FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE COURT OF APPEAL

HCVAP 2010/017

BETWEEN:

CEDRIC LIBURD

Appellant

and

[1] EUGENE A. HAMILTON

1st Respondent

[2] LEROY BENJAMIN

2nd Respondent

[3] ANDY BLANCHETTE

3rd Respondent

HON. ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Interested Party

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal [Ag.]

Appearances:

Dr. Henry Browne and Mr. Sylvester Anthony for the Appellant
Mr. Terence V. Byron, Mr. Vincent Byron and Mr. De Lara McClure Taylor for the 1st Respondent
Mr. Arudranauth Gossai for the 2nd and 3rd Respondents

HCVAP 2010/018

BETWEEN:

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Appellant/Interested Party

and

[1] CEDRIC LIBURD

1st Respondent/Petitioner

[2] EUGENE A. HAMILTON

2nd Respondent

[3] LEROY BENJAMIN

3rd Respondent

[4] ANDY BLANCHETTE

4th Respondent

Appearances:

Dr. Lloyd Barnett and Mr. Arudranauth Gossai for the Appellant/Interested party
Mr. Terence V. Byron, Mr. Vincent Byron and Mr. De Lara McClure Taylor for the 2nd Respondent
Mr. Arudranauth Gossai for the 3rd and 4th Respondents

2011: May 18;
2011: December 5.

Civil appeal – Election Petition – Challenge to the election of the first respondent in HCVAP 2010/017 to the National Assembly of the Federation of Saint Christopher and Nevis – Whether the respondent is qualified to be elected to the National Assembly in light of sections 27 and 28 of the Saint Christopher and Nevis Constitution Order 1983 – What it means for one to be "under any acknowledgement of allegiance, obedience or adherence to a foreign power or state", by virtue of his/her own act

The appellant,[1] Cedric Liburd, filed an Election Petition challenging the election of Eugene Hamilton to the National Assembly of the Federation of Saint Christopher and Nevis ("the National Assembly"). He did so on the grounds that Mr. Hamilton was a citizen of a foreign state and/or the holder of foreign travel documents which included a resident alien card issued by the United States government, at the time of his nomination and election. Mr. Liburd contended that Mr. Hamilton's status disqualified him from being nominated or elected to the National Assembly, by virtue of sections 27 and 28 of the Saint Christopher and Nevis Constitution Order 1983 ("the Constitution"). The Attorney General of Saint Christopher and Nevis[2] intervened as an interested party.

In the court below, the learned judge dismissed the petition and determined that Mr. Hamilton was duly returned and elected. Both Mr. Liburd and the Attorney General appealed, seeking clarification of the issue of whether Mr. Hamilton was qualified to be a member of the National Assembly.

Held: dismissing the appeals with costs to be assessed unless agreed within 30 days and affirming the trial judge's decisions below, that:

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[1] In HCVAP 2010/17.
[2] The appellant in HCVAP 2010/018.

1. The question whether a person is by virtue of his own act, under an acknowledgment of allegiance, obedience or adherence to a foreign power or state, is to be determined in accordance with the provisions of the applicable foreign law. With respect to section 28(1)(a) of the Constitution, the Court concludes that: (i) there is no basis for upsetting the trial judge's finding that Mr. Hamilton has not acknowledged allegiance, obedience or adherence to a foreign power or state; (ii) Mr. Hamilton does not fall within the category of persons who, by reason of their status as citizens of a foreign power, owe a duty of allegiance or obedience to that foreign power since he does not have the status of a citizen or national of the United States; and (iii) Mr. Hamilton is not under the protection of the United States as though he were a citizen.

   Sykes v Cleary [1992] HCA 60; (1992) 176 CLR 77 applied.

2. In concluding that a lawful permanent resident is not under an acknowledgment of allegiance and/or obedience and/or adherence to the United States, the learned judge clearly considered the disjunctive formulation of the reference to "allegiance", "obedience" and "adherence" in section 28(1)(a) of the Constitution and evaluated the evidence in relation thereto.

3. The trial judge's finding at paragraph 46 that as a Green Card holder Mr. Hamilton enjoys certain rights and privileges in the United States with concomitant obligations and responsibilities particularly if he chooses to become a United States citizen later, cannot be looked at in isolation. It has to be placed in the context of the expert evidence of Mr. Chiappari that there is no acknowledgment of allegiance or adherence to the United States by a lawful permanent resident, and also in the context of the judge's finding that the possession of a United States permanent resident card enables Mr. Hamilton to live and work in the United States. The learned judge properly construed section 28(1) and correctly found that Mr. Liburd was not disqualified.

