PRESS SUMMARY

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA
ANUHCVAP2013/0026

BETWEEN:

[1] THE HON. GASTON BROWNE,
(LEADER OF THE OPPOSITION)
[2] THE HON. LESTER B. BIRD
[3] THE HON. ASOT MICHAEL
[4] MR. EISEN BAPTISTE
[5] MS. PAULET HINKSON

Appellants/Applicants

AND

[1] THE CONSTITUENCIES BOUNDARIES COMMISSION
[2] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[3] THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
[4] THE PRIME MINISTER OF ANTIGUA AND BARBUDA
[5] THE ATTORNEY GENERAL
(FOR AND ON BEHALF OF HER EXCELLENCY THE GOVERNOR GENERAL)

Respondents

Judgment delivered 28th April 2014

The last general election in the State of Antigua and Barbuda was held in 2009. A Constituencies Boundaries Commission ("the Commission") was appointed in that State at latest, on 1st March 2012 pursuant to section 63 of the **Antigua and Barbuda Constitution Order 1981** ("the Constitution"). The **Constituencies Boundaries Commission Guidance Act, 2012** ("**Guidance Act**") came into effect on 28th December 2012. The **Guidance Act** is an Act to guide the Commission in its review of the numbers and boundaries of constituencies.

All of the appointees to the Commission, save for Mr. James Fuller ("Mr. Fuller"), were appointed by the Governor-General on the advice of the Prime Minister. Mr. Clarence Crump ("Mr. Crump"), the Chairman of the Commission was appointed by the Prime

Minister after consultation with the Leader of the Opposition. Mr. Fuller was appointed on the advice of the Leader of the Opposition.

The Commission produced a first report in March 2013 in which it recommended alterations to constituency boundaries, after having organised one day of consultation with members of the public on 29th November 2012. This first report fell within the Commission's deadline of 28th June 2013 for submission of the report to the Speaker of the House of Representatives. Objections were made to it in the form of legal proceedings filed by two of the appellants. They essentially complained that the Commission had not given the persons from whom they invited consultations any of the proposals it was considering and that insufficient use has been made of the census data in attempting to achieve equality in the number of inhabitants in the proposed constituencies. Mr. Fuller had also made known his objections to the processes leading up to the first report. Following legal advice, this first report was withdrawn.

Subsequently, the Commission revisited their review of the constituencies and boundaries and sought to obtain information from the Census officers. They had also placed before the Census officers various boundary scenarios, to be overlaid with the census data. This information was not forthcoming from the Census officers until 7th June 2013, and it was not until just prior to 13th June 2013 after several meetings with the Census officers and other experts assisting the Commission, that the Commission was able to come up with a preliminary proposal which could be put out for consultation. By letter dated 13th June 2013 the Commission invited each of the current parliamentarians, prospective political candidates and others to consultation sessions which were to be held and were in fact held in four separate locations fixed over four consecutive days being 17th 18th 19th and 20th June 2013. In addition, the consultations were to be carried live on TV and radio. The Commission gave to interested persons, including the appellants, until 21st June 2013, the day after the last consultation meeting, to submit any comments or counter-proposals.

The second report was produced by the Commission on 25th June 2013 with various proposals including that there be no change to the number of constituencies, four

constituencies be re-named and alterations be made to the boundaries of 14 of the 16 constituencies. The second report modified its proposals to boundary changes as contained in the first report. It also proposed modifications to 6 constituencies over and above the alterations proposed in the first report.

The appellants took issue with the second report and instituted legal proceedings seeking declaratory and injunctive relief and essentially seeking to impugn the Second Report. The learned trial judge dismissed the claim holding that the Commission was bound to produce their report by 28th June 2013; there was no abdication of the Commission's responsibilities; the consultations, admittedly less than ideal, were adequate in the circumstances; the conclusions reached by the Commission were neither irrational or unreasonable; and there was no cogent evidence to sustain an allegation of gerrymandering and bias by the Commission.

The appellants have appealed the decision of the trial judge on various grounds which can be summarised as follows:

1. Whether the trial judge failed to properly consider the evidence and law;
2. Whether the Commission engaged in gerrymandering;
3. Whether, given the composition of the Commission, there arose the real possibility of bias;
4. The proper interpretation of section 64(2) of the Constitution and thus whether there existed 'an urgency' which, as the appellants put it, 'justified the abrogation of the Commission's obligation to properly and adequately consult'; and
5. Whether the Commission conducted a proper review, particularly its obligation to consult, in compliance with the requirements of the Guidance Act.

