THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2013/0026

IN THE MATTER OF
THE CONSTITUENCIES BOUNDARIES COMMISSION
AND

IN THE MATTER OF
THE PURPOURTED RECOMMENDATIONS AND 'CONSULTATIONS'
OF THE CONSTITUENCIES BOUNDARIES COMMISSIION
AND

IN THE MATTER OF
SECTIONS 40 AND 64 OF THE CONSTITUTION ORDER 1981
OF ANTIGUA AND BARBUDA
AND

IN THE MATTER OF
THE CONSTITUENCIES BOUNDARIES COMMISSION GUIDANCE ACT
10/2012

AND

IN THE MATTER OF AN APPLICATION FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF BY THE APPLICANTS GASTON BROWNE, ASOT MICHAEL, EISEN BAPTISTE AND PAULET HINKSON

UNDER THE PROVISIONS OF SECTION 119 OF THE ANTIGUA AND BARBUDA CONSTITUTION ORDER 1981 AND/OR THE GENERAL LAW

BETWEEN:

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

Appellants/Applicants

and

[1] THE CONSTITUENCIES BOUNDARIES COMMISSION
[2] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[3] THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

[4] THE PRIME MINISTER OF ANTIGUA AND BARBUDA
THE ATTORNEY GENERAL
(FOR AND ON BEHALF OF HER EXCELLENCY THE GOVERNOR GENERAL)

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste Justice of Appeal
The Hon. Mde. Louise E. Blenman Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC, with him, Ms. Samantha Marshall,
for the Appellants
Mr. Douglas Mendes, SC, with him, Mr. Michael Quamina,
for the First and Second Respondents

2014: February 14
April 28.

Civil appeal – Constitutional law – Constituencies Boundaries Commission – Antigua and Barbuda Constitution Order 1981 - Constituencies Boundaries Commission Guidance Act, 2012 – Election petition – Whether the Commission engaged in gerrymandering – Bias – Whether Commission was biased – Consultation – Information provided – Time allotted for consultation – Whether consultation adequate

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

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

The Commission produced a first report in March 2013 in which it recommended alterations to constituency boundaries, after having organised one day of consultation with members of the public on 29th November 2012. This first report fell within the Commission's deadline of 28th June 2013 for submission of the report to the Speaker of

the House of Representatives. Objections were made to it in the form of legal proceedings filed by two of the appellants. Following legal advice, this first report was withdrawn.

Subsequently, the Commission revisited their review of the constituencies and boundaries. Prior to 13th June 2013, after several meetings with the census officers and other experts assisting the Commission, the Commission was able to produce a preliminary proposal which could be put out for consultation. By letter dated 13th June 2013 the Commission invited each of the current parliamentarians, prospective political candidates and others to consultation sessions which were to be held and were in fact held in four separate locations fixed over four consecutive days being 17th 18th 19th and 20th June 2013. In addition, the consultations were to be carried live on TV and radio. The Commission gave to interested persons, including the appellants, until 21st June 2013, the day after the last consultation meeting, to submit any comments or counter-proposals.

The second report was produced by the Commission on 25th June 2013 with various proposals including that there be no change to the number of constituencies, four constituencies be re-named, alterations be made to the boundaries of 14 of the 16 constituencies. The second report modified its proposals to boundary changes as contained in the first report. It also proposed modifications to 6 constituencies over and above the alterations proposed in the first report.

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

The appellants have appealed the decision of the trial judge on various grounds including inter alia that the learned trial judge has failed to properly consider the evidence and law; the learned trial judge erred in holding that (1) there was no evidence of gerrymandering and or bias by the Commission, (2) the consultation period was adequate, and (3) the Commission acted in compliance with the requirements of the **Guidance Act**.

Held: allowing the appeal only on the ground that consultation was inadequate and dismissing the other grounds of appeal and ordering that the parties bear their own costs, that:

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

away. Bare assertions or equivocal inferences, which may be drawn from a primary fact, do not suffice. Accordingly, there is no basis for this Court to reject or disregard the evidence of Mr. Crump.

2. A decision making body is required to provide to persons with whom it must consult such information, in clear terms, as to what the proposal is and why it is under positive consideration. The decision making body ought to furnish enough information to enable persons to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this. In this regard, the Commission's obligation was to consult with the appellants on the changes being proposed to existing constituency boundaries and why the changes were being proposed. The Commission was obligated to disclose enough information to enable the appellants to make an intelligent response. The undisputed evidence indicates such evidence was provided to the appellants. There was no request by the appellants, who are veteran politicians and who would know the boundaries of their existing constituencies, for further information. It is unlikely that the body consulting would be on notice of its failure to provide additional information in the absence of a request for specific information. The body may have reasonably concluded that the information provided was sufficient for the consultation purposes. Accordingly, the complaint of failure to disclose information in the circumstances of this case cannot be sustained.

   Regina v North and East Devon Health Authority, *Ex parte* Coughlan [2001] QB 213 applied; **Bushell and Another v Secretary of State for the Environment** [1980] 3 WLR 22 applied.

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

   In re H. and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 applied; and **In re Dellow's Will Trusts** [1964] 1 WLR 451 applied.

4. The test for establishing apparent bias is whether a fair minded and informed observer would consider that there was a real possibility of bias. An allegation of apparent bias is to be considered having regard to all the relevant facts and

circumstances of the particular case based on the material before it and within the context of the issue to be decided. Therefore, a fair minded and informed observer having regard to all the facts would be aware of the constitutional provisions establishing the Commission. Where the Constitution itself provides for the appointment of members to a council, commission or other constitutional body in a certain manner and there is compliance with those provisions in making the appointment, the composition of the commission or such body so appointed, cannot in and of itself ground a charge of apparent bias. The fact that the Commission was appointed in accordance with specified provisions of the Constitution would trigger the presumption of impartiality in favour of the members regardless of their personal affiliations. That means that the onus would then be placed on the appellants to rebut that presumption by cogent evidence on a balance of probabilities. An examination of the appellant's allegations fall significantly short of this threshold. There was no evidence on which a fair minded and well-informed observer who is not given to suspicion, or is overly sensitive would conclude that the Commission was infected with bias and discharged its functions so as to prejudice the appellants or the parties to which they belong.

Vance Amory v Thomas Sharpe et al Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2009/0013 (Nevis Circuit) (delivered 27th August 2012, unreported) followed; **Constituency Boundaries Commission and Another v Baron** (1999) 58 WIR 153 applied; **George Meerabux v The Attorney General of Belize** [2005] UKPC 12 applied.

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

   R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 211, para 112

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

where a decision-maker has identified a preferred option or reached a provisional view upon which it wishes to consult. There was no pre-determination on the part of the Commission and no final decision had been made.

East Devon District County Council and The Electoral Commission, The Boundary Commission for England [2009] EWHC 4 (Admin); **Port Louis Corporation v Attorney General of Mauritius** [1965] 3 WLR 72 applied. **Sardar v Watford Borough Council** [2006] EWHC 1590 considered.

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

   ex p Coughlan; Bushell [1981] AC 75 at 102; **R v (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions** [2003] 2 AC 295; **Edwards & Anor v The Environmental Agency & Ors** [2006] EWCA Civ 877 at para 103; **The Queen on the application of Robin Murray & Co and The Lord Chancellor** [2011] EWHC 1528 at para 47 applied.

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

   Russell v Attorney General of St Vincent and the Grenadines, distinguished.

9. The learned judge erred in holding that the respondents could rely on an urgency and that the consultations though '*not ideal were adequate'.* The respondents could not rely on an urgency primarily of its own making to justify the wholly inadequate time given for consultation. The last general election was in 2009. The Commission was appointed at latest in March 2012. The **Guidance Act** was enacted in December 2012. The first report was withdrawn at the end of April 2013

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

East Devon District Council and Electoral Commission [2009] EWHC 4 per Mr. Justice Cranston applied.

JUDGMENT

[1] This is the judgment of the Court to which all members of the panel have contributed. This appeal arises from challenges by the appellants to the composition of the Constituencies Boundaries Commission ("the Commission") appointed pursuant to section 63 of the **Antigua and Barbuda Constitution Order 1981**[1] ("the Constitution"), the manner in which it conducted its review of the number of constituencies and their boundaries and its recommendations for changes to constituency boundaries as contained in its report for submission to the Speaker[2] having regard to the **Constituencies Boundaries Commission Guidance Act, 2012**[3] ("the Guidance Act"). The third to fifth respondents have taken no active part in this appeal. The first and second respondents shall, for ease of reference, be called "the respondents".

The background

[2] The last general elections were held in Antigua and Barbuda in 2009. Accordingly, general elections are constitutionally due in the year 2014. It is a notorious fact

[1] Cap. 23, Revised Laws of Antigua and Barbuda 1992.
[2] The Speaker is defined in the Constitution of Antigua and Barbuda as the Speaker of the House of Representatives.
[3] Act No. 10 of 2012, Laws of Antigua and Barbuda.

that Antigua and Barbuda has two main political parties. One is the United Progressive Party ("the UPP"), which currently forms the Government led by the Prime Minister who is named as the fourth respondent herein. The other is the Antigua and Barbuda Labour Party ("the ALP"). The first, second and third appellants are all members of the ALP and members of the Opposition in the House of Representatives. It is also a notorious fact that views had been expressed by several sources including the Commonwealth Observer Team that there is a disparity in the number of voters in various constituencies.

[3] The Commission was appointed at latest, on 1st March 2012. Mr. Clarence Crump, who was appointed Chairman, Mr. James Sebastian, and Ms. Clovis Ralph were appointed on 14th February 2012. Mr. James Fuller, was appointed on 1st March 2012. All of the appointees, save for Mr. Fuller, were appointed by the Governor General on the advice of the Prime Minister. In Mr. Crump's case however, the Prime Minister would have consulted with the Leader of the Opposition. Mr. Fuller was appointed on the advice of the Leader of the Opposition. It is not disputed that all members of the Commission including the Chairman are or were at one time affiliated with the political party the leader of which advised their appointment.

