

SAINT CHRISTOPHER AND NEVIS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. SKBHCV2010/0020

In the matter of the National Assembly
Elections Act, Cap. 162 of the Laws of
Saint Christopher and Nevis

And in the matter of the Constitution
of Saint Christopher and Nevis

And in the matter of an Election for
the Electoral District/Constituency 8
held on 25th January 2010

BETWEEN

CEDRIC LIBURD

Petitioner

-and-

EUGENE A. HAMILTON

1st Respondent

LEROY BENJAMIN

2nd Respondent

ANDY BLANCHETTE

3rd Respondent

ATTORNEY GENERAL OF ST. CHRISTOPHER
AND NEVIS

Interested Party

Appearances:

Dr. Henry L.O.S. Browne and Mr. Sylvester Anthony for the Petitioner
Mr. Terrence Byron, Mr. Vincent Byron and Mr. Delara McClure Taylor for the 1st
Respondent
Mr. Arudranauth Gossai for the 2nd and 3rd Respondents
Dr. Lloyd Barnett and Mr. Delano F. Bart, Q.C. instructed by Mr. Arudranauth Gossai for
the Interested Party

2010: July 23, 26, August 13
2010: October 13

Catchwords

Election Petition - Section 28(1)(a) of the Constitution of St. Christopher & Nevis states "a person shall not be qualified to be elected or appointed to the National Assembly for Saint Christopher & Nevis, who is by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state."

On nomination day, First Respondent was not a citizen of the United States, as pleaded in the Election Petition but a permanent resident or a "green card" holder- Petitioner conceded this fact on day of trial – no application to amend Petition – should Petitioner have withdrawn Petition at this stage since he was bound by his pleadings – Petitioner did a change of tack and then alleges that a green card holder owes allegiance to the United States.

Does green card holder owe allegiance to the United States? –evidence reveals that First Respondent is a citizen of St. Kitts& Nevis – lives and works in St. Kitts – does not own property or pay taxes to the United States Government – no evidence that he lives and works in the United States – domicile of choice is not the United States.

Green card holder not required to take oath of allegiance to the United States – concepts in United States which are analogous to the concept of adherence are confined to naturalization to United States citizenship and do not apply to green card holders – no greater acknowledgement of obedience on a green card holder than any foreign national within U.S. jurisdiction – a lawful permanent resident is a foreign national who retains his or her (non-United States) nationality.

First Respondent was therefore qualified to be a member of the National Assembly - Right of return as the duly elected Member of Parliament for Constituency 8.

Headnote

The Petitioner brings this Election Petition seeking several relief including a determination that the nomination, election and return of the First Respondent to the National Assembly for Saint Christopher and Nevis is invalid, null and void and of no legal effect and a determination that the First Respondent was, on nomination day, not qualified and was disqualified from being nominated.

The Petitioner pleads that as an adult, the First Respondent became a United States citizen in that he applied for, accepted and traveled using foreign travel documents (including a green card) and passports issued by the United States Government. The Petitioner swore an affidavit in support of the truth of these allegations. In compliance with an order for disclosure the First Respondent disclosed a copy of a valid "green card" issued by the United States Department of Justice Immigration and Naturalization Service. The Petitioner produced no further evidence of the alleged US travel documents and withdrew his pleaded assertion that the First Respondent held a US passport at the commencement of the trial.

Held:

- (1) It is beyond doubt that one cannot be a United States citizen and a green card holder at the same time. Having pleaded that the First Respondent was a United States citizen, the

- same pleading cannot imply that he was also a green card holder. The two statuses are mutually exclusive. Thus, in light of the Petitioner's concession at the opening of the trial that 'the averment in the Petition that the First Respondent is the holder of a United States passport must fail', the Petitioner should have withdrawn the Petition instead of proceeding with the trial.
- (2) It is an elementary rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served: see **Yorkshire Provident Life Assurance Co. v Gilbert and Rivington (1895) 2 QB 148, 152 CA.**
 - (3) A party may not raise any new ground of claim, or include in his pleadings, any allegation or fact inconsistent with his previous pleadings. In order to raise such a new ground of claim, or to include any such allegations, amendment of the original pleading is necessary. He must either apply for leave to amend the pleading or particulars already served, or for leave to serve further particulars: see **London Passenger Transport Board v Moscrop [1942] AC 332.**
 - (4) On the evidence, although the First Respondent is the holder of a United States "green card," he lives and works in St. Christopher & Nevis. He does not maintain an unrelinquished lawful permanent residence in the United States although he should in order to maintain his resident status. This Court is not concerned with what he does in order to maintain that status. That is strictly a decision for the United States Government.
 - (5) The First Respondent travels on a passport issued by the Federation of St. Christopher and Nevis. As the holder of a United States "green card" or "lawful permanent resident status", he owes no greater obedience to the laws of the United States than any other foreign national or temporary visitor, such as a student or non-immigrant worker, who retains his or her foreign nationality would owe while within the US jurisdiction. Also, unlike the grant of citizenship, there is no oath of allegiance to the United States required upon the grant of a green card nor did the First Respondent make any such oath.
 - (6) The First Respondent was under no acknowledgment of allegiance, obedience or adherence to any foreign power or state on nomination day. He was therefore duly qualified and not disqualified from being nominated as a candidate and from being elected and/or returned as a Member of the National Assembly for Constituency St. Christopher 8 and I certify such determination to His Excellency, the Governor General.

