend bias.

[18] The authorities agree that the test is as set out in Porter v Mc Gill [2002] 2 AC 357. Would a fair minded and informed observer having considered all the facts, conclude that there was a real possibility that the ABEC was biased? Applying that test, I conclude that there is no likelihood of the observer arriving at such a conclusion. There are several reasons. The ABEC is a body comprising of five (5) persons, all appointed by the Governor-General under Section 3 of the 2001 Act. In her making of the appointment of the Chairman and two members, the Governor-General acts on the recommendation of the Prime Minister. The recommendation of the Leader of the Opposition is the basis for the appointment of the Deputy Chairman and one other member of ABEC. It is far less likely that a group so comprised will be seen to suffer from apparent or real bias rather than an individual. The fair minded observer is not particularly paranoid. He will

recognize that both the Prime Minister and the Leader of the Opposition will recommend persons in whom they have a degree of confidence. The informed and fair-minded observer will also know that the ABEC did not pass the legislation into law and as such the issue of any apparent bias on the part of the ABEC is of little moment in deciding whether the legislation can be challenged on this ground.

[19] While it may be accepted that one possible interpretation of the utterances of the Chairman may be that he is sympathetic to the views ascribed to the UPP that Non-Antiguan commonwealth citizens by their voting patterns, almost cost the UPP the elections, there can be no finding, based on the evidence before this court, that such feelings by the Chairman, somehow translated themselves into legislation or action. There is also nothing in the evidence before me to show that in the carrying out of the functions of the ABEC, there were decisions made which are being challenged as having been tainted by bias. A broad allegation in this regard cannot suffice. There must be some specific decision or decisions of the ABEC to which the claimant can point and say that it could be viewed as biased or apparently biased.

[20] For the above reasons, this court finds that the claimant's claim stands to be dismissed. The declarations sought by the Claimant are refused. Under Part 56.13 (6), Civil Procedure Rules 2000, I make no order as to costs. I thank all Counsel involved for the invaluable assistance they provided the court and the very helpful manner in which the contending submissions were distilled and presented.



Brian Cottle
High Court Judge