[4] It is common ground that for the purposes of 64(2) of the Constitution the deadline for submission of the Commission's report to the Speaker was 28th June 2013, based on the date when the last such report was submitted. As to whether the 28th June 2013 deadline was mandatory or merely directory is also an issue in this appeal and will be addressed later in this judgment.

[5] The Guidance Act came into effect on 28th December 2012, so that in reality it may be said to have become operational only at the beginning of 2013. Section 3 of the Guidance Act is relevant to this appeal. It states as follows:

> "**3. General principle**
>
> (1) In conducting its review the Commission shall be guided by the cardinal principles that all constituencies shall contain as nearly equal numbers of inhabitants taking into account the need

to achieve voter's parity as appear to the Commission to be reasonably practicable, but the Commission may depart from the principles to the extent it considers expedient and necessary to take into account the following factors–

(a) The density of population and the changing demographics of the constituency;

(b) The need to ensure the adequate representation of sparsely populated rural areas; and

(c) The geographical features of the constituency; and

(d) The boundaries of the various towns and villages and more particularly, residential area expansions.

(2) During the process of review, the Commission shall where necessary hold consultations with interested persons and obtain credible data or information to assist it in its deliberations."

[6] The Commission produced a report in March 2013 ("the First Report") in which it recommended alterations to constituency boundaries, after having organised one day of consultation with members of the public on 29th November 2012. This was prior to the passing of the Guidance Act. The First Report was challenged by the Hon. Mr. Bird and the Hon. Mr. Michael, two of the appellants in this appeal, in legal proceedings ANUHCV 2103/0160. They essentially complained that the Commission had not given the persons from whom they invited consultations any of the proposals it was considering and that insufficient use has been made of the census data in attempting to achieve equality in the number of inhabitants in the proposed constituencies. The Commission, following legal advice, decided to withdraw the First Report. The claimants in those proceedings (ANUHCV 2013/0160) were so informed by letter dated 29th April 2013 from the Attorney General. Mr Fuller had also made known his objections to the processes leading up to the First Report. He had even penned, with the assistance of senior counsel for the appellants herein, a minority report. Eventually, this report was not submitted.

[7] The Commission thereafter revisited their review of the constituencies and boundaries and sought to obtain information from the Census officers. They had also placed before the Census officers various boundary scenarios, to be overlaid with the census data. This information was not forthcoming from the Census

officers until 7th June 2013, and it was not until just prior to 13th June 2013 after several meetings with the census officers and other experts assisting the Commission, that the Commission was able to come up with a preliminary proposal which could be put out for consultation.

[8] Time was clearly running up to the Commission's deadline date of 28th June 2013. By letter dated 13th June 2013 the Commission invited each of the current parliamentarians, prospective political candidates and others to consultation sessions which were to be held and were in fact held in four separate locations fixed over four consecutive days being 17th, 18th, 19th and 20th June 2013. In addition, the consultations were to be carried live on TV and radio. The Commission gave to interested persons, including the appellants, until 21st June 2013, the day after the last consultation meeting, to submit any comments or counter-proposals.

[9] The Commission produced its report on 25th June 2013 ("the Second Report"). It proposed not to change the number of constituencies. The total number would therefore be left at 16. It proposed re-naming four constituencies and further proposed alterations to the boundaries of 14 of the 16 constituencies. It also modified its proposals to boundary changes as contained in the First Report. It proposed modifications to 6 constituencies over and above the alterations proposed in the First Report.

[10] The appellants launched a fresh set of proceedings seeking declaratory and injunctive relief and essentially seeking to impugn the Second Report. The trial judge, in his judgment delivered on 4th December 2013, dismissed the claim it its entirety and awarded no costs. It is from that dismissal that this appeal arises essentially traversing the same grounds as advanced before the trial judge.

The findings of the trial judge

[11] (a) *Abdication of Commission's responsibilities.*

In relation to the issue as to whether the Commission had abdicated its responsibilities by suggesting scenarios to the statistical officers to generate options out of which the Commission selected one as the basis for its proposals, the learned trial judge found at paragraph 7 that the appellants (claimants) appeared to have conceded that the Commission was bound to place before them meaningful material to evaluate before inviting consultation. He found that this was the gravamen of the complaint which vitiated the First Report, and thus he concluded that "[t]he [appellants] could not now argue that by suggesting scenarios to the statistical officers … amounts to [an] abdication of the Commissions' responsibilities".

[12] *(b) Whether section 64(2) of the Constitution was mandatory.*

The trial judge, after considering the decisions **Randolph B. Russell and Another v Attorney-General for Saint Vincent and the Grenadines and Another**[4] and **London & Clydeside Estates Ltd. v Aberdeen District Council and Another**,[5] noted in relation to the **Russell** case,[6] that the Privy Council 'was careful to confine their remarks to the effect of a failure to comply with Section 33 of the constitution on the validity of a subsequent election' and opined that he '[did] not take that to mean that a constitutionally imposed obligation is to be lightly or cavalierly ignored'. He then concluded[7] that the 'Commission was entirely justified in considering themselves bound to produce their report by the June 28, 2013 deadline'.

[13] *(c) Failure to consult prior to putting out proposals/adequacy of consultation on proposals.*

The trial judge opined[8] that, 'in order to have proper consultations, those who are to be consulted must be afforded information as to what is to be considered'. He found that the Commission received the census data on 7th June 2013; that it then

[4] [1997] 1 WLR 1134, a decision of the Privy Council from the Court of Appeal, Saint Vincent and the Grenadines.
[5] [1980] 1 WLR 182.
[6] At para. 12.
[7] At para. 14.
[8] At para. 15.

developed its proposals which it sent to the appellants one week later; that consultations were fixed for a 4 day period beginning 17th June 2013. He then concluded that *the Commission had complied with the Guidance Act.* As to the adequacy of consultation he concluded[9] that, given the imperative of the Constitution, 'the consultations, admittedly less than ideal, were adequate in the circumstances'.

[14] *(d) Irrationality or unreasonableness of the Commission's recommendations.*
The trial judge, after reminding himself that the role of the court is not to substitute its judgment for that of the Commission, found[10] that the conclusions arrived at by the Commission were not 'so outside the pale that no reasonable body could reach them'.

[15] *(e) Gerrymandering and bias*
In relation to the allegations of gerrymandering and bias made against the Commission, the trial judge found[11] that no cogent evidence had been led to support either allegation. He went on further to state, which appears to have been accepted by him, that the Commission said that 'they had no regard to party support in deciding on the amended boundaries'. He went on to say that the first appellant (first claimant) said that the effect of the proposed recommendations is to dilute his areas of popular support and strengthen those of less political opponents, but concluded that '[t]his was not demonstrated with the specificity an allegation of fraud would demand'.

The appeal

[16] The appellants' grounds of appeal set out in the amended notice of appeal, though variously numbered set out some eight grounds of appeal with a number of sub-grounds. The appellants have helpfully marshalled those grounds in their written submissions into five main areas of challenge; all posited against the backdrop of the constitutional right to vote in free and fair elections, a component of which is

[9] At para. 14.
[10] At. para. 16.
[11] At para. 17.

the right to vote in an election with lawfully and properly constituted constituencies. They may be summarised as follows:

(i) whether the trial judge failed to properly consider the evidence and law;

(ii) whether the Commission engaged in gerrymandering.

(iii) whether, given the composition of the Commission, there arose the real possibility of bias.

(iv) The proper interpretation of section 64(2) of the Constitution and thus whether there existed 'an urgency' which, as the appellants put it, 'justified the abrogation of the Commission's obligation to [properly and adequately] consult'; and

(v) whether the Commission conducted a proper review, particularly its obligation to consult, in compliance with the requirements of the Guidance Act.

It is proposed to consider these issues in the order as set out.

The evidence and the law

(a) Acceptance of Mr. Crumps' evidence

[17] It is useful to state at the onset that the case proceeded below based on the affidavit evidence tendered by both sides with no cross-examination of any of the affiants on either side. Mr. Crump gave a detailed affidavit[12] in answer to the complaints made by the appellants in their affidavits. In that affidavit he detailed the appointment process and composition of the Commission, the task of the Commission as guided by the Guidance Act, the notorious and established fact of voter disparity in existing constituencies, the manner in which the Commission set about its task and the data and information sources to which it had regard, the experts or resource persons employed, the fact that all members of the Commission acted independently and without favour, and the fact that it did 'not rely on any statistics or have regard to any information which would evidence how voters cast their votes in the last or any previous election.' He categorically denied

[12] See record of appeal Vol. 2, Part B,, pp.78-101.

that any of the proposed changes made by the Commission were made with the intention of giving any advantage to the UPP over the ALP or 'vice versa'. He detailed how the data and information were utilised, the manner in which consultations were conducted, what information was provided for inspection, and the reasons underlying the recommendations of the Commission.

[18] In the circumstances of this case where gerrymandering[13] is alleged, an allegation which connotes or imports an element of bad faith on the part of the Commission in carrying out its review and making its recommendations, it can only be said that the failure or inability to cross-examine Mr Crump (however occurring[14]) so as to test his veracity or the credibility of his statements or at least to establish by cogent evidence the Commission's lack of bona fides, is unfortunate. Counsel for the appellants submits that the evidence of Mr. Crump falls outside the general evidential rule set out in **Phipson on Evidence**.[15] That general evidentiary rule is to the effect that a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point.[16] Rather, counsel urges the court to regard the evidence of Mr. Crump as being of an 'incredible or romancing character' such that the failure to cross-examine is not to be treated as an acceptance of his evidence. He places reliance on a portion of paragraph 12-35 of **Phipson** to this effect.

[19] Counsel for the respondents counters this argument by pointing to the fact that the appellants chose not to cross-examine Mr Crump. Further, that the appellants adduced no evidence whatsoever that put into question what Mr. Crump said in his affidavit detailing how the Commission conducted its review, and how it went about remedying the flaws levelled against the First Report, one of which was the

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[13] Black's Law Dictionary (9th edn.) defines 'gerrymandering' as 'The practice of dividing a geographical area into electoral districts, often of highly irregular shape to give one political party an unfair advantage by diluting the opposition's voting strength.'