JUDGMENT

Introduction

- [1] **HARIPRASHAD-CHARLES J:** In this Election Petition brought by the Petitioner, Cedric Liburd against the 1st, 2nd and 3rd Respondents (collectively "the Respondents"), he seeks the following relief namely: (1) a determination that the nomination of the First Respondent, Eugene A. Hamilton

to the National Assembly for Saint Christopher and Nevis is invalid, null and void and of no legal effect; (2) a determination that Mr. Hamilton was, on nomination day, not qualified and was disqualified from being elected; (3) a determination that the election of Mr. Hamilton as a Member of Parliament for the Electoral District/Constituency 8 ("Constituency 8") be declared null and void; (4) a determination that Mr. Liburd, being the only duly qualified and validly nominated candidate on nomination day, be returned to the National Assembly as the duly elected Member of Parliament for Constituency 8 and (5) a certificate directed to His Excellency the Governor General that on nomination day, Mr. Hamilton was not qualified and was disqualified from being nominated and that Mr. Liburd is the duly elected and returned candidate for that Constituency.

- [2] In a nutshell, Mr. Liburd alleges that, on nomination day, Mr. Hamilton was not qualified to be nominated as a candidate to contest the General Elections held on 25 January 2010 because he was a citizen of the United States. Therefore, Mr. Hamilton was, by virtue of his own act, under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state namely the United States.
- [3] His allegation is grounded in section 28(1) (a) of the Saint Christopher and Nevis Constitution ("the Constitution") which provides that "*A person shall not be qualified to be elected or appointed to the National Assembly for Saint Christopher and Nevis, who is by virtue of his own act, under an acknowledgment of allegiance, obedience or adherence to a foreign power or state.*"
- [4] Mr. Hamilton trenchantly refutes the allegations contained in the Petition. He asserts that on nomination day, he was duly qualified to contest the General Elections since he is not and never was a United States citizen. He says that he is a citizen of St. Christopher & Nevis with permanent resident status in the United States since 2003. Mr. Hamilton categorically denies that he was at the time of his nomination for election a person who was by his own act under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state, namely the United States.

Background facts

- [5] Mr. Liburd was a candidate in the General Elections for Constituency 8. Mr. Hamilton was also a candidate in the said General Elections for the same constituency. The 2nd Respondent is the Supervisor of Elections. The 3rd Respondent is the Returning Officer for Constituency 8. The Interested Party is the Honourable Attorney General (“the Attorney General”).
- [6] Nomination day was on 15 January 2010. On that day, Mr. Liburd and Mr. Hamilton were nominated as rival candidates for election as a Member of Parliament for Constituency 8. On obtaining his nomination, Mr. Hamilton declared that he was not, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state and that he was qualified and not disqualified to be nominated as a candidate.
- [7] General Elections were held in St. Christopher and Nevis on 25 January 2010. On the following day, after the final count of the ballots, the Returning Officer declared that Mr. Liburd received 1,986 votes and Mr. Hamilton received 2,017 votes. The Returning Officer then returned Mr. Hamilton to the Supervisor of Elections as being duly elected.
- [8] On 5 February 2010, Mr. Liburd instituted this Election Petition claiming, in the main, that the nomination, election and return of Mr. Hamilton as a Member of the National Assembly are invalid, null and void and of no legal effect. The Petition was duly supported by an Affidavit sworn to on 5 February 2010.
- [9] On 23 April 2010, the Attorney General, initially, not a party to these proceedings, filed a Notice of Application to intervene. In his Notice of Application to intervene, he premised his application on four discrete grounds, namely (1) the Petition raises issues of grave constitutional importance and calls for the interpretation of section 28(1)(a) of the Constitution and (2) the intervention of the Attorney General is desirable so that the public interest can be represented and there are no decided cases within this jurisdiction that determine the legal effect and constitutional implications where a person who is nominated for election or who is elected to the National Assembly has engaged in applying and obtaining, accepting and or possessing, travel or immigration documents including passports and/or green cards belonging to or issued by a foreign power or state, in the

context of section 28(1)(a) of the Constitution which prescribes the disqualification of a person who is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state.

- [10] At a Case Management Conference held on 29 April 2010, the court ordered that pursuant to section 36(2) of the Constitution, permission is granted to the Attorney-General to intervene as an Interested Party.¹ At the said Case Management Conference, the learned judge gave further directions in readiness for a 3-day trial to commence on 26 July 2010. Paragraph 3 of the Order directed "The First Respondent to produce for inspection, on or before 13 May 2010, by the Petitioner, 2nd and 3rd Respondents and the Attorney General any passport, travel document, visa, or other instrument relating to citizenship, immigrant or residential status issued by him by any State other than St. Christopher and Nevis". Paragraph 4 directed the Respondents to file and serve an Answer to Petition on or before 20 May 2010.
- [11] Mr. Hamilton complied with the order for specific disclosure. On 11 May 2010, he duly filed and served on all parties a list of documents for inspection comprising one document namely his Permanent Resident Card issued by the United States Department of Justice, Immigration and Naturalization Service (or "INS").² He gave notice that the document was available for inspection at the Chambers of his Counsel during normal business hours. It is not disputed that none of the parties or their legal representatives attended for inspection.
- [12] On 20 May 2010, Mr. Hamilton filed an Answer to the Election Petition. It was properly supported by an affidavit of even date declaring that the contents of the Answer are true.³ In his Answer, Mr. Hamilton emphatically denies that: (1) he was on nomination day, a person who was by his own act under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state, namely, the United States and/or a citizen, and thus was not qualified and was disqualified from being nominated, and from being elected and/or returned as a Member of the National Assembly; (2) he has never applied for or been issued with, or travelled on, a United States Passport and (3) he was never required to, or that he ever did, swear to an oath of allegiance,

¹ See Tab. 6 of the Trial Bundle.

² See Tab. 7 of the Trial Bundle.

³ See Tabs 8 and 9 of the Trial Bundle.

obedience or adherence to a foreign state or power, namely, the United States. However, he admits that he is a permanent resident of the United States and the holder of what is universally known as a "green card."

