

PRESS SUMMARY

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA
ANUHCVP2013/0028

BETWEEN:

THE HON. GASTON BROWNE
(THE LEADER OF THE OPPOSITION)

Appellant

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

Judgment delivered 28th April 2014

In 2010, Parliament, by ordinary legislation, amended the **Representation of the People Act** ("principal Act") which amendment changed the qualifications for Commonwealth citizens to be eligible to vote in Antigua and Barbuda. Section 5 of the **Representation of the People (Amendment) Act 2010** ("amending Act 2010") altered section 16 of the principal Act by increasing from 3 years to 7 years the residency qualification of a Commonwealth citizen before such citizen could be registered as an elector. Additionally, section 6 of the amending Act 2010 repealed and replaced section 18 of the principal Act by prescribing a period within which persons who now qualify under the amended section 16 are to apply for registration as an elector. The Electoral Commission ("the Commission") conducted a registration exercise in light of the new qualification for Commonwealth citizens.

The appellant challenged the constitutionality of the amending Act 2010 and posited that the re-registration process had retrospective effect and that this infringed section 40(3) of

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the **Antigua and Barbuda Constitution Order 1981** ("the Constitution") and section 19 of the principal Act. The appellant alleged that during the registration process the Supervisor of Elections was illegally striped of her duties as the Chief Registration Officer. This rendered the re-registration process null and void. Further, the Chairman of the Commission was actuated with bias and this bias infected the Commission and its subsequent functions.

The learned trial judge disagreed with the appellant's allegations and claims and found that Parliament had the authority to legislate from time to time with respect to the qualifications for Commonwealth citizens. The amending Act 2010 did not violate or infringe any provisions within the Constitution. The judge found that the legislation prescribes the needed qualifications which are required at the time the right to vote is to be exercised. The learned judge could not identify any specific function of the Supervisor of Elections that was usurped. In addition, the learned judge found that there was no evidence of bias.

The appellant appealed contending that:

1. The amending Act 2010 was in direct contravention of the entrenched right to vote in the Constitution.
2. In the event that Parliament had the authority to lawfully prescribe such qualifications evidence of the legitimate aim pursued by this prescription ought to have been adduced.
3. The application of the amending Act 2010 violated the principle against retrospectivity and the rights of those persons already registered to vote;
4. The compulsory re-registration process violated the Constitution;
5. The learned trial judge failed to consider the cumulative effect of all the evidence in relation to the issue of bias; and
6. The Supervisor of Elections was declared by Henry J in Claim No. ANUHCv2012/164 delivered on 6th November 2013 to have been stripped of all powers as Chief Registration Officer. This rendered the re-registration process illegal as the Supervisor of Elections was not involved in the process.

JUDGMENT

The appeal is dismissed.

REASONS

1. The scope of section 40 of the Constitution identifies the parameters within which a person becomes entitled to vote. It recognises that the right to vote is made subject to inter alia a person's registration as a voter. Apart from being a

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Commonwealth citizen having attained the age of 18 years and having not been disqualified to vote, a person must possess such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe to be entitled to register as a voter. The words “may prescribe” specifically mentioned in section 40(2) of the Constitution gives to Parliament the power to legislate from time to time and as it sees fit in respect of the qualifications relating to residence or domicile for registration of any person as a voter. The section clearly reserves to Parliament the power to pass ordinary laws in relation to the specified qualifications. Thus, it must be presumed that the framers of the Constitution intended that Parliament retain such power. In that regard, Parliament having made an amendment to the principal Act was not infringing section 40 or any other provision of the Constitution. Parliament purported to act within the powers directly conferred on it by the Constitution, particularly section 40(2).

2. Fundamental rights and freedoms are generally protected under the Constitution except in certain instances where the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. The right to vote, though it is a constitutional right, is not a fundamental right. As such, there was no requirement for the State to show that the amendment was justifiably required in a democratic society. Auxiliary to that, section 40(2) of the Constitution does not speak to “justifiably required in a democratic society”. On those bases, the changing of the provision with respect to the residency qualification does not attract or engage the requirement of “reasonably justifiable in a democratic society”. Simply, section 40(2) does not engage the issue of proportionality.
3. There is a common law presumption that a statute is not intended to operate retrospectively. The presumption can be rebutted if it clearly appears that it was the intention of Parliament to produce the result in question. The words contained in the amendment to the Act in no way suggest that it was the intention of Parliament for the Act to operate retroactively or retrospectively. The entitlement to vote belongs to a person entitled to be registered. Parliament, exercising powers sanctioned by the Constitution, amended the law. The fact that the law is amended from time to time does not mean that those who were entitled to vote before the amendment and not entitled after the amendment could succeed in arguing that the amendment has retroactive effect. The amending Act 2010 unmistakably affected or altered existing rights prospectively. .
4. Section 40 of the Constitution does not confer on a person an entitlement to be registered for the purpose of voting ad infinitum or in perpetuity. The entitlement to vote is restricted to every person who is registered as a voter. With respect to the residency qualifications, Parliament reserves the right to alter such qualifications as it sees fit and from time to time. The amending Act 2010 altered the residency qualifications from 3 years to 7 years. That is the law which Parliament has prescribed and which law is currently in force. To be entitled to be

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registered to vote every Commonwealth citizen must satisfy the 7 year requirement. It follows that persons who do not fall within the new residency criteria are not entitled to be registered to vote. A re-registration process is but one method of ensuring that all persons registered to vote are so entitled based on the new residency criteria and so as to ensure that the register of electors are properly maintained at all times. Persons who were previously registered but now do not meet the new qualifications that Parliament lawfully prescribed cannot rightfully assert the right to remain registered. They have become “disqualified for registration” by virtue of the amendment to the Act, and therefore disqualified under the principal Act.

5. The appropriate test in determining an issue of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. The fair-minded and informed observer can be assumed to have full knowledge of all the material facts and must adopt a balanced approach in assessing the facts. The material facts in this case indicate that the Chairman of the Commission was appointed by the Prime Minister after consultation with the leader of the Opposition, the majority of the members of the Commission are not nominees of the Prime Minister, the changes made to the principal Act were made by Parliament and not the Commission or its Chairman and finally, there was no evidence the Chairman of the Commission conspired with or caused the UPP to make the statements which they made. Those material facts are what a fair-minded and informed observer would have within their contemplation when assessing whether there exists any evidence of apparent bias. The facts plainly show that there would be no basis for a fair-minded and informed observer to conclude that there was a real possibility of bias.
6. The position of Chief Registration Officer had previously not been statutorily established and hence not mentioned or specifically defined in the principal Act. General direction and control of the preparation of the register is given to the Commission and not to the Supervisor of Elections or the Chief Registration Officer. The Supervisor of Elections had always acted under the direction of the Commission, whether it be under the principal Act or the amending Act 2010. The Commission’s use of registration officers in the re-registration process was provided for in both the principal Act and the amending Act 2010. That being the case, there can be nothing unlawful about the procedure that was adopted by the Commission. Moreover, there are no specific statutory duties assigned to the Supervisor of Elections. As such, there could not have been an usurpation of the Supervisor of Elections’ role in the re-registration process. Additionally, it could not be the intention of Parliament that if the wrong person is appointed Chief Registration Officer the registration process is void.

ADDITIONAL INFORMATION

The jurisdiction of the Eastern Caribbean Supreme Court spans nine Member States/Territories. It 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 fulfill 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**.

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