[14] Counsel for the appellants indicated that the respondents had pointed out that notice or application to cross-examine had not been given as required by CPR 30.1(3). In any event no leave to cross-examine was sought from the judge.

[15] (16th edn., Sweet & Maxwell 2005).

[16] See. Phipson on Evidence (16th edn., Sweet & Maxwell 2005) p. 322, para.12-12.

failure to take into account the census data, by contacting and meeting with the Census officers. Counsel also pointed to the fact that Mr. Crump in his evidence stated in effect that the Commission did not take into account votes cast and for whom, and that Mr. Crump categorically denied that any of the proposed changes made by the Commission were made with the intention of giving any advantage to the UPP over the ALP. Counsel accordingly contends that there is no basis put forward to justify the court treating the evidence of Mr. Crump as being of an *incredible or romancing character*, thus placing it within the exception to the general evidentiary rule.

[20] Counsel for the respondents, in making good his point, rely not only on the passage from **Phipson** above referred, but also on:

(a) dictum of Sharma JA in **The Police Service Commission of Trinidad and Tobago v The Attorney General of Trinidad and Tobago and Wayne Hayde**[17] where he stated:

> "When an applicant has to prove "bad faith" as a necessary element to some right, it would in my view be very difficult to do so by the affidavit evidence alone unless the facts are clearly undisputed and "bad faith" can be unquestionably inferred. … a court is more likely to be influenced by cross-examination of the relevant witnesses in order to form some opinion or assessment of him.";

(b) **Halsbury's Laws of England**[18] where the principle is stated thus:

> "Where the court is being asked to disbelieve a witness, the witness should be cross-examined, and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."

(c) The House of Lords' decision in **Browne v Dunn**[19] from which this principle was developed; and

[17] Republic of Trinidad and Tobago Cv.A. No. 12 of 1999 (CA) at p. 9.
[18] 4th edn., para. 278.
[19] (1893) 6 R 67 (HL).

(d) The case of **S v Airedale National Health Service Trust**[20] where the view was expressed that the principle is well suited to judicial review proceedings.

[21] The arguments of the respondents on this issue are compelling. This court, would be hard pressed to treat the evidence of Mr. Crump as being of an 'incredible or romancing character' without some undisputed objective evidential material, either oral or documentary, inconsistent with the evidence of Mr. Crump which cannot be sensibly explained away. The simple fact is that no such evidence has been put forward. Bare assertions or equivocal inferences, which may be drawn from a primary fact, do not suffice. Accordingly, no basis has been established warranting this court to reject or disregard the evidence of Mr. Crump.

(b) Non-disclosure of information by the Commission.

[22] Much ado has been made by the appellants of the fact that the Commission had all the information or exclusive access to information in respect of which they were obliged to make full disclosure to the appellants. It is worthwhile noting at this point that certain information in respect of which the appellants now complain was not specifically requested, was not pleaded, nor indeed any application for disclosure made to the trial judge. Firstly, the appellants refer to their letter of 30th November 2012 which pre-dated the First Report in which the chairman of the ALP wrote, inter alia, in these terms: 'We expected, and believe that it was reasonable to expect, that you would have been in a position to detail the work done by the Commission thus far, specifying the possibilities in terms of changes that are being explored by the Commission, and the reasons [therefor].' Secondly, they assert that, unlike the case with the First Report, no minutes of meetings of the Commission leading to the Second Report were disclosed. Thirdly, they say they were entitled to be shown or given the various scenarios which were given by the Commission to the Statistics Division. They rely on the Leader of the Opposition's

[20] [2002] EWHC 1780 (Admin).

letter of 17th June 2013, the same day consultations were to begin, in response to the Commission's letter of 13th June 2013 inviting consultation.

[23] The Commission's letter of 13th June 2013, addressed to the political leader of the ALP, stated in part as follows:

> "We are proposing to maintain seventeen constituencies but in maintaining this number we are proposing changes to the boundaries.
>
> "The way in which we are looking at making these changes is by placing as much as practicable, equal number of inhabitants and voters in each constituency. Details of our proposals will be sent at a later date.
>
> "We are therefore inviting you to attend four consultations where you can make recommendations verbally or in writing. …
>
> "We also invite you to submit to us your suggestions in writing of how you think these changes can be made. We would appreciate if this could be done before 21st June, 2013."

This letter was said to accompany the Commission's proposals. One document outlined what the Commission sought to do under the Guidance Act, and further stated that it had relied on census data, the register of electors and the existing constituencies' boundaries map, for example, to guide it. It stated that both sets of data showed that there needed to be changes to the existing constituencies and attached the proposed changes, on which input and review was being invited for enhancing the exercise.

[24] The Leader of the ALP responded, in part, on 17th June 2013 as follows:

> "With regard to the proposed Recommendations as enclosed with your letter dated the 13th day of June 2013, my Party requires that the Commission provide us forthwith with all material which it has relied on to make the proposed recommendations. This must include, but is certainly not limited to, complete copies of any maps, the census report; voters list; witness statements from any person interviewed; and/or any reports and/or documents provided by any technicians and/or experts … to be delivered to us immediately so that we could review and analyse the same."

[25] It is common ground that the gravamen of the complaints levelled at the Commission's First Report was that it had not put forward any specific proposals

for boundary changes neither had they made use of relevant census data. These criticisms were accepted and caused the Commission to go back to the drawing board to have regard to the up-to-date census data and formulate specific proposals to be discussed at the consultation meetings. It is not disputed that the Commission did not submit any further specific information to the appellants. The appellants however, did not specifically request sight of the various scenarios provided to the statistics officers, or for that matter, the minutes of the Commission's meetings, which led to the proposals being put forward. The respondents, on the other hand, say they were never asked for this specific information. The appellants accept that they did not request this specific information neither from the respondents nor by application to the court. The appellants complain however, that the details were only forthcoming in the affidavits of Mr. Crump, and Mr. Rohan Anthony of the Statistics Division in response to their claim and that this information should have been given before. The appellants say they were not provided with a single map/document to study[21].

[26] In reliance on the authorities of **Bushell and Another v Secretary of State for the Environment**,[22] **Attorney General v Kenny D. Anthony**[23] and **Paponette and Others v Attorney General of Trinidad and Tobago**[24] cases, the appellants say that the Commission, as a public body, was obliged to make full disclosure. The Commission was required to justify why an alteration was being made. The appellants say this was not done. Rather, they say that the 'consultee' was left shooting in the dark with an eloquent affidavit of Mr. Crump coming only after the consultations. They also complain that despite the allegations levelled against Mr. Fuller in respect of his well-publicised hostility towards Mr. Browne and Mr. Michael (two of his party members), the Commission had failed to call Mr. Fuller as a witness.

[27] In **Bushell**, Lord Diplock opined at pages 28 to 29 that:

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[21] See para. 43 of the affidavit of the Hon. Gaston Browne (record of appeal Vol. 2, Part B, p. 50).
[22] [1980] 3 WLR 22.
[23] Saint Lucia High Court Civil Appeal SLUHCVAP2009/0031 (delivered 14th June 2010, unreported).
[24] [2010] UKPC 32.

> "Fairness … requires that the objectors should be given sufficient information about the reasons relied on by the department [body] as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons are based."

Paponette, a decision of the Privy Council, contains statements to similar effect.

[28] The respondents accept these statements of principle. What they say however, is that the Commission was required to ensure that the boundaries it proposed would produce equality in the number of inhabitants taking into account voter parity. It was accordingly required to provide information which would explain the course it proposed to take and to enable those with whom it was consulting to give advice and make suggestions. The Commission says it met this obligation in the following ways:

(a) detailed summaries of the census data used by the Commission showing the number of inhabitants per district, disaggregated by age showing those inhabitants who would have reached voting age, as well as detailed proposals of the changes were furnished to the appellants; The census data provided explained its choices.

(b) This information was made available to the public at the consultations and was incorporated into 'PowerPoint' presentations made at the consultation meetings; and

(c) that had the appellants stayed on at the consultation meetings they would have witnessed the PowerPoint presentations and could have asked any questions they wished.

[29] The respondents also make the further additional points:

(a) that the information which the appellants say they ought to have been provided with, related mostly to existing boundaries which would have been of little or no assistance as it was not in dispute that the existing boundaries contained vast voter disparity and

thus had to be changed if the cardinal principles of the Guidance Act were to be honoured;

(b) that the appellants are seasoned and experienced politicians intimately familiar with their constituencies and would have already been aware of this information in relation to the existing boundaries and the existing voter disparity and thus the need for changes so as to comply with the principles of the Guidance Act;

(c) that the alleged complaint of failure to provide them with the various scenarios being considered by the Commission before coming up with their preliminary proposals is unfounded as the Commission did furnish that information which was the census data. They say that any other data or workings would be in respect of other scenarios which the Commission had considered and rejected as not meeting the objective of the Guidance Act. In respect of this complaint, the respondents also say this assumes that such workings did exist and was available, yet this complaint was never pleaded, never requested, and raised for the first time on this appeal and thus the Commission was deprived of the opportunity of addressing it. It was accordingly unfair to raise this complaint at this stage. We agree;

(d) In respect of the failure to provide minutes of the Commission leading to its Second Report they say that if there are minutes contradicting what Mr. Crump said, then such minutes would be required to be disclosed. Further, that had the appellants requested the minutes they would have been furnished. They say that the question of providing the minutes did not surface until late in the trial at the time of closing submissions. The respondents also point to Mr. Fuller, who they say could have been called by the appellants to say whether Mr. Crump's evidence was contrary

to the minutes. The evidence showed that at least up to March 2013, Mr. Fuller was keeping the ALP apprised of the workings of the Commission, by providing them with his notes, and letters and even drafted a minority report in relation to the First Report. The appellants did not avail themselves of Mr. Fuller as a witness. No evidence was led contradicting what Mr. Crump said in his affidavit. What the appellants say however is that Mr. Fuller did a 'turn coat' after the ALP convention when Mr. Browne became the Leader of the ALP thus trouncing his friend and former Leader of the ALP, Mr Lester Bird. There was no evidence however that Mr. Fuller had or has done a 'turn coat' on the ALP. He signed off on the Second Report.