- [13] On 3 June 2010, Mr. Liburd filed and served an Affidavit in Reply to Mr. Hamilton's Answer.⁴ He accepts that Mr. Hamilton is a United States permanent resident. He however argues that, with such status, Mr. Hamilton was, by virtue of his own act, under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state and therefore, he was disqualified from being nominated for election.
- [14] On 1 July 2010, on the instructions of the Attorney-General, an expert report of one Ted J. Chiappari was filed. Mr. Chiappari is an attorney in the New York Bar who received his law degree from Harvard University. He has been practising his profession since 1993. Throughout his career, he has concentrated in the area of immigration and citizenship law, with a special focus on business immigration.
- [15] On 7 July 2010, via teleconferencing, the court gave further case management directions in preparation for a three-day trial to commence on 23 July 2010.

The Pleadings

- [16] Stripped to their bare essentials, Mr. Liburd alleges the following facts to establish the relief which he sought namely that:
- a) Mr. Hamilton became and was a United States citizen on nomination day.
 - b) Although Mr. Hamilton was born in St. Christopher & Nevis, as a United States citizen, he was, by his own act, under an acknowledgment of allegiance and/or obedience and/or adherence to a foreign power or state, namely, the United States.

⁴ See Tab. 10 of the Trial Bundle.

- c) On nomination day, Mr. Hamilton falsely declared that he was not, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to the United States and that he was qualified to be nominated.
- d) As an adult, Mr. Hamilton applied for, accepted and travelled on numerous occasions on foreign travel documents or papers and a passport issued by the Government of the United States.
- e) The acquisition of a foreign travel document (**including a green card**) [emphasis added] and/or passport of the United States required Mr. Hamilton to swear to an oath of allegiance and/or acknowledge allegiance, obedience and/or adherence to the United States. **Consequently, Mr. Hamilton was by his own act, a United States citizen or a person, under an acknowledgement, obedience and/or allegiance to the United States.** [emphasis added]
- f) In 2008 and 2009, Mr. Hamilton travelled several times to the United States including Puerto Rico and Miami using foreign travel documents and passports numbered A055211598; BP001812 and 00158215.
- g) Mr. Hamilton has never produced any Certificate of Renunciation issued by the United States State Department.
- h) Mr. Liburd believes and has reasonable grounds to believe that Mr. Hamilton is a United States citizen whose citizenship has not been renounced.
- i) Since Mr. Hamilton owes allegiance and/or obedience and/or adherence to the United States, he is not qualified and was therefore, disqualified by virtue of the Constitution from being nominated, and from being elected and/or returned as a Member of the House of Assembly for Constituency 8.

The Trial

[17] In his opening statement at the commencement of the trial, Dr. Browne appearing as Counsel for Mr. Liburd asserted:

“The answer to the Petition in no way demurs or joins issue with the fact that the First Respondent is a permanent resident alien of the United States of America... On the averment that he is the holder of a United States passport, that averment in the Petition must fail. The sole issue therefore is whether the permanent residence alien status is such in law as to prohibit him under section 28(1) (a) of the Constitution from standing as a candidate in the general election spoken to.”

[18] Mr. Terrence Byron appearing as Counsel for Mr. Hamilton submits that on making such a concession, Dr. Browne should have sought to absolve Mr. Liburd’s deception of the court and of all of the parties whom he joined in his Petition and, as a form of penance, ask the court to dismiss the Petition with costs. Instead of doing that, Mr. Byron argues, Mr. Liburd and his Counsel led the court on an excursion of speculation into whether, as the holder of a United States permanent resident card⁵ since July 2003, Mr. Hamilton was disqualified from being elected. Mr. Byron submitted that in order for Mr. Liburd to argue at the trial that Mr. Hamilton was a green card holder, Mr. Liburd would have had to amend his Petition in order to plead that and make it a “live” issue.

[19] It is an elementary rule of pleading that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served.⁶

[20] It is also elementary that “when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation....The certainty or particularity of pleading is directed not to the disclosure of the case of the party, but to the informing the court,...and the opponent, of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a

⁵ On 11 May 2010, Mr. Hamilton disclosed his permanent resident card. Also attached was a Notice to Inspect.

⁶ *Yorkshire Provident Life Assurance Co. v Gilbert and Rivington* (1895) 2 QB 148, 152, CA.

single and certain point, avoiding the prolixity and uncertainty which would very probably arise from the stating, all steps which will lead up to that point.”⁷

[21] The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.”⁸ A party must so state his case that his opponent will not be taken by surprise.

[22] **A party may not raise any new ground of claim, or include in his pleadings, any allegation or fact inconsistent with his previous pleadings** [emphasis added]. In order to raise such a new ground of claim, or to include any such allegations, amendment of the original pleading is necessary. He must either apply for leave to amend the pleading or particulars already served, or for leave to serve further particulars. In **London Passenger Transport Board v Moscrop**,⁹ Lord Russell of Killowen said:

“Any departure from the cause of action alleged or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court’s record, and be capable of being referred to thereafter should necessity arise. **Pleadings should not be ‘deemed to be amended’ or ‘treated as amended.’ They should be amended in fact.**” [emphasis added]

[23] Where a party makes a radical departure from the case stated in their pleadings, amounting to a new, separate and distinct case, the party will not be entitled to succeed. In **Waghorn v George Wimpey**,¹⁰ it was held, amongst other things, that this was not a case which was just a variation, modification or development of what had been averred; it was new, separate and distinct, and not merely a technicality, and constituted so radical a departure from the case as pleaded as to disentitle the plaintiff to succeed.

⁷ *Williams v Wilcox* (1838) 8 Ad & El 314; [1835-1842] All ER Rep 25.

⁸ Halsbury’s Laws of England 4th ed. Vol. 36: Pleading, para. 4. ‘Function of pleadings’. See also the case of *Esso Petroleum Co. Ltd v Southport Corpn.* [1955] 3 All ER 864.

⁹ [1942] AC 332; [1942] 1 All ER 97, 105 C-E.

¹⁰ [1970] 1 All ER 474.