JUDGMENT

The appeal is allowed only on the ground that consultation was inadequate. The other grounds of appeal are dismissed.

REASON

1. A party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. Failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence. The appellants failed to cross-examine or test the evidence of Mr. Crump. In addition, there was simply no undisputed objective evidential material, either oral or documentary, inconsistent with the evidence of Mr. Crump which could not have been sensibly explained away. Bare assertions or equivocal inferences, which may be drawn from a primary fact, do not suffice. Accordingly, there is no basis for this Court to reject or disregard the evidence of Mr. Crump.

2. A decision making body is required to provide to persons with whom it must consult such information, in clear terms, as to what the proposal is and why it is under positive consideration. The decision making body ought to furnish enough information to enable persons to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this. In this regard, the Commission's obligation was to consult with the appellants on the changes being proposed to existing constituency boundaries and why the changes were being proposed. The Commission was obligated to disclose enough information to be able to let the appellants make an intelligent response. The undisputed evidence indicates such evidence was provided to the appellants. There was no request by the appellants, who are veteran politicians and who would know the boundaries of their existing constituencies, for further information. The Commission had previously withdrawn its first report after objections were made to it by some of the appellants. The Commission thereafter produced a second report which was approved by Mr. Fuller, the appointee made by the Leader of the Opposition. Even then there was no request for additional information. It is unlikely that the body consulting would be on notice of its failure to provide additional information in

the absence of a request for specific information. The body may have reasonably concluded that the information provided was sufficient for the consultation purposes. Accordingly, the complaint of failure to disclose information in the circumstances of this case cannot be sustained.

3. In order for a charge of gerrymandering to succeed, two elements must be satisfied by cogent evidence. Firstly, it must be shown that the Commission altered the boundaries and that the alterations had the effect of diluting or weakening the opposing party's support in those altered constituencies. Secondly, it must be shown that the Commission so altered the boundaries precisely for achieving that effect – that is, the strengthening of the other party's electoral chances over the opposing party thus weakening the opposing party's electoral chances in those constituencies. On the facts of this case, gerrymandering was clearly not made out. The evidence fell short of establishing with clarity and certainty, that the ALP votes have been diluted to the advantage of the UPP. Further, there was no evidence which amounted prima facie, let alone established, that the Commission in fact set about re-drawing the constituency boundaries in order to negatively impact the ALP's chances and positively impact the UPP's chances or vice versa.

4. The test for establishing apparent bias is whether a fair minded and informed observer would consider that there was a real possibility of bias. An allegation of apparent bias is to be considered having regard to all the relevant facts and circumstances of the particular case based on the material before it and within the context of the issue to be decided. Therefore, a fair minded and informed observer having regard to all the facts would be aware of the constitutional provisions establishing the Commission. Where the Constitution itself provides for the appointment of members to a council, commission or other constitutional body in a certain manner and there is compliance with those provisions in making the appointment, the composition of the commission or such body so appointed, cannot in and of itself ground a charge of apparent bias. The fact that the

Commission was appointed in accordance with specified provisions of the Constitution would trigger the presumption of impartiality in favour of the members regardless of their personal affiliations. That means that the onus would then be placed on the appellants to rebut that presumption by cogent evidence on a balance of probabilities. An examination of the appellant's allegations fall significantly short of this threshold. There was no evidence on which a fair minded and well-informed observer who is not given to suspicion, or is overly sensitive would conclude that the Commission was infected with bias and discharged its functions so as to prejudice the appellants or the parties to which they belong.

5. A body which is under a duty to consult must let those with whom it must consult know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. It is not sufficient simply to inform those with whom the Commission must consult that the Commission is considering altering boundaries and ask for their recommendations. Proposals must be put forward around which comments and alternative proposals may be put forward for the Commission's consideration.

6. Section 3(2) of the Guidance Act cannot be interpreted as requiring the Commission to consult even before it develops its proposals. The phrase "during the process of review" must therefore be interpreted holistically to encompass the entire process commencing with the appointment of the Commission and ending with its recommendations to the Speaker. Consultation must take place during this period, but it would be pre-mature to have any consultation before the Commission has some idea of what it proposes should be done, that is to say, until there is something specific around which consultation may be usefully held. Consultation at too early a stage would be insufficient to discharge the Commission's duty to consult 'if matters have not been formulated with sufficient detail to enable meaningful responses. A decision is still at a formative stage even where a decision-maker has identified a preferred option or reached a provisional

view upon which it wishes to consult. There was no pre-determination on the part of the Commission and no final decision had been made.