[30] The respondents rely on the cases of **Regina v North and East Devon Health Authority, Ex parte Coughlan**[25] and **Rollo and Another v Minister of Town and Country Planning**[26] in relation to the information which a decision making body is required to provide to the person with whom it must consult. In **North and East Devon Health Authority**, Lord Woolf, at paragraphs. 108 and 112 had this to say:

> "108. … To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken… .
>
> …
>
> 112. ... It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

[25] [2001] QB 213.
[26] [1948] 1 All ER 13.

[31] As alluded to above, this is a case where there was no cross-examination, and one where there was no request for specific information. Yet the court was being asked to make a value judgment as to the credibility of Mr. Crump in circumstances where no contradicting documentary or other evidence had been proffered. Also, while it is fully accepted that a public body is under an obligation to disclose information or come to the table with all cards facing upwards, this is a principle which must be applied within context. It cannot be taken to mean that all information, including information which is irrelevant, must be disclosed. In the circumstances of this case the duty was to consult on the changes being proposed to existing constituency boundaries. It would be expected that the Commission would furnish information so as to: (a) show or depict the proposed boundary changes; and (b) to explain or justify why the proposed changes would meet the objective – that is, to achieve nearly equal numbers of inhabitants taking into account voter's parity. The Commission says it provided information detailing the proposed changes, and provided the census data disaggregated by age to show inhabitants per district who would have reached voting age, which explained their proposed changes in seeking to adhere to the cardinal principles of the Guidance Act. Further, the Commission says it presented at each of the scheduled consultation meetings a PowerPoint presentation, which provided information and explained the basis of the proposals made. It is not disputed that the appellants are veteran politicians who would know the boundaries of their existing constituencies. In our view, if additional or specific information was needed for the purpose of consultation then, in the absence of a request for specific information, it is unlikely that the body consulting would be on notice of its failure to provide it and may have reasonably concluded that the information provided was sufficient for the purposes. Accordingly, we conclude that the complaint of failure to disclose information in the circumstances of this case, cannot be sustained.

The allegation of gerrymandering

[32] The appellants allege gerrymandering of constituency boundaries in relation to St. Paul, St. Mary's North, St. John Rural East, St. John Rural West and St. Peters. The appellants do not say that the boundary changes proposed by the Commission are not in keeping with the cardinal principles of the Guidance Act nor do they assert that it was necessary to depart from the cardinal principles and have regard to the four factors enumerated in section 3(1) of the Guidance Act. Rather, the appellants allege that the effect and purpose of the proposed boundary changes was to weaken ALP's electoral chances in those areas.

[33] There can be no doubt that an allegation of gerrymandering by a public body established under the Constitution, which is the supreme law of the State, is a serious allegation. It connotes the carrying out of constituency boundaries alterations in bad faith by that public body; in essence, that the exercise was conducted for the purpose of giving one political party an unfair advantage by diluting the opposing political party's voter strength – a wholly improper purpose. Any pleaded allegation of which bad faith is a necessary component, must be proven by cogent evidence. This case is no exception. The more serious the allegation, the more cogent must be the evidence in proof of it. This principle is one which is so well established in such decisions as **In re H. and Others (Minors) (Sexual Abuse: Standard of Proof)**,[27] and **In re Dellow's Will Trusts**[28] and so consistently applied in our court, that it admits of no doubt and needs no further exposition.

[34] In order for a charge of gerrymandering to succeed, two elements must be satisfied by cogent evidence. Firstly, it must be shown that the Commission altered the boundaries and that the alterations had the effect of diluting or weakening ALP's support in those altered constituencies. Secondly, it must be shown that the Commission so altered the boundaries precisely for achieving that effect. – that is, the strengthening of the UPP's electoral chances over the ALP thus weakening the ALP's electoral chances in those constituencies.

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[27] [1996] AC 563.
[28] [1964] 1 WLR 451.

[35] It cannot be disputed that whenever constituency boundaries are altered, that the fortunes of an electoral candidate will be correspondingly affected – either positively or negatively. That consequence is inevitable. However, that without more, does not lead to the inevitable conclusion that the alteration was with the intention or for the purpose of affecting a candidate's political fortunes by deliberately giving one an unfair advantage over the other.

The evidence

[36] Mr. Browne, in his 4th affidavit[29] under the heading "**Particulars of Gerrymandering**" says, in relation to the proposed boundary alterations, as follows:

St. Paul

> "The effect of [the Commission's proposal] is that [it] has removed from St. Paul the majority of [ALP's existing] support areas and have packed UPP votes into the constituency of St. Philip South which is [a] UPP stronghold thereby strengthening … St. Philip North and making it a garrison as well as building support for the UPP candidate in St. Paul and making it unlikely that that an [ALP] Candidate can win in areas which currently form the All Saints East and St. Luke Constituency which has been a predominantly UPP area … . As a result, it would mean that the UPP will maintain 2 stronghold Constituencies of St. Phillip South and St. Paul."

Mr. Browne says that 'this is unlikely to have been the situation if the boundaries were to remain as is because the [ALP] candidate for St. Paul lost the 2009 General Election by a narrow margin of 92 votes'.

St. Mary's North (to be renamed St. John's Rural South East)

He says that the effect of proposed alterations is that:

> "… the villages and surrounding environs of Ebenezer & Jennings which have been an [ALP] stronghold for the past 30 years or more will now be removed and placed in St. Mary's South (to be named St. Mary's). In the 2009 General Election [the ALP] won St. Mary North by 21 votes and the UPP Candidate won St. Mary's South by 319 votes. The proposed boundary changes would result in most likely the proposed new constituency of St. Mary's North becoming a UPP stronghold".

[29] See record of appeal Vol. 2, Part B, pp. 38-63.

St. John Rural East (now to be split into St. John Rural East North and St. John Rural East Central)

He says that:

> "The effect of this is that this is a blatant effort to 'gerrymander' in order to give [the UPP] an upper hand as they seek to remove the existence of the 2nd Named Claimant's Constituency which has been a stronghold for the [ALP] for the past 20 years, with the exception of the General Election of 2004".

St. John's Rural West

He says that:

> "The proposed … changes … will result in the wholesale removal of [ALP] support in the St. John Rural West Constituency by the removal of the Cook Hill area and the very likelihood of the disenfranchisement of Commonwealth Nationals who would be eligible to vote in St. John Rural West, which has a high percentage [of] Commonwealth Votes."

St. Peter

Mr. Michael in his affidavit[30] stated that the proposed changes would result in the constituency of St. Peter being split between the constituencies of St. Philip North and St. George. He said:

> "45. The effect of this [would] be that the Constituency of St. Philip North would include, Parham, and Pares, and the constituency of St. George would include Fitches Creek, Paynters East and West. These were all areas within the constituency of St. Peter. … St. Peters will be no more if these proposals become … law. The elimination of St. Peter, which is one of [the ALP's] strongest seats, with the largest plurality of votes, is a clear example of "gerrymandering". …
>
> …
>
> "48. It is obvious to me therefore that this is a blatant attempt at *"gerrymandering"* in order to give [the UPP] an upper hand. The

[30] See record of appeal Vol 2, Part B, pp. 19 -20, paras. 45-48.

> Commission is seeking to remove the very existence of my constituency which has been established in the same manner for the past 20 years, without any basis for so doing. … it is instructive that since 1968 [the ALP] candidates have always held the seats in St. Peter and St. Phillip North. The Boundaries Commission's proposals to make these changes is calculated to give [the UPP] an unfair advantage, and to prevent the representation of the local people by an Antigua and Barbuda Labour Party candidate, in constituencies nurtured for in excess of 45 years, by the candidates. There is no proper or principled reason for this."

[37] Interestingly, Mr. Michael, who has complained that St. Peter will cease to exist, has led no evidence as to his chances – win or lose – in respect of any of the areas into which St. Peter is proposed to be split. It is expected that such evidence would readily come from Mr. Michael who on his own account is a veteran politician and candidate in those areas, which made up the constituency of St. Peter.

[38] The problem with this evidence is that the case of gerrymandering is not made out merely by saying that this is gerrymandering. One must clearly demonstrate on the facts how this is so. Generalised statements that a certain area was an ALP stronghold or, that the ALP has been weakened in another area, is not enough. The respondents contend that the evidence of the appellants falls short of the proof needed to establish this allegation. They say that what is required to be shown is the provision of hard numbers which would show that in the particular areas which have been removed or added to a constituency, the ALP has net voter support of a particular amount; that the net result of the accumulation of changes is the net loss of a particular amount of votes, which, when compared to previous elections, would mean that the ALP margin of victory would be overhauled. We respectfully agree. The evidence falls short of establishing with clarity and certainty, that the ALP votes have been diluted to the advantage of the UPP.

[39] If the very fact of dilution has not been satisfactorily established then this complaint fails on the first limb. For completeness however, the second limb is

briefly addressed. We are of the view, based on the state of the evidence, that proof of mala fides on the part of the Commission is even more insurmountable. It is nowhere suggested that the boundary alterations have failed to achieve as far as practicable equality of inhabitants taking into account voter parity. There is also the uncontradicted evidence of Mr. Crump who set out in detail the manner in which the Commission conducted the exercise. He stated[31] that he was unable to say what the impact was on ALP strongholds versus UPP strongholds since 'in performing its task the Commission did not rely on any statistics or have regard to any other information which would evidence how voters cast their votes in the last or any previous election'. He went on to state as follows:

> "In fact, I suggest that it would have been entirely improper for the Commission to have had regard to any such matter. I therefore categorically deny that any of the proposed changes made by the Commission were made with the intention of giving any advantage to the UPP over [the ALP] or … vice versa. … Indeed, it would be an impossible task to attempt to achieve parity in inhabitants in constituencies, bearing in mind the other relevant factors set out in the statute, and at the same time seek to ensure that the election prospects of candidates are not affected. If it is appropriate to alter boundaries to achieve the statutory mandate, somebody's electoral chances will be affected, for better or worse."