[24] In addition, every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies ...” What constitutes material facts? The word “material” means necessary for the purpose of formulating a complete cause of action; a cause of action is the group of facts, or a ‘factual situation’ which if proven, will entitle a claimant to obtain a remedy from the Court against another person.¹¹

[25] In “**The Law and Practice of Election Petitions,**” being a Supplement to **Roger’s on Elections and Registration** (1869),¹² the following passage appears under the rubric Form of Petition, and next to the marginal note “What precision necessary:”

“Although no technical form was ever necessary in framing a petition to the House of Commons, it was nevertheless requisite to state with certainty such facts as were intended to be relied on in evidence, in order that the opposite party might have notice of the charges against him. Thus it was not competent to the petitioner to prove as matter of complaint facts introduced into the petition by way of recital only, not when specific charges were made was it competent to enter into evidence of charges not alleged. See 2nd Norwich, 3 Lud. 463; Middlesex, 2 Peck 5; 2nd Clitheroe, post, p 13.”

[26] The Election Petition pleads that Mr. Hamilton became a United States citizen and as an adult, he applied for, accepted and travelled using foreign travel documents (including a green card) and passports issued by the United States Government. The acquisition of a foreign travel document (including a green card) and/or passport of the United States required Mr. Hamilton to swear to an oath of allegiance and/or acknowledge his allegiance, obedience and adherence to a foreign power or state, namely, the United States. As such, by section 28(1)(a) of the Constitution, Mr. Hamilton was not qualified to be elected as a representative of the National Assembly. Consequently, he was not qualified to be nominated and he made a false declaration on nomination day that he was qualified and not disqualified to be elected as a Member of the National Assembly.

[27] The common thread running through the Election Petition is that Mr. Hamilton was, by his own act, a United States citizen, who owes allegiance to the United States, indisputably, a foreign state and consequently, he is not qualified and was disqualified from being nominated and/or elected and/or returned as a member of the National Assembly for Constituency 8. Not only did Mr. Liburd alleged

¹¹ Per Lord Diplock **Letang v Cooper [1965] 1 QB 232, 242-3.**

¹² Eleventh Edition, at page 10.

that Mr. Hamilton travelled to the United States including Puerto Rico and Miami on many occasions during 2008 and 2009 but he went even further to enumerate the United States passports that Mr. Hamilton travelled on. In my opinion, the phrase “travel documents including a green card, was fleetingly used in the Petition. That was not the crux of the pleadings. If Mr. Liburd intended to plead that as a green card holder, Mr. Hamilton was, by virtue of his own act, under an acknowledgement of allegiance and/or obedience and/or adherence to the United States and therefore disqualified from being nominated for election, he could have done so. He cannot do so incidentally or parenthetically. Material facts must be pleaded. This is trite law.

[28] On 11 May 2010, Mr. Hamilton disclosed a copy of his valid green card, issued by the United States Department of Justice (“INS”). This was in keeping with the Order dated 29 April 2010. By virtue of that Order, Mr. Liburd was at liberty to file and serve Affidavits in Reply by 3 June 2010. On that day, Mr. Liburd filed an Affidavit in Reply to Mr. Hamilton’s Answer. Armed with this new information, for the first time, he specifically averred that because Mr. Hamilton is a green card holder, that means, in no uncertain terms, that he is, by his own act, under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state, namely the United States and therefore, disqualified from being nominated for election¹³. At paragraph 7, Mr. Liburd went on to state that “paragraph 13 of the Answer is denied as the First Respondent failed to disclose on nomination day that he was a *“Permanent Resident”* of the United States and has in fact taken an oath on nomination day saying that he was not by his own act under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state.”

[29] It is incontrovertible that one cannot be a United States citizen and a green card holder at the same time. Thus, having pleaded that Mr. Hamilton is a United States citizen it is axiomatic that the same pleading cannot imply that Mr. Hamilton is a green card holder. The two statuses are mutually exclusive.

[30] In this catch-22, it is my firm view that Mr. Liburd should have withdrawn the Election Petition. Instead, he did a volte face and now states at paragraph 6 of his Reply to Answer that:

¹³ See paragraph 6 of Affidavit of Petitioner in Reply to the 1st Respondent’s Answer.

"...the First Respondent has admitted that he is a "*Permanent Resident*" of the United States of America and this means, in no uncertain terms, that he is by his own act under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign state or power and therefore disqualified from being nominated for election."

- [31] In addition, Mr. Liburd did not make an application seeking an amendment to the Election Petition, and perhaps, rightly so, because the time to make an application to amend would have long elapsed.¹⁴
- [32] As Mr. Byron correctly posited, it is absolutely misleading to aver that Mr. Hamilton has admitted a fact which is not in issue. It is not material to the Election Petition that Mr. Hamilton holds a United States permanent resident status. This is not a fact which was necessary to establish a claim in the Petition that Mr. Hamilton is a United States citizen and travels on a United States passport.
- [33] In these circumstances, I agree entirely with Mr. Byron that the Election Petition should be dismissed with costs. I so order.
- [34] If, however, I am wrong in my interpretation of the rules of pleadings, I will carry on with this Petition. Both the Attorney General and Dr. Browne identified several issues in their Statements of Facts and Issues. I am immeasurably grateful for their assistance.

Does a green card holder owe allegiance to the United States?

- [35] All parties are agreed that Mr. Hamilton is a citizen of St. Christopher and Nevis. He is also the holder of a green card having acquired permanent resident status in the United States in July 2003. The card is valid for 10 years and will expire on 21 July 2013. The card also indicates a category of "F42." "F" stands for family-based, and F42 is the code assigned to someone who immigrates to the United States as the spouse of a sibling of a United States citizen.
- [36] The primary issue which arises for determination is whether Mr. Hamilton was, as the holder of a green card at the time of his nomination, a person who, by virtue of his own act, under any acknowledgement of (1) allegiance, and/or (2) obedience and/or (3) adherence to the Government

¹⁴ See section 83(1)(a) of the Constitution and Elections Ordinance, Cap. 162

of the United States? Arising out of the key issue are some related issues which will also be addressed under this generic head.