4. The learned judge's statement that there was "no need for the intervention by the Attorney General" was merely explanatory of and introductory to her decision that the Attorney General would bear his own costs; it was not a ruling that he had no right to intervene in the proceedings. In the circumstances, there is no valid ground of appeal in relation to this issue.

5. No person can be without a domicile and no person can at the same time and for the same purpose have more than one domicile. Also, an existing domicile is presumed to continue until it is proved that a new domicile has been acquired. At birth, every person receives a domicile of origin which can be supplanted by a domicile of choice; this domicile of choice can be acquired by an adult by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely. Central to the acquisition of a domicile of choice is the dual requirement of residence in fact, coupled with the intention of permanent or indefinite residence in the new jurisdiction. The learned

judge quite properly found that Mr. Hamilton lives and works in Saint Christopher and occasionally visits his wife and children in Florida and there was no evidence that he maintains a permanent residence in the United States. Consequently, there is no basis upon which it can be asserted that Mr. Hamilton has acquired a domicile of choice in the United States.

A & L [2009] EWHC 1448 (Fam) applied; In the Estate of Fuld, Decd. (No. 3) [1968] P. 675 applied; Mark v Mark [2005] UKHL 42 applied; Gaines-Cooper v Revenue and Customs [2008] EWCA Civ 1502 applied.

JUDGMENT

[1] BAPTISTE, J.A.: These two appeals stem from an Election Petition filed by Cedric Liburd challenging the election of Eugene Hamilton to the National Assembly of the Federation of Saint Christopher and Nevis ("the National Assembly"), primarily on the grounds that at the time of nomination and election, Mr. Hamilton was a citizen of a foreign State and/or that he was the holder of foreign travel documents including a permanent resident alien card issued by the United States government. The card, which was issued on 9th July 2003, expires on 31st July 2013. Mr. Liburd, the defeated candidate in the Electoral District/Constituency 8 ("Constituency 8"), contends that Mr. Hamilton's status disqualified him from being nominated or elected to the National Assembly, by virtue of the provisions of sections 27 and 28 of the Saint Christopher and Nevis Constitution Order 1983 ("the Constitution"). The Attorney General, the other appellant, intervened in the court below as an interested party. The learned judge dismissed the petition and determined that Mr. Hamilton was duly returned and elected as the representative to the National Assembly for Constituency 8. Central to these appeals is the question whether Eugene Hamilton is qualified to be a member of the National Assembly of The Federation of Saint Christopher and Nevis. The answer depends on whether Mr. Hamilton is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state, namely, the United States, within the purview of the Constitution.

The Constitution

[2] Section 27 of the Constitution states:

> "Subject to section 28, 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, he is a citizen of the age of twenty-one years or upwards and he or one of his parents was born in Saint Christopher and Nevis and he is domiciled there at the date of his nomination for election or his appointment, as the case may be."

Section 28 of the Constitution states:

> "(1) A person shall not be qualified to be elected or appointed as a member if he –
>
> *(a)* is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state;
>
> …"

The Petition

[3] Mr. Liburd avers in paragraph 8 of his petition that Mr. Hamilton was, at the time of nomination, a person who by his own act was under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign state or power, namely the United States of America and/or a citizen and thus was disqualified from being nominated and being elected and/or returned as a member of the National Assembly for Constituency 8. Paragraph 10 avers that Mr. Hamilton, though born in the Federation, later became a person under an acknowledgement, obedience and/or adherence to a foreign power or State and/or a citizen of the United States of America and as an adult, applied for, accepted and travelled on foreign travel documents or papers and a passport issued by the Government of the United States of America. Paragraph 11 alleges that the acquisition of a foreign travel document (including a Green Card) and a passport of the United States of America required Mr. Hamilton to swear to an oath of allegiance and/or acknowledge his allegiance, obedience and/or adherence to a foreign power or State and was therefore, on nomination day, duly under an acknowledgement of allegiance, obedience and/or adherence to a foreign State or power. Paragraph 12 avers that Mr. Hamilton has travelled from the Federation on more than one passport including foreign travel documents and an American passport.

Paragraph 13 avers that by virtue of section 28 of the Constitution, Mr. Hamilton is not qualified to be elected as a Representative of the National Assembly as, by virtue of his own act, he owes allegiance to a foreign power, namely, the United States. Mr. Liburd therefore prays that Mr. Hamilton's nomination is null and void and of no legal effect and that on nomination day he was not qualified to be elected and that Mr. Hamilton's election be declared null and void.