There is no evidence, documentary or otherwise, which disputes or puts this evidence in doubt. Accordingly, there is no evidence which amounts prima facie, let alone establishes, that the Commission in fact set about re-drawing the constituency boundaries in order to negatively impact the ALP's chances and positively impact the UPP's chances or vice versa. Accordingly, even were the appellants able to show by numbers certain that their voting prospects had been diluted, their challenge would have still failed unless they were able to show by evidence that the Commission in fact acted for this purpose. The learned trial judge, notwithstanding the brevity with which he dealt with this complaint, was correct in dismissing it.

Bias of the Commission

[31] At paras. 11, 12, 18 and 19 of his affidavit, (see record of appeal Vol 2,. Part B, pp. 83-87).

[40] The challenge of gerrymandering having failed, no issue arises as to actual bias. The appellants ground this aspect of their case also on a complaint of apparent bias, based on the composition of the Commission. The test for establishing apparent bias is now well settled. It is whether a fair minded and informed observer would consider that there was a real possibility of bias.[32] As to the characteristics which infuse the fair minded and informed observer, these are eloquently espoused in such cases as **Gillies v Secretary of State for Work and Pensions**[33] and **Helow v Secretary of State for the Home Department and Another**.[34] As Baptiste JA remarked in **Vance Amory v Thomas Sharpe et al**[35] at paragraph 12:

> "The fair minded and informed observer is a legal construct upon whom remarkable qualities have been grafted geared no doubt to insulate the administration of justice from the contaminants of unfairness and partiality. The court no doubt is the touchstone and carries the mantle of the fair minded and informed observer."

[41] An allegation of apparent bias is to be considered having regard to all the relevant facts and circumstances of the particular case based on the material before it and within the context of the issue to be decided[36]. As such, the court is not constrained to looking only at the facts known to the objector or available to the hypothetical observer at the time of the decision.[37] The court at the end of the day is here tasked with constructing that fictitious character called the 'fair minded and informed observer' within the Caribbean context in which this issue arises. The question then is whether the fair minded and informed Antiguan or Barbudan walking along Redcliffe Street in St. Johns, Antigua, would conclude that there was a real possibility of bias.

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[32] George Meerabux v The Attorney General of Belize [2005] UKPC 12.
[33] [2006] UKHL 2.
[34] [2008] UKHL 62.
[35] Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2009/0013 (Nevis Circuit) (delivered 27th August 2012, unreported).
[36] Locabail (U.K.) Ltd. v Bayfield Properties Ltd. and Another. [2000] QB 451.
[37] National Assembly for Wales v Condron [2006] EWCA Civ 1573.

[42] A useful starting point in formulating this legal construct of the Antiguan 'fair minded and informed observer' is the constitutional provisions establishing the Commission. Section 63(1) of the Constitution provides as follows:

> "**63.** (1) There shall be a Constituencies Boundaries Commission for Antigua and Barbuda which shall be appointed from time to time to review the number, and the boundaries, of the constituencies and report thereon to the Speaker in accordance with the provisions of this Part and which shall consist of–
>
> *(a)* a chairman who shall be appointed by the Governor-General acting in accordance with the advice of the Prime Minister given after the Prime Minister has consulted with the Leader of the Opposition;
>
> *(b)* two members appointed by the Governor-General acting in accordance with the advice of the Prime Minister; and
>
> *(c)* one member appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition.
>
> (2). A person shall not be qualified to be appointed as a member of a Constituencies Boundaries Commission if he is a Senator, a member of the House or a public officer."

The evidence

[43] (i) As earlier stated, Mr. Crump, the Chairman of the Commission, is said to be a close friend of the Prime Minister and was a member of the political party which now forms the Government. He is said to be involved or engaged in a number of other entities such as the Antigua Workers Union, which is closely affiliated to the UPP as well as various other governmental Boards or Authorities. Furthermore, at the time of service of a letter from Mr. Browne on the date on which consultation was to begin, service was effected on him at the Office of the Prime Minister. Mr. Crump in his affidavit[38] says that he and two other members who were appointed on the advice of the Prime Minister, had in the past some association with the UPP. He says he was an active member until his appointment as Chairman of the Commission and that he is no longer a financial member.

[38] See record of appeal Vol.2, Part B, p.85, para. 17.

(ii) Mr. Sebastien is said to be a member and supporter of the UPP. In his affidavit[39] he denied being a member of the UPP Branch in the Constituency of St. Mary's North or that he had been a member of the UPP Central Executive. He says however that leading up to the 2004 Election campaign, he was a National Campaign Manager.

(iii) Ms. Clovis Ralph is said to be an activist and supporter of the UPP and was a platform speaker for the UPP in the 2009 General Elections campaign. In her affidavit[40] she says that she has been a member of the UPP Central Executive from its inception, and that she is a financial member of the UPP and a member of the UPP St. Paul's Constituency Branch.

(iv) Mr. James "Jimmy" Fuller, who was appointed on the advice of the Leader of the Opposition (then Leader of the ALP) is said to be hostile towards Mr. Browne and Mr. Michael; that he has publicly and privately advocated the removal of Mr. Michael from the ALP; that he was openly hostile to Mr Michael and Mr. Chet Greene, the ALP candidate and caretaker for the constituency of St. Paul's. No evidence was adduced by or on behalf of Mr. Fuller. However, what is conspicuously missing from the allegations made against Mr. Fuller is that he has ceased being a supporter of the ALP.

Discussion

[44] It becomes immediately apparent that neither the members nor the Chairman of the Commission fall within the disqualification contained in section 63(2) of the Constitution. The dictum of Singh JA (as he then was) in **Constituency Boundaries Commission and Another v Baron**[41] resounds with an unmistakeable resonance. It is here repeated in the hope that in the application of

[39] See record of appeal Vol.2, Part B, pp.103-104, para. 3.
[40] See record of appeal Vol.2, Part B, pp. 107-108, para.3.
[41] (1999) 58 WIR 153 at 161a-g.

this section, which is similar to provisions in several of our Caribbean Constitutions, the exhortation will be taken to heart thus promoting a climate of unquestionable independence and impartiality:

> "It is my considered opinion that such a commission will always lean more towards political loyalty than constitutional integrity. What would assist in order to avoid the appearance of this mischief of bias is that if, when members are to be recommended to the President [the Governor-General], the respective politicians give names of those who are less politically conspicuous. Life would be so much simpler. Section 56(4) of the Constitution precludes from membership of the commission, a Member of the House. The obvious purpose of this provision was to avoid this very danger of bias. **In this context, it is my opinion that there is very little difference between Members of the House and political activists**."[42] (emphasis added)

It is therefore not surprising that the appellants submit that 'the appointment of party supporters, affiliates and activists constitutes in [and of] itself a constitutional or legal vice, which inherently infects and undermines the impartiality of and public confidence in the Commission which is a creature of the Constitution.'

[45] The Court is in complete agreement and endorses the statements of Singh JA. However, while it may be said that such a result was not intended, the more compelling question is whether it can be said that nonetheless, this must have been in the contemplation of the framers of the Constitution having regard to the fact that it is the Constitution itself which provides for three members (including the Chairman) of the Commission to be appointed on the advice of the Prime Minister, and one member, on the advice of the Leader of the Opposition. It may be said that it is the very constitutional provision, which provides for the scales to be weighted on one side. It is no doubt this reality (dealing with a substantively similar provision in the Constitution of the Commonwealth of Dominica), that led Singh JA in the **Baron** case to opine as follows:

> "I do not wish what I am saying to be misunderstood or misinterpreted. The fact that the commission was appointed in accordance with s 56 of the Constitution triggered the presumption of impartiality in favour of the members, regardless of their personal affiliations. That means that the onus was then placed on the respondent to rebut that presumption by

[42] At 161a-b.

> cogent evidence on a balance of probabilities. In doing so the respondent did not have to prove actual bias. All he was required to prove was a real danger of bias or prejudice and that was all the court was required to find."[43]

[46] The decision of the Privy Council in **George Meerabux v The Attorney General of Belize**[44] also provides useful guidance. In that case, complaint was made to the Governor General by the Bar Association of Belize and a senior barrister against a former justice of the Supreme Court of Belize. It was alleged that the judge had misbehaved while in office. The Governor General referred the matter to the Belize Advisory Council pursuant to section 98(5) of the Constitution. The Chairman of the Council was required by virtue of section 54(1) of the Constitution to be someone qualified to hold office as a judge of a superior court of record. By section 97(3) a person was not qualified to be appointed as a justice of the Supreme Court unless he was qualified to practise as an attorney-at-law in a court in Belize. It was further compulsory that persons qualified to practice law in Belize be a member of the Bar Association. The Chairman of the Council was required to preside at any meeting of the Council convened to discharge its duties under section 98. Two members of the council, including the chairman, were members of the Bar Association which had made the complaint. The judge objected to the composition of the council asserting apparent bias. The objection was rejected by the Privy Council, which, on considering the provisions above referred, stated as follows:

> "These provisions indicate that it must be taken to have been within the contemplation of the framers of the Constitution that the Chairman who was directed by the first proviso to section 54(11) to preside over an inquiry into the question whether a judge of the Supreme Court should be removed for inability or misbehaviour would be a member of the Bar Association. Section 40(3) of the Legal Profession Act provides that the objects of the Bar Association include representing the Bar in matters concerning the profession in relation to the courts and promoting the proper administration of justice: paras (d) and (e). So it must also have been appreciated that complaints alleging inability or misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the

[43] At 161f-g.
[44] [2005] UKPC 12.

> Bar Association, and that it would be likely to be involved in the presentation of such complaints to any tribunal that was convened to inquire into the matter under section 98(5)(b). This is a powerful, and in their Lordships' opinion a conclusive, indication that in this context, mere membership of the Association is not to be taken, in itself, as a ground of disqualification in the case of the Chairman."[45]

[47] The principle which we extract from the cases of **Baron** and **Meerabux** is this: Where the Constitution itself provides for the appointment of members to a council, commission or other constitutional body in a certain manner and there is compliance with those provisions in making the appointment, the composition of the commission or such body so appointed, cannot in and of itself ground a charge of apparent bias. Singh JA termed it the 'presumption of impartiality' which may be rebutted by leading cogent evidence for this purpose.