The evidence

- [37] Mr. Liburd gave evidence. He did not call any witness but relies on the entire affidavit of Mr. Chiappari for its full purport and intent. Mr. Hamilton also gave evidence and he called an expert witness, Mr. Sherfield Bowen, an attorney and counselor at law, having been admitted to practise law before the courts of the State of New York and before the Eastern Caribbean Supreme Court (Antigua & Barbuda Circuit). The Attorney General did not call any witness to give viva voce evidence at this trial. This is because it was agreed that his expert witness, Mr. Chiappari will not be cross-examined.
- [38] Under intense cross-examination, Mr. Liburd admitted that Mr. Hamilton is not and never was a United States citizen and that he did not apply for a passport issued by the United States Government. He also admitted that: (a) Mr. Hamilton lives in Cayon, St. Kitts and in Florida but he does not know where in Florida; (b) he knows that the Hamilton family has a house in Florida; (c) he does not have any information whether Mr. Hamilton lived in the United States in 2003; (d) he does not know if Mr. Hamilton went to the United States between 2003 and 2008; (e) he has investigated and found out that Mr. Hamilton travelled to the United States in 2008 and 2009 but he does not have specific dates of such travels; (f) he does not have any information that Mr. Hamilton went to the United States in 2010; (g) he knows that Mr. Hamilton was (he does not know if he still is) the Agency Manager at British American on Cayon Street, St. Kitts; (h) he has no evidence whether Mr. Hamilton has ever worked in the United States or whether he pay taxes to the United States Government.
- [39] Mr. Hamilton took the witness stand. He also was cross-examined extensively. He admits that: (a) he is the holder of a green card and one cannot have two permanent residences; (b) he does not have a permanent residence in the United States; (c) he did not apply for a green card but he obtained one through marriage; (d) his children and wife live in the United States; (e) he does not and has never paid taxes in the United States; (f) he does not own property in the United States; (g) he obeys the laws of the United States when he visits that country; (h) his green card is valid; (i)

he does not use his green card to gain an advantage; (j) he goes to the United States on vacation and uses the green card conjunctively with his St. Christopher and Nevis passport in order to gain entry; (k) he was prepared on nomination day to surrender his green card and to waive any rights from the day he got it; (l) he agrees that as a Member of Parliament, he should owe no allegiance, adherence or obedience to any foreign power or state and (m) he owes no such allegiance, adherence or obedience to the United States.

[40] As I have already indicated, Mr. Bowen also testified on behalf of Mr. Hamilton. He unconditionally agrees with most of Mr. Chiappari's evidence and states that paragraphs 36, 37 and 38 of Mr. Chiappari's affidavit evidence succinctly summarize the primary issue under consideration.

[41] Having had the opportunity of seeing and hearing the witnesses who testified at this trial, I accepted their evidence (including the experts) as being honest and straightforward. However, I did not believe Mr. Liburd when he said that he found out the night before the trial that he was not going to rely on parts of the Petition with regards to Mr. Hamilton not being a United States citizen. But, I accepted his forthrightness in admitting that the facts contained in paragraphs 10, 11, 12, 14 and 15 of the Petition were not true. As a result of these admissions, it was clear as can be that the entire foundation of Mr. Liburd's stated belief in paragraph 17 that on nomination day, Mr. Hamilton was a United States fell by the wayside. Indeed, these admissions created a colossal vacuum in the Petition; so grave that Mr. Liburd had yet another opportunity to withdraw his Petition. Instead, he soldiered on: introducing the green card issue or non-issue as will become evident later on in the judgment.

[42] I return to the evidence. I was able to positively discern that Mr. Hamilton never was and is not a United States citizen. As a matter of fact, the only citizenship which he holds is that of St. Christopher & Nevis. Mr. Hamilton is also the holder of a United States permanent resident card which enables him to live and work in the United States. However, there is not a scintilla of evidence that Mr. Hamilton lives and works in the United States although he is privileged to do so by virtue of his permanent resident status.

[43] Learned Counsel for the Attorney General, Dr. Barnett trenchantly submits that by holding a permanent resident card, Mr. Hamilton has accepted the obligation since 2003 to reside in the

United States on a permanent basis. He further submits that Mr. Hamilton has done nothing to relinquish that status and that he has admitted that he has travelled regularly to the United States, at least twice a year, thereby seeking to satisfy his obligation to maintain the United States as his place of permanent residence and to avoid cancellation of that status.

- [44] Extrapolating the attractive submission of Dr. Browne, he asserts that as a holder of a green card, Mr. Hamilton has demonstrated his intention to maintain his United States permanent resident status in order to take advantage of the rights and privileges attached to that status and also, to subordinate himself to the duties and obligations consonant with such status.
- [45] In order to preserve that green card, it is mandatory that Mr. Hamilton maintains an unrelinquished lawful permanent resident status in the United States with any absences from that country being temporary. This is the defining characteristic of lawful permanent resident status in the United States.¹⁵ Mr. Liburd insists that in applying for and obtaining the grant of lawful permanent residence, Mr. Hamilton has undertaken to maintain an unrelinquished lawful permanent residence status in the United States. But Mr. Liburd himself admits that Mr. Hamilton lives and works in St. Christopher & Nevis. In this regard, I believe that in order to maintain a lawful permanent resident status in the United States, Mr. Hamilton may be telling untruths to the United States Government every time he attempts to enter that country but that is not a concern of this court.
- [46] Unquestionably, by being the holder of a green card, Mr. Hamilton enjoys certain rights and privileges in the United States. It cannot be gainsaid that with these rights and privileges come concomitant obligations and responsibilities particularly if Mr. Hamilton may choose to become a United States citizen later. As Dr. Browne insinuates, Mr. Hamilton may have the advantage of two worlds, and I believe that he does. Nonetheless, the vexed question is: does that make him a person who, by virtue of his own act, was on nomination day, under any acknowledgement of (1) allegiance, and/or (2) obedience and/or (3) adherence to the Government of the United States? Both Dr. Barnett and Dr. Browne answer this question in the affirmative. Mr. Byron argues to the contrary. The gist of his argument is that a green card holder owes no allegiance, obedience or

¹⁵ See paragraph 11 of Ted J. Chiappari's affidavit filed on 1 July 2010.

adherence to the United States since he is essentially a foreign national. He says that the affidavit of Mr. Chiappari, the expert witness for the Attorney General crystallizes this.