Proceedings below

[4] The averment that Mr. Hamilton was the holder of a United States passport was essentially abandoned at the trial when Mr. Liburd's counsel, Dr. Browne, stated:[3]

> "…[O]n the averment that he [Hamilton] is not [sic] the holder of a United States passport …, that averment in the petition must fail.
>
> "The sole issue therefore is whether the permanent residence [sic] alien status is such in law as to prohibit him under section (28)(1) (a) from standings as a candidate in the general election spoken to."

This volte-face was a consequence of an order of Belle J. dated 29th April 2010 directing Mr. Hamilton to produce for inspection any passport, travel document, visa or other instrument relating to citizenship, immigration or residential status issued to him by any State other than Saint Christopher and Nevis. The disclosure netted the permanent resident card issued by the United States Government on 9th July 2003. The issue of dual citizenship not being pursued, the sole issue remaining, though not clearly stated, was the question whether the permanent resident status enjoyed by Mr. Hamilton disqualified him by reason of section 28 (1)(a) of the Constitution from being elected to the National Assembly.

Definition of substantive issues

[5] In his skeleton arguments, the Attorney General defined the substantive issues raised in the pleadings and evidence thus:

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[3] See p. 28 of the Transcript of Trial Proceedings for Friday 23rd July 2010.

At the time of his nomination and on his being returned as the successful candidate, was Mr. Hamilton a person who by virtue of his own act, was under any acknowledgement of allegiance, obedience or adherence to the United States of America?

At the time of his nomination and/or return as the successful candidate, had Hamilton agreed or pledged, thereby acknowledging allegiance, obedience or adherence to the United States of America?

At the time of his nomination and/or election, was the United States Hamilton's domicile of choice, so that he was under an acknowledgement of adherence to the United States?

At the time of his nomination and/or return as the successful candidate, was Mr. Hamilton by his own act accepting any reciprocal rights, privileges and obligations to a foreign state, namely, the United States, which amounted to an acknowledgement of allegiance, obedience or adherence to the United States?

Was Hamilton, by virtue of his acquisition of permanent resident status in the United States, accepting the obligation to pay US income tax on his worldwide income and/or to be called upon by US authorities if US laws so require to perform military or selective service for the Government of the United States, thereby pledging allegiance and/or obedience to the United States?

Did Mr. Hamilton, by travelling on a United States immigration card from Saint Christopher and Nevis to the United States, acknowledge that he had chosen to treat the United States as his permanent residence, thereby by his own act acknowledging adherence to the United States?

[6] All of the above are really variations of the critical question which is whether Mr. Hamilton was, by his own act, under an acknowledgement of allegiance, obedience or adherence to the United States by having the status of a lawful

permanent resident and as such was disqualified from being nominated and elected to the National Assembly.

Expert evidence

[7] Ted J. Chiappari is an expert in the area of immigration and citizenship law. The Attorney General requested Mr. Chiappari to provide an expert opinion on the question, whether, under the laws of the United States of America, a person to whom a permanent resident card ("a Green Card") is issued, is, by his own act under any acknowledgement of allegiance, obedience or adherence to the Government of the United States. Mr. Chiappari stated that a permanent resident card or "Green Card" is issued as evidence of lawful permanent resident status in the United States. The defining characteristic of lawful permanent resident status in the United States is the foreign national's maintenance of his or her permanent home there with any absence having to be temporary. 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 (and passport) and who can be removed from the United States if one of many grounds of removability is met, such as commission of certain crimes. 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. It is possible to lose permanent resident status by, for example, living too long outside the United States even though the foreign national is still in possession of the actual card.

[8] With respect to the obligation to pay income tax on worldwide income and to register for selective service, Mr. Chiappari noted that foreign nationals who are physically present in the United States without authorization may also be subject to such obligation. The obligation to register for selective service only applies to males between the ages of 18 to 25. That would exclude Mr. Hamilton as he was 40 years old when the permanent resident card was issued to him. The obligation to perform military service would only apply in the event the US Congress

reintroduced conscription. Under current law, there is no draft and no obligation to perform military service.