[48] Applying this principle to the present case, in the face of section 63(1) of the Constitution coupled with due compliance to the letter of this provision, an attack on the mere composition of the Commission based on their political party affiliations, is not enough to ground the charge of apparent bias. Something more is needed. In the **Baron** case that 'something more' was provided. The question is whether that 'something more' has been provided on the facts and circumstances of this case.

[49] The appellants say that when the composition, the manner in which the majority of the respondents in the initial stages, and the Commission as a whole in the later stages, conducted themselves, are considered together with the inadequacies of the consultations and the recommendations actually made, there ought to be no question, viewed cumulatively,[46] that there existed a real possibility of bias.

[50] At this juncture, it is useful to make this further observation. Notwithstanding that the Commission was appointed at latest, on 1st March 2012, and its composition was well known to the parties, no allegation or question of bias based on the

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[45] At para. 28, per Lord Hope of Craighead.

[46] See Vance Amory v Thomas Sharpe et al (Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2009/0013 (Nevis Circuit) (delivered 27th August 2012, unreported)).

composition of the Commission was raised at any time – not even at the time of the production of the First Report which was withdrawn after the first round of legal proceedings – until these proceedings, by which time the Commission was almost at the end of the exercise.

[51] The respondents contend that the appellants are to be taken as having waived any objection of bias on the part of the Commission, as they, with full knowledge of their appointment as from March 2012, failed to lodge any objection. On the contrary, the appellants were urging the Commission to get on with its work. Certainly, a challenge raised, as it has been in this case, so late in the process does cause the force of such a challenge to pale in significance.

[52] The respondents point to the fact that the First Report was withdrawn when the flaws in the process were identified. They also refer to the mandate given to the Commission in determining whether changes are to be made to boundaries in order to achieve equality of inhabitants taking into account voter parity. No evidence has been adduced contradicting the evidence of the Commission that the exercise carried out produced a result inconsistent with the mandate to achieve equality of inhabitants taking into account voter parity. It may very well be that other boundary configurations could have been proposed which may have also met the objective of equality of inhabitants having regard to voter parity. However, as matters stand, this would involve speculation as there is no evidence that the appellants or anyone else put forward proposals which would have equally achieved this purpose. Furthermore, the appellants did not remain at the consultations such as they were. The appellants considered the consultations to be a sham as they took the view that the proposals put out for consultations were in the nature of a 'fait accompli'.

[53] The respondents also say that Mr. Fuller's hostility to Mr. Michael could not lead the fair minded and informed observer to conclude that there is a real possibility that the Commission as a whole is not simply biased against Mr. Michael but would engage in gerrymandering to affect his political prospects. The *well-*

informed and fair-minded Antiguan observer would know that Mr. Fuller was appointed by Mr. Michael's party and to look after that party's interest. Even if it were to be accepted that Mr. Fuller, due to his hostility, was to be taken to act improperly towards Mr. Michael, it does not follow that the entire Commission would be similarly infected. We agree. It is highly unlikely that the *informed and fair-minded Antiguan observer* would conclude that Mr. Fuller would act against the interest of his party as a whole because of his hostility to Mr. Michael. The well-informed observer would not, on this basis, conclude that there was a real danger of bias in respect of the entire Commission.

[54] Finally, the respondents say that even if the boundary changes proposed could disadvantage the ALP, that fact in and of itself is not sufficient to raise a real possibility of bias. They say that, unlike the factors leading to a finding of real possibility of bias in the **Baron** case,[47] this case is decidedly different as there is no evidence that parts of a small constituency have been inexplicably added on to a larger constituency; there have been attempts at consultation; recommendations have been considered; there is no evidence that the Commission considered past voting patterns; and the Opposition's representative on the Commission signed off on the final report. Accordingly, they say there is no evidence on which the fair minded and well-informed observer who is not given to suspicion, or is overly sensitive would conclude that the Commission discharged their functions so as to prejudice the appellants or the parties to which they belong.

[55] Having taken into consideration all the factors and circumstances of this case the court is of the view that the evidence which would have been required to establish that 'something more', is lacking in this case. It has not been shown that the objective of the Guidance Act has not been achieved. Even though the constituency of St. Peter is proposed to be split between the constituencies of St.

[47] (1) There were four political activists in the Commission; (2) no consultations had taken place; (3) there were no documentary readings; (4) all the constituencies to be altered were not represented by any Government Member; (5) all votes taken at the second meeting were split down the middle with the Speaker giving the casting vote at all times in favour of the Government nominees; (6) Petite Savanne, which was an already small Opposition constituency, was being made smaller so that the Government-won constituency of Grand Bay could become larger.

Phillip North and St. George, and the constituency of St. Peter as it then was will cease to exist, no evidence has been adduced to show what Mr. Michael's electoral chances would be - in either St Phillip North or St. George. There is no evidence suggesting that he would be unable to win in either of the constituencies into which St. Peter has been split. There is no evidence that the Commission had regard to voting patterns in carrying out and proposing the alterations. Even if the Commission had regard to the Election Report which contained information as to how voters cast their vote, among other information, it does not inexorably follow that the Commission must be taken to have had regard in making their proposals for alteration, as to how electors cast their vote. No evidence has been led which contradicts the evidence of Mr. Crump. The Commission sought to have consultations within the limited window of time it saw as being available to it in seeking to keep the constitutional deadline. This is simply not a case on all fours with **Baron** in terms of the factors which would lead a *fair- minded and informed Antiguan observer* to conclude that there was a real possibility or danger of bias on the part of the Commission. This challenge also fails.

Consultation

[56] Section 3(2) of the Guidance Act provides a duty to consult. There is no dispute in this case that there was some form of consultation. The issue is as to its adequacy. The appellants complain that the consultation which was held did not satisfy the Commission's statutory obligation for a number of reasons, but primarily because the time allowed for consultation was too short, those with whom the Commission consulted were not given relevant documents and other information to make the consultation meaningful and, the Commission did not commence the consultation at a point when its proposed alterations were at a formative stage. A more detailed summary relating to this aspect is now set out to place this complaint within context.

Summary

[57] The Commission produced the First Report in March 2013 recommending alterations to the boundaries. This was after it had organised just one day of consultation with members of the public on 29th November 2012. As already stated above, two of the appellants on this appeal, Mr. Bird and Mr. Michael, challenged the First Report in legal proceedings. The Commission sought and received advice that, as Messrs. Bird and Michael had complained in those proceedings, the Commission did not give those invited to the consultation any indication of the proposals it was considering and that accordingly Messrs. Bird and Michael had a strong basis upon which to challenge the Report. The Commission was also advised that Messrs. Bird and Michael had also complained that insufficient use was made of census data in attempting to achieve equality in the number of inhabitants in the proposed constituencies. Counsel therefore advised the Commission to revoke the First Report and 'revisit the constituency boundaries after having obtained further information from the census authorities and carried out a proper consultation process.'[48] The Commission accepted this advice.

[58] Thereafter, the Commission re-commenced the review of the constituencies and enlisted the assistance of the census officers to obtain the necessary information.[49] The Commission was provided with the information requested on 7th June 2013. Thereafter, the Commission held several meetings with the census officers and experts assisting the Commission and it was not until just before 13th June 2013, that it was in a position to develop what Mr. Crump referred to as a "preliminary position" which could be put out for consultation.[50] The process which the Commission followed is set out in the following paragraph of Mr. Crump's affidavit:

[48] See letter from Douglas L. Mendes, SC – record of appeal Vol. 3, pp. 146-147.
[49] See record of appeal Vol. 2, Part B, p. 89.
[50] Ibid.

> "Pursuant to Section 3(2) of the Constituencies Boundaries Commission Guidance Act, the Commission is required to engage in a process of public consultation. We were advised by Senior Counsel that the consultation held before the preparation of the First report was inadequate both in number and in the fact that we had simply asked for comments from the public without giving them any indication of what the Commission's thinking was. We were also advised that we had erred in not taking account of the available census data. Accordingly, having decided to revoke the first report, we set about to correct our previous errors. To that end I made contact with the Census Office and told them what information we needed. I impressed upon them the urgency of my request. I followed up with telephone calls, but I was made to understand that because the census had not been completed the information requested had to be compiled. It was not [until] June 7, 2013 that we were provided with the information requested. We then had several meetings with the census people and the experts assisting us, and it was not until just before June 13th that we were in a position to develop a preliminary position which we could then put out for public comment and consultation. As noted, we were advised that for the consultation process to be meaningful, we had to let the public know of our preliminary position."[51]

By way of letters dated 13th June 2013, and notices in the newspaper, the Commission invited various political parties, including the ALP, each of the current Parliamentarians, prospective political candidates and Mr. Luke James of the Free and Fair Elections League to attend consultations to be held on 17th, 18th, 19th and 20th June 2013 at four different locations.[52] These locations were chosen because they provided easy access to persons from all parts of the country.[53] Notices were put in the newspaper advertising the consultations and announcements were made on the radio stations.[54]

[59] The June 13th letters contained information concerning the Commission's proposed alterations to the boundaries along with census data showing the population in each proposed constituency.[55] The consultations were televised live

[51] See record of appeal Vol. 2, Part B, p. 89.
[52] See record of appeal Vol. 2, Part B, p. 90.
[53] See record of appeal Vol. 2, Part B, p. 92.
[54] See record of appeal Vol. 2, Part B, p. 90.
[55] See record of appeal Vol. 3, pp. 179-201.

to the entire nation.[56] The proposed changes were presented by PowerPoint, and attendees were informed that the survey utilised by the Commission were the census data and the Register of Electors.[57] All relevant supporting documentation was available at the consultations for inspection.[58] It is accepted however, that no printed or copy maps depicting the proposed boundary changes were available. Attendees were encouraged to make recommendations for the Commission to consider.[59] Questions posed and clarifications sought were answered.[60] It is not disputed that the consultations drew heated exchanges, at various points and calmer discussions at other points.