Constitutional Provisions

[47] At this stage, it is appropriate that I set out the constitutional provisions. Section 27 of the Constitution addresses the qualification for membership of the National Assembly while section 28 deals with the disqualification for membership.

[48] Section 27 in effect provides that "...a person shall be qualified to be elected or appointed as a member of the National Assembly if, and shall not be so qualified unless, (1) he is a citizen of the age of twenty-one years or upwards; (2) he was born in St. Christopher & Nevis and (3) he is **domiciled** there at the date of his nomination for election or his appointment [emphasis added].

[49] Much was made by Mr. Liburd and the Attorney General that at the time of Mr. Hamilton's nomination and/or election, his **domicile of choice** was the United States so that he was under an acknowledgement of adherence to that country. They say that by his acceptance of permanent resident status in the United States, Mr. Hamilton demonstrated an intention to adhere to and treat the United States as his permanent residence thus triggering his domicile of first choice as the United States. At first blush, this appears to be an attractive submission because to maintain lawful permanent resident status, a foreign national must maintain his or her permanent residence in the United States¹⁶. However, the evidence, as I found it, is that Mr. Hamilton lives and works in St. Kitts and he occasionally visits his wife and children in Florida. There is not an iota of evidence that he maintains a permanent residence in the United States. Therefore, this issue is merely a bare allegation unsubstantiated by evidence.

[50] So, it is clear that Mr. Hamilton satisfied the qualifications to be a member of the National Assembly subject of course, to section 28(1)(a) which is at the heart of this controversy. Section 28(1)(a) reads:

28. Disqualification for representatives and senators:

(1) "A person shall not be qualified to be elected or appointed as a member if he or she

¹⁶ See paragraph 26 of the affidavit of Mr. Ted Chiappari.

(a) is, by virtue of his or her own act, under acknowledgement of allegiance, obedience or adherence to a foreign power or state.”

- [51] The Constitution lists three disqualifying factors namely (1) allegiance; (2) obedience or (3) adherence, in each case to a foreign power or state. It is not disputed that the United States is a foreign state.
- [52] Dr. Barnett submits that the use of the three different words in a disjunctive manner demonstrates the clear intention of the Constitution – makers to eliminate as far as possible any possibility of a parliamentary representative having loyalties or obligations which compete with his loyalties and obligations to St. Christopher & Nevis. Dr. Browne made similar submissions relying on a paper entitled “**Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification**” by Gerard Carney. The learned author reminds us that “the obvious rationale for this ground of disqualification is the avoidance of an actual or perceived split-allegiance or divided loyalty on the part of members of parliament.”
- [53] Dr. Barnett submits that the terms “allegiance”, “obedience” and “adherence” are general terms and that it is well established that allegiance may be owed to a state by a non-citizen as in the case of a person who travels on a passport of a foreign state or who is so associated with the foreign state or who is so associated with the foreign state that he or she has some benefits, privileges or protection of the foreign state. Regrettably, learned Counsel could not cite any authority to support such a well established principle. Indeed, there may be none.
- [54] With respect to the obedience factor, Dr. Barnett states that it is clear that Mr. Hamilton has accepted the requirements of the resident status regime by his frequent visits to the United States using his permanent resident card as the instrument for gaining entry to the United States and which distinguishes him from a tourist or non-immigrant visitor. Mr. Chiappari opines that “a lawful permanent resident, by virtue of his own act of residing permanently in the United States, acknowledges obedience to the laws of the United States. This obedience, however, is no greater

than the obedience any foreign national within U.S. jurisdiction must acknowledge.¹⁷ This makes good sense because a lawful permanent resident, like a temporary visitor, student or worker (a “nonimmigrant”) is still a foreign national who retains his or her (non-United States) nationality.¹⁸

- [55] Dr. Barnett submits that the very fact that Mr. Hamilton accepted permanent resident status and his obligation to treat the United States as his unrelinquished permanent residence establish his attachment to the United States as well as his continued intention to maintain that attachment.
- [56] Dr. Browne makes similar submissions. He argues that the positive acts of Mr. Hamilton in applying for and accepting permanent resident status in the United States demonstrates such a permanent bond with the United States as to give rise to an acknowledgement of his allegiance, obedience or adherence to a foreign power within the meaning of section 28(1)(a) of the Constitution of St. Christopher & Nevis. Dr. Browne also could not cite any authority to substantiate his argument although in fairness to him, many of his submissions seem to have had their basis in the consolidated Jamaican appeals of **Dabdoub v Vaz, Harris and Attorney General; Vaz v Dabdoub**¹⁹ which I will come to later.
- [57] All parties rely heavily on the expert evidence of Mr. Chiappari for its full meaning and intent. Even Mr. Hamilton’s expert witness, Mr. Bowen accepts, to a great extent, the evidence (particularly paragraphs 36, 37 and 38) of Mr. Chiappari’s affidavit. And what does Mr. Chiappari say on the three disqualifying factors of “allegiance”, “obedience” and “adherence”?
- [58] At paragraph 36, Mr. Chiappari speaks to the oath that a naturalization applicant **must** take at a public ceremony as part of the application process for U.S. citizenship. The oath states:

“I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national

¹⁷ See paragraph 38 of the affidavit of Mr. Ted F. Chiappari.