[9] Mr. Chiappari, also stated that part of the naturalization process for United States citizenship requires the taking of an oath absolutely renouncing all allegiance and fidelity to any State and supporting and defending the Constitution and laws of the United States against all enemies. There is no such oath requirement to become a lawful permanent resident. Further, "adherence" (as in adherence to a foreign state or power) is not a term used or concept applied in United States immigration or citizenship laws. Analogous concepts exist in the context of naturalization, example, "support" and "defend" the constitution and laws of the United States. This does not however apply to lawful permanent residents outside of the context of naturalization to United States citizenship.

[10] Mr. Chiappari concluded that a lawful permanent resident, by virtue of his own act of residing permanently in the United States, acknowledges obedience to the laws of that country. This obedience is no greater than the obedience any foreign national within United States jurisdiction must acknowledge. There is no acknowledgement of allegiance or adherence to the United States other than to abide by the laws of that country.

United States law versus the law of Saint Christopher and Nevis

[11] The averment in paragraph 11 of the Petition that the acquisition of a Green Card required Mr. Hamilton to swear to an oath of allegiance, and/or acknowledge his allegiance, obedience and/or adherence to the United States could not be supported having regard to the expert evidence of Mr. Chiappari, which the learned judge accepted. Mr. Chiappari's evidence evidently created much difficulty for the appellants. To get around that difficulty, the Attorney General submits: (i) it is of critical importance that the distinction between what is to be established on the basis of US law and what is to be decided according to the laws of Saint Christopher and Nevis should be strictly maintained; (ii) the rights, privileges and obligations of a person with US permanent resident status is

determined by US law as a question of fact on the basis of expert evidence; (iii) the question whether a person who acquires such a status has by his own act brought himself under any obligation of allegiance, obedience or adherence to a foreign State, namely the United States of America, is a matter to be determined by the laws of St Christopher and Nevis. In this respect, the US definition or lack of definition of "allegiance", "obedience" or "adherence" is irrelevant because this is a matter of the construction of the Constitution of Saint Christopher and Nevis. Dr. Browne submits that the law of the United States is relevant to prove that Mr. Hamilton is a "Green Card" holder entitled to the rights and privileges of such holder. To my mind, the question to be determined remains, whether, the permanent resident alien status enjoyed by Mr. Hamilton, disqualifies him from being elected to the National Assembly by virtue of section 28(1)(a) of the Constitution. It emerges from the case of Sykes v Cleary[4] that the question whether a person is by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, is to be determined in accordance with the provisions of the applicable foreign law.

[12] In seeking to discern the intention of the framers of the Constitution with respect to section 28(1)(a), Dr. Browne invited the court to consider jurisprudence from the Commonwealth of Australia derived from Sykes v Cleary. An issue arising in Sykes v Cleary concerned the respective capacities of two respondents to be chosen as members of the House of Representatives. The challenge was based on section 44(i) of the Constitution of Australia, the material part of which is somewhat kindred to section 28(1)(a) of the Constitution of Saint Christopher and Nevis. Section 44(i) reads as follows:[5]

> "Any person who –
>
> (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: …
>
> …

[4] [1992] HCA 60; (1992) 176 CLR 77.
[5] See para. 2 of the judgment of Brennan J. in Sykes v Cleary (supra note 4).

> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives." (My emphasis).

Brennan J. explained in paragraph 3 of his judgment that the purpose of sub-section 44(i) was to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power. Brennan J. went on to say:

> "Putting acknowledgment of adherence to a foreign power to one side, the sub-section contains three categories of disqualification, each of them being descriptive of a source of a duty of allegiance or obedience to a foreign power. The first category covers the case where such a duty arises from an acknowledgement of the duty by the candidate, senator or member. The second category covers the case where the duty is reciprocal to the status conferred by the law of a foreign power. The third category covers the case where the duty is reciprocal to the rights or privileges conferred by the law of a foreign power."

[13] Brennan J. stated that the second category refers to subjects or citizens of a foreign power. It covers persons who, by reason of their status as subjects or citizens (or nationals) of a foreign power, owe a duty of allegiance or obedience to the foreign power according to the law of the foreign power. The third category mentioned in section 44(i) covers those who, though not foreign nationals, are under the protection of a foreign power; they may owe a duty of allegiance or obedience to the foreign power by the law of that power. Brennan J. pointed out that in Joyce v Director of Public Prosecutions,[6] it was held that a non-subject owed allegiance to the Sovereign by reason of the protection afforded him by the issue of a British passport.[7]

[14] Brennan J. explained the applicability of the categories as follows: The first category applies when, as a matter of fact, the person has acknowledged allegiance, obedience or adherence to a foreign power. The second and third categories apply when, under the law of a foreign power, the person owes allegiance or obedience to the foreign power by reason of his or her status, rights or privileges. Brennan J. pointed out that although 44(i) was part of the municipal