[60] Thereafter, the Commission produced the Second Report on 25th June 2013.[61] As a result of its further review and more in depth incorporation of the census data, the Commission modified the boundaries of six of the constituencies over and above what had been originally proposed in its First Report.[62]

[61] The above provides an important backdrop to the appellants' complaint that the time allowed for consultation was too short. This will be examined later in the judgment.

The appellants' submissions

[62] Mr. Astaphan SC, counsel for the appellants, contends that the learned judge failed to properly consider and apply and/or hold that section 3(2) of the Guidance Act imposed the statutory obligation to consult interested persons and more specifically when he failed to hold that the respondent did not comply with section 3(2) of the Act. This statutory obligation, did not permit the respondents to pick four of the many constituencies directly affected in which to hold public consultations. The obligation was to properly and adequately consult all interested

[56] See record of appeal Vol. 2, Part B, p. 92.
[57] See record of appeal Vol. 2, Part B, p. 93.
[58] See record of appeal, Vol. 2, Part B, p. 92
[59] See record of appeal Vol. 2, Part B, p. 93
[60] ibid.
[61] See record of appeal Vol. 3, pp. 150-176.
[62] See record of appeal Vol. 3, pp. 9-11.

persons, and fairly. Counsel submits that the obligations imposed and rights created by section 3(2) of the Guidance Act were and are clear and specific. Properly construed, section 3(2) imposed the specific obligation to consult, and for specific purposes. More specifically:

(i) the consultation must take place '[d]uring the process of review', and not at any time thereafter. Read in accordance with the common law, this means the respondents were required to consult at the formative stage of the review with interested parties in order to 'obtain credible data or information to assist it in its deliberations' (emphasis added). The appellants complain that it was only after the receipt of the work from the Statistics Divisions that the respondents decided to 'consult.'

(ii) '… the Commission shall where necessary hold consultations with interested persons' (emphasis added). These words created an obligation to consult with 'interested parties' in all and not some of the constituencies affected by their recommendations. Significantly, Parliament did not say 'the public.' The Commission held four public consultations in four constituencies only notwithstanding that other constituencies, Members of Parliament and others were materially affected. Counsel posits that 'interested persons' include or certainly ought to include those Members of the Parliament or candidates, Town Councils and other persons or bodies who will be directly affected by the recommendations to alter the boundaries. For example, there was no person better qualified to be an 'interested person' than Mr. Asot Michael, whose constituency was being recommended for elimination. In addition, there are the Members of Parliament for Saint Paul's, Saint John's Rural East and Saint Mary's North, all of whose constituencies were seriously impacted by the recommendations. The Commission never sought any data from, and never consulted, any of them specifically or at all. Counsel further submits that once the decision was made to hold public consultations it had to be done properly. This therefore required that members of the public be given adequate information sufficiently in advance of the purported

consultations to enable them to read, digest and understand it, seek advice and make recommendations or participate constructively, if necessary. This never occurred. The members of the public, including the appellants,[63] were only informed of the proposals and some explanations on the very day of the consultations.

(*iii) 'obtain credible data or information to assist it in its deliberations'*[64]Counsel contends that Parliament expected or required this consultation and procurement of this credible data or information from interested persons to take place before and certainly prior to the deliberations of the Commission. He submits that no attempt was made to comply with this obligation. No interested person, and certainly none of the appellants, was asked to provide data or information to the Commission in order to assist it in its deliberations.

[63] The appellants relied on paragraphs 11 to 13 of the affidavit evidence of Mr. Crump to support the conclusion that the Commission had passed the formative stage of review.

i. In paragraph 11, Mr. Crump stated:

"The Commission explained to the Statistics Division's officers various scenarios as to where constituency boundaries might be." (emphasis added)

"The Division's officers then made the calculations to estimate about how many inhabitants would be in each of the proposed constituencies which the Commission was considering,[65] while giving some approximation to those enumeration districts which cut across constituencies' boundaries." (emphasis added)

"The Commission was of the view[66] that by marrying the information concerning the number of inhabitants in the proposed constituencies with the voting ages and the number of registered voters we would be better able to achieve the statutory mandate." (emphasis added)

[63] The appellant Mr. Browne received the proposals two days before with only the population data for the new constituencies and not of the existing constituencies.

ii. In paragraph 12:

"To this end,[67] the Commission utilised the services of a statistician, and three persons with backgrounds in surveying and or digital map making, namely, the Chief Surveyor, Mr. Bird at the Survey Department, Mr. Alva Guishard Sr, a surveyor attached to the National Office for Disaster Services (NODS), Mr. Alpheus Tonge, an officer in the Statistics Division whose expertise includes digital map construction and Mr. Rohan Anthony, also of the Statistics Division."

iii. And in paragraph 13:

"The procurement of this critical information[68] took several weeks and this impacted on the time frame available for consultation." (emphasis added)

[64] The appellants argued that these are unambiguous admissions that the Commission had passed the formative stage of a review or deliberations, and had in fact decided on or were in fact crystallising or finalising their recommendations on the constituencies. Counsel submitted that the inevitable inference or consequence of Mr. Crump's evidence is that the respondents made early decisions in principle or otherwise on the proposed boundaries. But instead of at this stage consulting with interested parties (especially the first appellant who was and is the Leader of the Opposition and the Antigua and Barbuda Labour Party), and Mr. Michael, whose constituency was being recommended for extinction, the respondents submitted these proposals or decisions to the Statistical Division and other public officers in order for them to complete the process and plans. The respondents therefore purported to hold four public consultations in four constituencies only after its review and deliberations were completed, or substantially completed, by the public officers and themselves. This failure to consult or seek data and information from interested parties at the formative or early stage of or before the substantial, if not total completion, of the review and deliberations is fatal to the respondents notwithstanding what may have occurred subsequently or because of the alleged urgency.[69]

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[69] See Sardar and Others v Watford Borough Council [2006] EWHC 1590 (Admin) at paras. 29 to 35.

The respondents' submissions

[65] Mr. Mendes, SC, counsel for the respondents, pointed out that in its invitation letter, the Commission described the proposal on which it wished to consult as just that, a proposal, and invited recommendations and suggestions.[70] Further, in the document entitled "Details to attach to letters of invitation for Consultation", the Commission referred variously to changes or modifications it was 'considering' or 'desired',[71] and concluded as follows:[72]

> "The Commission is still in the reviewing exercise and still looking at other changes. … The Commission invites your input in forwarding your thoughts on our proposals set out above. Be advised that these proposals are subject to changes."

The Law on Consultation

[66] The law imposes an obligation of fairness on any public consultation exercise and such consultation must be carried out properly. The requirements for a fair consultation are now well-established. Firstly, consultation must be undertaken at a time when proposals are still at a formative stage. Secondly, sufficient reasons must be provided for particular proposals so as to permit those consulted to give intelligent consideration and make an intelligent response. Thirdly, adequate time must be given to allow responses to be made. Finally, the responses to consultation must be conscientiously taken into account when the ultimate decision is taken.[73]

[67] The requirement that consultation must be at a time when proposals are at a formative stage can be expressed as a requirement that the decision maker has not pre-determined the issue upon which he goes out to consult, i.e. that he has an open mind.[74]

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[70] See record of appeal Vol. 3, pp. 179, 180.
[71] See record of appeal Vol. 3, p. 181.
[72] See record of appeal Vol. 3, p. 183.
[73] See R v Brent London Borough Council, Ex parte Gunning (1985) 84 LGR 168, approved in Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 at para. 108.
[74] See Sardar and Others v Watford Borough Council [2006] EWHC 1590 (Admin).

Discussion

[68] The appellants' complaints about the consultation process can be put on a threefold basis:

(a) that the consultation did not take place when the proposals were still at a formative stage;

(b) that the Commission did not allow sufficient time for consultation; and

(c) that the Commission failed to provide sufficient information to enable those consulted to engage meaningfully with the process.

There were other miscellaneous complaints which for the reasons earlier addressed and others appearing later in this judgment do not require further consideration. The Court will first consider the complaint with respect to the argument that the Commission had passed the formative stage of review.

(a) Formative stage

[69] It will be recalled that Mr. Crump deposed that in its discussions with officers from the Statistics Division, the Commission had described 'various scenarios as to where constituency boundaries might be'. The statisticians then estimated how many inhabitants would be located in the proposed constituencies which the Commission was considering. This gave the Commission 'some idea of the extent to which its proposals would achieve equality in the number of inhabitants in the proposed constituencies'.[75] Mr. Crump deposed further that after several meetings with the census officers and the experts assisting them:

> "… it was not until just before June 13th that we were in a position to develop a preliminary position which we could then put out for public comment and consultation. As noted, we were advised that for the consultation process to be meaningful, we had to let the public know of our preliminary position."[76]

[70] The appellants contend that the Commission was wrong to have put their 'preliminary position' out for public comment. What it ought to have done, they say, was to put out for public comment the 'various scenarios' which the

[75] See record of appeal Vol. 2, Part B, p. 83.
[76] See record of appeal Vol. 2, Part B, p. 89.

Commission had put to the statisticians. The respondents submit, and we agree, that the Commission was not required to do so. A body which is under a duty to consult must let those with whom it must consult 'know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response'.[77] We agree with the respondents that it is not sufficient simply to inform those with whom the Commission must consult that the Commission is considering altering boundaries and ask for their recommendations. Proposals must be put forward around which comments and alternative proposals may be put forward for the Commission's consideration. It would be wrong, of course for the Commission to pre-determine the matter.