¹⁸ *Ibid*, paragraph 18.

¹⁹ Civil Appeal No.45 of 2008, Civil Appeal No. 47 of 2008.

importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion, so help me god." 8 C.F.R. § 337.1. **There is no such oath required to become a lawful permanent resident.** [emphasis added]

[59] At paragraph 37, Mr. Chiappari explains the word "adherence" (as in adherence to a foreign power or State" as that term is used in the St. Christopher & Nevis Constitution) is not a term used or concept applied in U.S. immigration or citizenship laws. He says that there are analogous concepts in the context of naturalization but those concepts do not apply to lawful permanent residents outside of the context of naturalization to U.S. citizenship.

[60] Mr. Chiappari concludes as follows:

"...it is my expert opinion that a lawful permanent resident, by virtue of his own act of residing permanently in the United States, acknowledges obedience to the laws of the United States. This obedience, however, is no greater than the obedience any foreign national within U.S. jurisdiction must acknowledge. There is no acknowledgement of allegiance or adherence to the United States other than to abide with the laws of the United States." ²⁰

[61] It is plain that a lawful permanent resident is not under an acknowledgement of allegiance and/or obedience and/or adherence to the United States as such person, **like a temporary visitor, student or worker (a "non-immigrant")** is still a **foreign national who retains his or her (non-United States) nationality (and passport)** and who can be removed from the United States (if one of the many grounds for removability is met, such as commission of certain crimes). **Moreover, a lawful permanent resident can surrender voluntarily or lose involuntarily his or her permanent resident status and right to reside permanently in the United States by abandoning his or her permanent residence in the United States.**"²¹

[62] Mr. Chiappari, being the meticulous expert, was at pains to include a miscellany of administrative cases which have established principles and factors to be considered in determining whether a

²⁰ See paragraph 38 of the affidavit of Ted J. Chiappari.

²¹ See paragraph 18 of the affidavit of Ted J. Chiappari.

holder of a permanent resident card (or re-entry permit) qualifies as a returning resident.²² In **Matter of Kane**,²³ the court lists several factors in determining the subjective intent of the foreign national, which can control whether a visit is temporary or not in those circumstances where the temporariness is not clearly indicated by elapsed time alone (in other words, where the absence abroad is for an extended period): whether there is a specific or definite purpose for departing; whether the visit abroad is expected to terminate within a relatively short period of time and whether the person has an actual home or place of employment in the U.S. The applicant was found to have abandoned her lawful permanent resident status where, for over 7 years, she spent approximately 11 months of each year in Jamaica, returning to the U.S. for only 3 weeks or so, she worked in Jamaica and had no actual home in the U.S.

[63] In **Matter of Huang**,²⁴ the court emphasize[d] that “unrelinquished lawful permanent residence” can have reference to something less than a permanent dwelling place in the United States... Consequently, the applicant’s lack of an actual dwelling place in the United States is not, in and of itself, determinative in ascertaining whether she was returning from a temporary absence abroad. The applicant’s green card was taken away on the ground that her husband’s contract to work and study in Japan could not be said to be temporary.

[64] In **Matter of Castro**,²⁵ the court lists three factors in determining the temporary nature of travel abroad: the duration of the absence; the location of the applicant’s family ties, property holdings and job; and the intention of the applicant with respect both to his actual home’s location and the anticipated duration of the trip. The case concerns a Mexican green card holder who got his green card in 1963 and then moved back to Mexico, built a house there, obtained steady employment there for six years but made numerous business trips to the United States. He was deported in 1969 on the ground that he had abandoned his permanent resident status.

[65] Finally, I dare say that given the media hype which this case has generated, I wonder whether Mr. Hamilton is still the holder of a permanent resident status in the United States even though he is in physical possession of a valid green card. He will know his fate when and if, he attempts to re-

²² See paragraphs 30, 31 and 32 of the affidavit of Ted J. Chiappari.

²³ 15I & N. Dec. 258 (BIA, April 1, 1975).

²⁴ 19 I. & N. Dec, 749 (Board of Immigration Appeals [BIA], Sept, 28, 1988.

²⁵ 14 I & N. Dec. 492 (BIA, Dec. 4, 1973).

enter the United States. I said before, being a permanent resident is a “privilege” and not a right. The United States government can take away your permanent resident status under certain circumstances.

The cases of *Dabdoub v Vaz, Harris and Attorney General; Vaz v Dabdoub*²⁶

- [66] These consolidated Election Petition cases come from Jamaica. They have been briefly cited to this court by Dr. Barnett. Although these cases are distinguishable from the present Election Petition because they concern a person with dual citizenship, which is permitted by the Jamaican Constitution, I believe that the decision of McCalla, C.J. which the Court of Appeal affirmed) is very helpful. I should say that the relief sought by the claimant/petitioner, Abraham Dabdoub in the Jamaican court mirrors the relief sought by Mr. Liburd in this court. Needless to say, the cases are of persuasive authority.
- [67] Both Mr. Dabdoub and Mr. Vaz were rival candidates for election in the General Election held on 3 September 2007, they having been nominated on 3 August 2007. Mr. Vaz won by 944 votes. Mr. Dabdoub then filed a claim seeking several relief including a determination that the nomination of Mr. Vaz on 7 August 2007 was invalid, null and void as he (Mr. Vaz] was not qualified to be elected to the House of Representatives in accordance with section 40 of the Constitution of Jamaica. Section 40(2)(a) specifically provides that “no person shall be qualified to be elected as a Member of the House of Representatives who is, by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state.”
- [68] At the material time, Mr. Vaz was a citizen of the United States, a foreign power. There was no dispute that he obtained his United States citizenship at birth, his mother being a United States citizen. His mother married a Jamaican and Mr. Vaz was born in Jamaica and by virtue of the United States Immigration and Nationality Act, he became a citizen of the United States. There is no dispute that Mr. Vaz had a total of four United States passports and that he travelled on a United States passport to various countries. On several occasions, he presented himself to Immigration Authorities as being an American citizen.