[6] [1946] A.C. 347.
[7] Per Brennan J. in Sykes v Cleary (supra note 4) at paras. 4 and 5 of his judgment.

law of Australia, the status, rights or privileges mentioned in the second and third categories are generally ascertained by reference to the municipal law of the foreign power.[8]

[15] I will apply the categories mentioned by Brennan J. to this matter. With respect to the first category, can it be said as a matter of fact that Mr. Hamilton has acknowledged allegiance, obedience or adherence to a foreign power or state? The judge found that he had not and there is no basis for upsetting that finding. The second category covers persons who, by reason of their status as citizens of a foreign power, owe a duty of allegiance or obedience to the foreign power according to the law of the foreign power. Mr. Hamilton does not fall within that category. Mr. Hamilton does not have the status of a citizen or national of the United States. He is a citizen of Saint Christopher and Nevis. This brings me to the third category. The question here is, though not a United States citizen, is Mr. Hamilton under the protection of the United States as though he were a citizen? On the evidence, Mr. Hamilton is clearly not.

Grounds of appeal

[16] Several grounds of appeal were advanced by the appellants, many of which overlap. To avoid duplicity and prolixity I will consider conjointly the grounds common to both appellants. A common ground of appeal concerns the pleadings. Counsel for Mr. Liburd alleges that the learned judge failed to appreciate the effect of "pleading in the alternative". The case was framed in the alternative and not solely on the basis of an allegation or averment that Mr. Hamilton was in possession of a foreign passport. The Attorney General alleges misdirection or error by the learned judge in holding that Mr. Liburd's pleading was misleading or unsustainable because it alleged mutually exclusive statuses and/or was a radical departure from his case. Mr. Terence Byron, learned counsel for Mr. Hamilton, points out that this ground of appeal does not fairly represent what the learned judge said; the judge never said that Mr. Liburd's pleading was misleading

[8] Per Brennan J. in Sykes v Cleary (supra note 4) at para. 6 of his judgment.

because it was a radical departure from his case and the judge never said that pleading was misleading because it alleged mutually exclusive statuses. Mr. Byron contends that the ground of appeal is not a reasonable one; it does not identify any "pleading in the alternative" which is being referred to and submits that the Election Petition discloses no material pleading in the alternative.

[17] At paragraph 27 of her judgment, the learned judge commented on the petition thus:

> "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 [sic] 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."

[18] The learned judge pronounced at paragraph 29 that 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 Hamilton is a Green Card holder. The two statuses are mutually exclusive. In the circumstances, the learned judge opined that Mr. Liburd should have withdrawn the Election Petition and proceeded to order that the petition be dismissed with costs. The learned judge exhibited good judicial foresight by stating[9] that:

> "If, however, I am wrong in my interpretation of the rules of pleadings, I will carry on with this Petition."

[9] At para. 34 of her judgment.

After considering the law and the evidence, the judge went on to hold[10] that:

> "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 and Nevis and as such, he is under acknowledgement of allegiance to that country."

[19] It is well known that pleadings define the issues to be resolved and mark out the parameters of the case advanced by the parties. A perusal of the averments in the petition shows that the case was indeed framed in the alternative and not solely on the basis of an averment that Mr. Hamilton was in possession of a foreign passport, although that averment was more dominant. For example, it was averred that Hamilton, as an adult, 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. It is also averred that the acquisition of a foreign travel document (including a Green Card) required Mr. Hamilton to swear to an oath of allegiance and/or acknowledge allegiance, obedience and/or adherence to the United States. The acquisition and use of the "Green Card" and the supposed requirement of swearing an oath of allegiance, was a live issue in the petition. The tradition of pleading in the alternative is a long one. At the very heart of pleading in the alternative is the ability of a party to argue two mutually exclusive positions. I agree that the learned judge made a flawed statement in paragraph 29 of her judgment in stating that:

> "…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."

However, because of the manner in which the learned judge dealt with the matter, this ground of appeal is of no real moment.

[20] An identical ground of appeal concerns the alleged failure of the learned judge to consider the disjunctive formulation of the reference to "allegiance", "obedience"

[10] At para. 78 of her judgment.

and "adherence" in section 28(1)(a) of the Constitution and to evaluate the evidence in relation to each separately. Mr. Byron contends that it is incorrect to posit that the learned judge did not consider the "disjunctive formulation of the reference to allegiance, obedience [or] adherence in section 28 of the Constitution".