7. Fairness, in the decision-making subject to public consultation does not generally require internal workings of a decision-maker to be disclosed as part of the consultation. The learned judge did not err when he held that the Commission was not required to disclose the various scenarios for the boundaries and other information or data which were submitted to the Statistics Division and other public officers. Fairness did not so require and there was no exceptional circumstance which required the disclosure.

8. While the appointment of a Commission or report is not a condition precedent to a lawful election, it cannot be said that the Commission was not to perform its duty as required by the Constitution. Even though the Commission was required to submit its report by a specified date, it was also required to do so in full observance of its statutory duties as contemplated by 64(3) of the Constitution. One obligation cannot be sacrificed so as to achieve compliance with another. The Commission was not entitled to deprive or deny interested parties the right to proper and adequate consultations. It could not have been the intention of the Parliament that the statutory right to be consulted which it had enacted into law could or would be rendered nugatory by delay through no fault of the appellants, or due to the conduct or failures of the Commission. Adequate time for consultation in relation to changes in constituency boundaries is a matter of considerable public importance in ensuring the effective exercise of the right to vote in properly constituted constituency boundaries drawn in full regard of the principles and provisions set out in the Guidance Act.

9. The learned judge erred in holding that the respondents could rely on an urgency and that the consultations though '*not ideal were adequate'.* The respondents could not rely on an urgency primarily of its own making to justify the wholly inadequate time given for consultation. The last general election was in 2009. The

Commission was appointed at latest in March 2012. The Guidance Act enacted in December 2012. The first report was withdrawn at the end of April 2013 and the review process re-started. A definitive proposal was not put out until 13th June 2013. Much time was therefore wasted. Whilst the appellants may be regarded as veteran politicians that does not diminish the right to be accorded adequate time to study, review carry out their own investigations on the proposal, and formulate counter-proposals if need be in a meaningful way. Seven days in a matter of this kind, coupled with the lack of printed maps depicting the changes can hardly be said to be adequate. Whereas failure to produce or lack of a report does not invalidate a subsequent election, a flawed report could jeopardise the constitutional right to vote in a properly demarcated constituency. Consultation at the end of the process is unacceptable, where there is insufficient time to comment or where the impact of any response on the body consulting is likely to be minimal since it will already have formulated its view. The time allowed for consultation was neither ideal nor adequate. The urgency brought about in part by the Commission does not justify abrogation of the duty to adequately consult on so vital a matter.

ADDITIONAL INFORMATION

The Supreme Court is a regularly sitting Court and at the appellate division it is itinerant. This means that the Court of Appeal is required to travel out every other week to sit in different Member State or Territories. In addition the Court is often required to hold additional sittings to accommodate other matters which may be deemed urgent. In addition to this, the Court is required to handle numerous applications concerning appeals during the same period.

Between January and third week of April 2014 the Court of Appeal conducted a total of 8 full sittings (which included 2 additional sittings) covering over 170 matters. It also conducted a further 4 full days of hearings dealing with various interlocutory applications

totalling 176. During the same period the Court delivered a total of 16 written judgments, and additionally gave a total of 42 oral decisions.

The above information is presented to provide the public with an appreciation of the volume of matters coming before the Court of Appeal on a regular basis. The Court considers all of its work to be important, both the work relating to matters of the Governments and constitutions of the Member States/Territories and the work of the private citizens and commercial entities throughout its nine Member State jurisdiction. All must be allocated appropriate judicial time in ensuring that justice is administered fairly to all within the confines of the judicial resources available to the Court. The fact that a matter is deemed urgent in one Member State does not relieve the Court of having to deal with matters deemed urgent in another Member State over the same period.

At present the Court of Appeal is operating with three full-time Justices of Appeal and the Chief Justice who also sits in the appellate division of the Court. When the Court of Appeal sits as a full Court there is a panel of three judges. In order to try to meet the demands of the work the Court would temporarily appoint additional Justices of Appeal to act for short stints during specific sittings. If this were not done then the Court would not be able to fulfil its duties to the citizens of our region.

In general, the court strives as much as possible to deliver outstanding judgments within a three-month period. Given the workload and the resources, which are available, this is a herculean task but every effort is made to deliver within these time standards. Further information about the Court may be found on the Courts website: **www.eccourts.org**.