²⁶ Civil Appeal No.45 of 2008, Civil Appeal No. 47 of 2008.

[69] The Court was called upon to consider whether Mr. Vaz, by renewing and travelling on a United States passport has taken positive steps to acknowledge allegiance to the United States.

[70] The learned Chief Justice in construing section 40(2)(a) said:

"I hold that the words 'acknowledgement of allegiance, obedience and adherence to a foreign power' in section 40 (2)(a) of the Jamaican Constitution are wide enough to embrace a citizen who is a subject or citizen of a foreign power."

[71] And in applying section 40(2)(a) to the evidence, she said:

"I further hold that by his positive acts of renewing and travelling on his United States passport Mr. Vaz has by virtue of his own act acknowledged his allegiance, obedience or adherence to the United States of America and by virtue of section 40(2)(a) he was not qualified to be elected as a Member of the House of Representatives."²⁷

[72] On appeal to the Court of Appeal, the Court dismissed the appeals and affirmed the orders of the Chief Justice.

Evidence of allegiance

[73] The House of Lords case of **Joyce v The Director of Public Prosecutions**²⁸ makes it clear that a person who holds a passport is under an acknowledgement of allegiance. In his speech Lord Jowitt, L.C. said at p. 369:

"But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed...By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign."

[74] And a person who renews his passport is by his own act under an acknowledgement of allegiance.

²⁷ See paragraph 58 of the judgment: per Smith J.A.

²⁸ [1946] A.C. 347.

[75] Another case in point is **Sue v Hill**.²⁹ Mr. Sue petitioned the High Court of Australia for an order that Mrs. Hill, who had been declared to be elected as a member of the Senate, was incapable of being chosen and was accordingly not duly elected, because as at the date of her nomination, she was under an acknowledgement of allegiance, obedience or adherence to a foreign power. Mrs. Hill was born in the United Kingdom and thus became a citizen of the United Kingdom. In 1971, she and her parents migrated to Australia. In 1981, she married an Australian citizen. There were two children of the marriage born in Australia. In 1990, she travelled overseas for a short holiday on a British passport which expired in 1992. In 1998, she made an application to become an Australian citizen. Before her application was granted an emergency arose and she had to travel with her parents to New Zealand. Because she was ineligible to obtain an Australian passport, she sought and obtained a British passport. Her application for Australian citizenship was later granted and she applied for an Australian passport. Her United Kingdom passport was current at the time of her nomination and election. It was held that she was disqualified because her renewal of the passport was acknowledgement of allegiance to the United Kingdom.

[76] These cases accentuate that it is not the owing of allegiance to the United States by virtue of being a citizen of that country that is the ground for disqualification from sitting in the House of Representatives but rather the voluntary taking of steps to acknowledge that citizenship that causes the disqualification.

[77] For completeness, I will refer to the paper by Gerard Carney which was cited by Dr. Browne. Mr. Carney opines that “an acknowledgement for the purposes of that phrase (section 28(1))a) of the Constitution) would appear to cover the following:

- (a) acceptance of a foreign passport;
- (b) service in one of the foreign armed forces;
- (c) taking an oath of allegiance to a foreign power;
- (d) seeking the protection of a foreign state;
- (e) describing oneself in an official document as a citizen or subject of the foreign state.

²⁹ [1999] 199 C.L.R. 462.

[78] It is therefore plain that Mr. Hamilton who has permanent resident status in the United States, is not, by virtue of his own act, under any acknowledgement of allegiance or obedience or adherence to any foreign power or state. He is still a foreign national as far as the laws of the United States are concerned. He is a citizen of St. Christopher & Nevis and as such, he is under an acknowledgement of allegiance to that country.

[79] For these reasons, which owe much to Mr. Byron's admirable submissions, I would dismiss the Election Petition. I make a determination that Mr. Hamilton was duly returned and elected as the representative to the National Assembly for Constituency 8 and I certify such determination to His Excellency, the Governor General, Sir Cuthbert Montraville Sebastian.

Costs

[80] The remaining issue for consideration is that of costs. The general rule is that costs follow the event. Although urged by Mr. Byron to make a wasted costs order, I will refrain from so doing. In the circumstances, I will order that Mr. Liburd will pay costs to Mr. Hamilton to be assessed if not agreed. Should there be no agreement, I will then hear the parties on costs. The Registrar will liaise with me on this issue so that some directions can be given.

Costs: Attorney General's intervention

[81] There was no need for the intervention by the Attorney General. As far as I am concerned the Election Petition raises no issues of grave constitutional importance which calls for the interpretation of section 28(1) (a) of the Constitution. The section is clear and unambiguous. That said, the Attorney General will bear his own costs.

[82] The court greatly acknowledges the assistance of all Counsel.

Indra Hariprashad-Charles
High Court Judge

CERTIFICATE

I HEREBY CERTIFY TO HIS EXCELLENCY THE GOVERNOR GENERAL, SIR CUTHBERT MONTRAVILLE SEBASTIAN AND THE SUPERVISOR OF ELECTIONS THAT THE RETURN TO THE WRIT OF ELECTION FOR THE CONSTITUENCY ST. CHRISTOPHER 8 BE CONFIRMED PURSUANT TO SECTION 86 OF THE NATIONAL ASSEMBLY ELECTIONS ACT, CAP. 162 OF THE LAWS OF ST. CHRISTOPHER & NEVIS

Indra Hariprashad-Charles
High Court Judge