[21] In paragraph 36 of her judgment, the learned judge stated that the primary issue arising for determination was whether Mr. Hamilton, as the holder of a Green Card, at the time of his nomination, was by his own act under any acknowledgment of allegiance, and/or obedience, and/or adherence to the United States. At paragraph 51, the learned judge listed the three qualifying factors stated in the Constitution: allegiance, obedience or adherence to a foreign power or state. The learned judge reviewed the submissions of Dr. Barnett and Dr. Browne with respect to the use of these words in a disjunctive manner. For instance, at paragraph 52 of her judgment, the learned judge referred to Dr. Barnett's submission 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 Saint Christopher and Nevis. At paragraph 56, the learned judge referred to the argument of Dr. Browne 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.

[22] The learned judge referred to Mr. Chiappari's evidence on the three qualifying factors of allegiance, obedience and adherence and also to his expert opinion that the obedience that a lawful permanent resident acknowledges to the United States is no greater than the obedience any foreign national within the United States must acknowledge. There is no acknowledgement of allegiance or adherence to the

United States other than to abide with its laws. The judge concluded, at paragraph 61 of her judgment (reflecting paragraph 18 of Mr. Chiappari's affidavit), that:

> "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...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)."

In arriving at her decision, the learned judge clearly considered the disjunctive formulation of the reference to "allegiance", "obedience" and "adherence" in section 28(1)(a) of the Constitution and evaluated the evidence in relation thereto. This ground of appeal accordingly fails.

[23] Both appellants also claim that the learned judge failed to examine or apply section (28)(1)(a) to her factual finding at paragraph 46. At paragraph 46 the judge found that:

> "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."

Mr. Byron states that the learned judge applied paragraph 46 to section 28(1) of the Constitution but simply found that there was no evidence that Mr. Liburd maintains a permanent residence in the United States.

[24] The judge's finding in paragraph 46 cannot be looked at in isolation. It has to be placed in the context of Mr. Chiappari's expert evidence that there is no acknowledgement of allegiance or adherence to the United States by a lawful permanent resident and the judge's finding that the possession of a United States permanent resident card enables Mr. Hamilton 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…".[11] I am of the view

[11] See para. 42 of the learned judge's judgment.

that the learned judge properly construed the section and correctly found that Mr. Liburd was not disqualified. This ground of appeal fails.

[25] A common ground of appeal alleges misdirection on the part of the learned judge in holding that no case was cited to the effect that allegiance may be owed to a state by a non-citizen such as a person who travels on a passport of a foreign state or who is so associated with a foreign state that he or she has benefits, privileges or protection of the foreign state. This ground of appeal does not advance the appellants' case in view of the correct finding of the learned judge that Mr. Hamilton was not under any acknowledgement of allegiance or obedience or adherence to the United States.

[26] Another ground of appeal common to both appellants is that:[12]

> "The Learned Trial Judge erred in treating the fact that a lawful permanent resident remains a foreign national who retains his or her nationality and passport and can be removed from the United States as decisive although such a person may nevertheless acknowledge same *"Allegiance"*, *"Obedience"* or *"Adherence"* to the United States."

[27] The learned judge referred to Dr. Barnett's arguments with respect to the "obedience" aspect of the disqualifying factors. In that regard, the judge mentioned Dr. Barnett's statement that it was 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, thus distinguishing him from a tourist or non-immigrant visitor. The learned judge then referred to Mr. Chiappari's evidence that a lawful permanent resident, by virtue of his own act of residing permanently in the United States, acknowledges obedience to the laws of that country. However, that obedience is no greater than the obedience any foreign national within the United States must acknowledge. This makes good sense because a lawful permanent resident, like a temporary visitor, student or worker is still a foreign national who retains his or her nationality. I

[12] See p. 7 of Notice of Appeal (Tab 1 of the Record of Appeal for HCVAP 2010/017).

agree with Mr. Byron that this ground of appeal cannot be supported having regard to the expert evidence of Mr. Chiappari.

Attorney General's intervention

[28] The Attorney General took issue with the statement of the learned judge that:

> "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."

The learned judge then stated that the Attorney General will bear his own costs.

[29] The complaint here is two-fold: (i) that the learned judge failed to properly consider that the right of the Attorney General to intervene under the Constitution is unfettered and/or a matter of public interest and therefore was not dependent on a construction of any provision of the Constitution; (ii) the learned judge erred in law in failing to appreciate or consider that another judge of concurrent jurisdiction had granted the Attorney General's application to intervene. Mr. Byron pointed out that the learned judge ordered the Attorney General to bear his own costs and in leading up to that order, remarked that there was no need for the Attorney General to intervene for the reason that she gave. Mr. Byron argued that, it is not every remark in a judgment that is appealable and the ground of appeal is against an obiter dictum which is not capable of giving rise to an appeal.

[30] Contextually, the statement of the learned judge was explanatory of and introductory to her decision that the Attorney General will bear his own costs. I do not take the learned judge's statement to be a ruling that the Attorney General has no right to intervene. The learned judge made no such ruling. Section 36(2) of the Constitution provides for the Attorney General or any representative to make an application to the High Court for the determination of any question whether any person has been validly elected as a representative. If the application is made by a person other than the Attorney General, the Attorney General may intervene and may appear or be represented in the proceedings. The Attorney General obtained an order from Belle J., sanctioning his application to intervene in the matter as an

interested party and fully participated in the proceedings. The learned judge recognized at paragraph 57 of her judgment that the affidavit evidence of Mr. Chiappari, the Attorney General's expert witness, was of great value to the court and the parties. In the circumstances there is no valid ground of appeal.

Failure to properly consider all evidence

[31] The Attorney General contends that the learned judge erred in law and/or misdirected herself when she failed to properly consider all the evidence and/or properly consider and/or hold that: (i) Mr. Hamilton had in fact travelled to the United States on a foreign document or paper; (ii) Mr. Hamilton was obliged to travel to and pay taxes in the United States as part of his commitment to treat that State as his unrelinquished permanent residence; (iii) Mr. Hamilton, on the facts and proper interpretation of section 28(1)(a) of the Constitution owed and/or was under an obligation or acknowledgement of adherence or obedience to the United States. Mr. Liburd also alleges that the learned judge failed to take any or any sufficient account of Mr. Hamilton's frequent trips to the United States, the fact that his family lives there permanently, his wife works there permanently and that given Mr. Hamilton's temporary absences from the United States, he has evinced a clear and unmistakable intention by virtue of his own acts under an acknowledgement of allegiance, obedience or adherence to the United States.

[32] In my judgment, there is no merit in these grounds of appeal. The learned judge properly considered all the evidence and on the facts and a proper interpretation of section 28(1)(a) of the Constitution, correctly concluded that Mr. Hamilton was not under any acknowledgement of allegiance or obedience or adherence to any foreign power or state. In paragraph 45 of her judgment, the learned judge considered Mr. Chiappari's evidence that a permanent resident card or "Green Card" is issued as evidence of lawful permanent resident status in the United States, the defining characteristic of which is the foreign national's maintenance of his or her permanent home in the United States, with any absences from there having to be temporary. The judge stated that in order to preserve the Green Card, it is mandatory that Mr. Hamilton maintains an unrelinquished lawful

permanent presence in the United States with any absences from that country being temporary. The learned judge went on to say that 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 resident status in the United States. Mr. Liburd himself admits that Mr. Hamilton lives and works in Saint Christopher. The judge found that there is no evidence that Mr. Hamilton lived or worked in the United States although he had the privilege of doing so by virtue of his permanent resident status. Mr. Hamilton stated that he does not and has never paid taxes in the United States.

Domicile of choice

[33] Dr. Browne contends that the learned judge erred in law in failing to appreciate that the fact that Mr. Hamilton, at all material times, had/has permanent resident alien status in the United States leads to the conclusion that he has chosen the United States as his domicile of choice thus triggering a result contemplated by section 27 of the Constitution. It is noted that section 27 was not mentioned in the Petition. In fact Dr. Browne acknowledged that section 27 was not prayed in aid as a disqualifying ground in the Petition. All that was said was that Mr. Hamilton travelled abroad on foreign travel documents and that the Green Card required him to swear an oath of allegiance, obedience or adherence to the United States. Dr. Barnett conceded that the domicile point under section 27 was not pleaded.

[34] Section 27 of the Constitution provides that one of the qualifying factors to be elected as a member of the National Assembly is that a person must be domiciled in Saint Christopher and Nevis at the date of his nomination for election. Dr. Browne submits that to be qualified to run for elective office or to be appointed to the National Assembly, section 28(1)(a) of the Constitution contemplates that the candidate who has permanent resident status in a foreign State must have intended to choose the foreign State as his domicile of choice and as such is deemed to have surrendered his domicile of origin – which, in this case is St. Christopher. A kindred contention is that by accepting 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.

[35] No person can be without a domicile and no person can at the same time and for the same purpose have more than one domicile. An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.[13] Every person receives at birth a domicile of origin which can be supplanted by a domicile of choice.[14] An adult can acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely.[15] Central to the acquisition of a domicile of choice is the dual requirement of residence in fact, coupled with the intention of permanent or indefinite residence in the new jurisdiction.[16]

[36] The learned judge stated at paragraph 49 of her judgment:

> "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 States. 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, the issue is merely a bare allegation unsubstantiated by evidence."

[37] The learned judge quite properly found that Mr. Hamilton lives and works in Saint Christopher and occasionally visits his wife and children in Florida and there was no evidence that he maintains a permanent residence in the United States. That was the uncontroverted evidence before the trial judge which she was entitled to

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[13] A & L [2009] EWHC 1448 (Fam).
[14] See In the Estate of Fuld, Decd. (No. 3) [1968] P. 675.
[15] Mark v Mark [2005] UKHL 42 at para. 39.
[16] Gaines-Cooper v Revenue and Customs [2008] EWCA Civ 1502.

and did accept. Taking into account the law with respect to the acquisition of a domicile of origin and the facts found by the learned judge, there is no basis upon which it can be asserted that Mr. Hamilton has acquired a domicile of choice in the United States. This ground of appeal accordingly fails.

[38] Mr. Liburd contends in ground 8 of the appeal that the learned judge failed to appreciate the subjective intent of Mr. Hamilton when from the evidence it was clear that he remains outside the United States within the period allotted by United States law in order not to jeopardize the validity of his permanent status in the United States thus entitling him to certain rights and privileges with their concomitant duties and obligations.

[39] The complaint made in this ground of appeal is unsubstantiated. The learned judge referred to the administrative cases mentioned by Mr. Chiappari which established principles and factors to be considered in determining whether a holder of a permanent resident card qualifies as a returning resident. In Matter of Kane,[17] the court listed 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 (that is, 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 United States. Matter of Kane concerned a Jamaican national who obtained a Green Card in 1964. She left the United States in 1967 and returned to live in Jamaica, returning to the United States once a year to maintain her Green Card status. It was held that she was not returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad. The Green Card was taken away.

[40] Mr. Liburd alleges that the learned judge failed to appreciate the significance of the fact that no effort has been made by the Government of the United States to

[17] 15 I. & N. Dec. 258 (BIA, April 1, 1975).

revoke Mr. Hamilton's permanent resident status in the United States. This presumptively suggests that the United States Government is satisfied that any absence from the United States is temporary only thus Mr. Hamilton is caught by section 28(1)(a) of the Constitution. This ground of appeal is unsubstantiated and speculative and accordingly fails. As pointed out by Mr. Terence Byron, no evidence was led to establish the "fact" that no effort was made by the Government of the United States to revoke Mr. Hamilton's permanent resident status in the United States. The trial judge made no such finding.

Costs

[41] The learned judge held that costs follow the event and ordered Mr. Liburd to pay costs to Mr. Hamilton to be assessed if not agreed. Dr. Browne submits that the learned judge erred in law and/or misdirected herself in making the costs order. Mr. Byron stated that the appeal should be dismissed with costs certified fit for two counsel. Dr. Browne reasoned that the costs order is inconsistent with the order and reasoning made in the appeals Leroy Benjamin et al v Lindsay Fitzpatrick Grant and Leroy Benjamin et al v Eugene Hamilton[18] where it was held[19] that "the public interest in an election petition is a factor that a judge may consider in deciding whether to award costs." It is pertinent to observe here that the learned judge remarked that the Election Petition raised no issues of grave constitutional importance which called for an interpretation of section 28(1)(a) of the Constitution and that the section is clear and unambiguous. Although made with respect to costs re the Attorney General's intervention, it is impractical to sever the comment from the issue of costs in the case as a whole. I find no good reason to depart from the general rule that costs follows the event; accordingly, the learned judge's order with respect to costs is affirmed.

[18] Saint Christopher and Nevis HCVAP 2006/009/011 and HCVAP 2006/012.
[19] At para. 13 of the judgment.

Conclusion

[42] It is ordered that the appeals are dismissed with costs to be assessed unless agreed within 30 days. The trial judge's decisions below are affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Janice M. Pereira
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal [Ag.]