[71] There is much force in the respondents' submission that section 3(2) of the Guidance Act cannot be interpreted as requiring the Commission to consult even before it develops its proposals. The phrase 'During the process of review' must therefore be interpreted holistically to encompass the entire process commencing with the appointment of the Commission and ending with its recommendations to the Speaker. Consultation must take place during this period, but it would be premature to have any consultation before the Commission has some idea of what it proposes should be done, that is to say, until there is something specific around which consultation may be usefully held. Consultation at too early a stage would be insufficient to discharge the Commission's duty to consult 'if matters have not been formulated with sufficient detail to enable meaningful responses'.[78]

[72] The guiding principles set out in the judgment of Wilkie J in **Sardar and Others v Watford Borough Council**[79] support the Commission's case that it consulted at the appropriate stage. Wilkie J, at paragraph 29 said:

> "The description 'a formative stage' may be apt to describe a number of different situations. A Council may only have reached the stage of identifying a number of options when it decides to

[77] See Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213, at para. 112.
[78] See East Devon District Council v Electoral Commission, The Boundary Committee for England [2009] EWHC 4 (Admin).
[79] [2006] EWHC 1590 (Admin).

> consult. On the other hand it may have gone beyond that and have identified a preferred option upon which it may wish to consult. In other circumstances it may have formed a provisional view as to the course to be adopted or may 'be minded' to take a particular course subject to the outcome of consultations. In each of these cases what the Council is doing is consulting in advance of the decision being consulted about being made. It is, no doubt, right that, if the Council has a preferred option, or has formed a provisional view, those being consulted should be informed of this so as better to focus their responses. The fact that a Council may have come to a provisional view or have a preferred option does not prevent a consultation exercise being conducted in good faith at a stage when the policy is still formative in the sense that no final decision has yet been made."

[73] Furthermore, the Commission's position is consistent with that which was accepted by the Privy Council in **Port Louis Corporation v Attorney-General of Mauritius**[80] In relation to consultation on a proposal to alter the boundaries of a town. Lord Morris of Borth-Y-Gest said:

> "If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problems that may be likely to arise in the event of there being an alteration of boundaries. The local authority must be told what alterations of boundaries are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or declined to express any views. The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think."[81]

[80] [1965] 3 WLR 67.
[81] At p. 72A-E.

[74] The Commission expressed the proposal which it had put forward for consultation as preliminary and subject to change. It was right to put out its proposal at this stage for consultation. A decision is still at a formative stage even where a decision-maker has identified a preferred option or reached a provisional view upon which it wishes to consult.[82] There was no pre-determination on its part. No final decision had been made. This ground of complaint accordingly fails.

(b) Failure to provide information

[75] This complaint is addressed to some extent above. For completeness however it is proposed to treat with it in greater detail. The trial judge found no substance in the appellants' complaint that there was a failure to provide information. The appellants complain that they were not provided with existing or proposed plans or material in relation to the existing boundaries and constituencies; information or data on population density figures, disparity, demographics, geographical features, for the existing boundaries which could justify changes; the information submitted to the census officers; the workings or data used; and the workings or data of the statistics division or other public officers. This, it was submitted, was necessary information for them to consider and review in order to test the accuracy of 'any facts and the validity of any arguments' of the work done by the officers and/or recommendations made by the respondents.

[76] The respondents argue, and it is not disputed, that the existing boundaries contained vastly unequal numbers of voters and had to be changed if the cardinal principles in the Guidance Act were to be honoured. They contend that the information which the appellants say they ought to have been provided with concerned mostly the existing boundaries but that all that this information would have shown is what everyone already knew. i.e. that there was inequality in the numbers of inhabitants in the constituencies and that alterations had to be made to comply with the cardinal principles. It is therefore not discernible how the

[82] See Sardar and Others v Watford Borough Council [2006] EWHC 1590 (Admin)

provision of such information would have assisted the appellants to provide advice to the Commission.

[77] Reference has been earlier made to the statements of Lord Woolf in **Regina v North and East Devon Health Authority, Ex parte Coughlan** which provide some guidance as to the information which the decision maker is required to provide the person with whom he must consult. In **Rollo and Another v Minister of Town and Country Planning**[83] Bucknill LJ said that consultation means that '… the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.'

[78] The Commission was required to ensure that the boundaries it proposed would produce equality in the numbers of inhabitants, taking into account voter parity. It was required to provide information which would explain the course it proposed to take and to enable those with whom it was consulting to give advice and make suggestions. Attached to its letter dated 13th June 2013, were detailed summaries of the census data used by the Commission showing the number of inhabitants per district, disaggregated by age, showing those inhabitants who would have reached voting age and so be eligible to vote. Attached also were the Commission's detailed proposals for change. The Chairman's evidence is, as well, that the information was made available to the public at the consultations and was incorporated into the PowerPoint presentations. The Commission provided the census data, which explained their choices. The complaint that they were not provided with information thereby affecting their ability to participate in the consultations is not well founded.

[79] The appellants claim that they should have been provided with the workings or data used by the Commission or the statistics division or other public officers. The respondents argue that this appears to be a different way of putting their other submission that the Commission ought to have provided them with the other

[83] [1948] 1 All ER 13, 17.

scenarios which it was considering before forming its preliminary view on the proposals which it chose to put out for public consultations. They point out that the Commission provided the census data in relation to its preliminary proposal. Any other workings or data would have been in respect of the other scenarios which the Commission had considered but did not pursue. They further point out that this particular complaint was not pleaded and in fact is being raised for the first time on the appeal. Further, the appellants did not at any time seek discovery of this information. The Commission was therefore deprived of the opportunity of saying whether any such workings or data was available.

[80] It is necessary to pay regard to the pertinent legal principle. The Court has already referred to the case of **Regina v North and East Devon Health Authority, Ex parte Coughlan** with respect to what is to be disclosed. Apart from **Ex parte Coughlan**, there are other cases bearing the same theme. Fairness, in the decision-making subject to public consultation does not generally require internal workings of a decision-maker to be disclosed as part of the consultation. In the **Bushell** case[84] Lord Diplock expressed the principle in the context of a minister's decision–making role on his department's motorway proposal, in which the minister took into account government policy as to the method of assessing future traffic growth, unavailable or unpublicised at the material time. He said at 102:

> "…Once he has reached his decision he must be prepared to disclose his reasons for it, ... but he is, in my view, under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he receives from his department in the course of making up his mind. If he thinks that to do so will be helpful to him in reaching the right decision in the public interest he may, of course, do so; but if he does not think it will be helpful – and this is for him to decide – failure to do so cannot in my view be treated as a denial of natural justice to the objectors."[85]

[84] Bushell and Another v Secretary of State for the Environment, [1980] 3 WLR 22.
[85] At p. 34G.

In **Regina v (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions**[86] the House of Lords approved and applied Lord Diplock's observation. At paragraph 14, Lord Clyde expressed an important qualification that parties should be allowed to comment if 'some significant factual material of which the parties might not be aware comes to his notice through departmental inquiry'.

[81] There is no obligation for a decision maker carrying out a consultation to disclose all material relied upon for his decision. In **David Edwards, Lilian Pallikaropoulos v The Environment Agency, The First Secretary of State, Secretary of State for the Environment Food, Rural Affairs**[87] Auld LJ said at paragraph 103:

> "In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in Bushell, require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if ... a decision-maker in the course of decision-making becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it."

[82] In **The Queen on the Application of Robin Murray & Co v The Lord Chancellor**[88] Mr. Justice Beatson, at paragraph 47, reviewed the cases of **Bushell** and **Edwards**. He stated that these decisions show that barring exceptional cases or, where fairness otherwise requires, there is, in general, no obligation on a minister to communicate advice received from officials or internal material or information to consultees. An example of an exceptional case would be where the matters which have emerged lead the public authority to wish to do something fundamentally different from the proposals consulted upon or where fairness otherwise requires further consultation on a matter or issue that has been thrown up. One such situation may be where the internal material undermines the value of the responses that have been made to a consultation.

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[86] [2001] UKHL 23.
[87] [2006] EWCA Civ 877.
[88] [2011] EWHC 1528 (Admin).

[83] The Court adopts and applies the law as stated above. It cannot be said that the learned judge erred when he held that the Commission was not required to disclose the various scenarios for the boundaries and other information or data which were submitted to the Statistics Division and other public officers. In the circumstances of this case, fairness did not so require. Neither was there any exceptional circumstance which required the disclosure.

(c) The time given for consultation

[84] The appellants complain that there was inadequate time for consultation. That complaint is also linked to the issue arising from a proper interpretation of section 64(2) of the Constitution. The Appellants argue that the Commission sought to hold these consultations some eleven days before the alleged deadline and urgency purportedly created by section 64(2) of the Constitution of Antigua and Barbuda. It was therefore much too late to consult with the interested parties in order to 'obtain credible data or information[89] 'to assist it in its deliberations' as required by the Guidance Act. They submit that on the assumption there existed an urgency, which is denied, the Court ought never in these circumstances to allow the Commission to use this as an excuse to deny adequate and fair consultation on so critically important an issue as the constitutional right to vote. The audience at the 4 consultations (in only 4 out of 17 constituencies) was only informed of the Commission's recommendations on the very day of the consultations. The Commission held these purported consultations between the 17th and 20th June 2013. Proposals were delivered to Mr. Browne on the 14th June 2013. Yet, the Chairman insisted that the appellant Browne provide his response to the proposals and consultations on the 21st June 2013, the very day after the last consultation held on the 20th June 2013.

[85] The appellants submit that these facts, show that the appellants and the public, were given wholly inadequate time. The deadline for proposals was the 21st June,

the day after the consultations ended. The purported deadline under section 64 (2) of the Constitution was the 28th June 2013.

[86] At the trial the respondents contended that section 64(2) of the Constitution was mandatory and created an urgency which prevented the Commission from holding more in-depth consultations. Counsel for the appellants submits that section 64 (2) was not mandatory, hence it created no urgency and that the trial judge was therefore wrong to find that the obligation to produce a report by June 28th 2013 was mandatory thereby providing justification for the less than ideal consultation period. He contends that the proper test to be applied in determining whether section 64(2) is mandatory or merely directory, is to consider whether a report by the Commission is a condition precedent to a valid election. He relies on the decision of the Privy Council in **Russell** in which it was held that the appointment of a Commission is not a condition precedent to a lawful election and thus in that sense the provision requiring the appointment of a Commission was not mandatory. On this basis he says that it was wrong to hold that the obligation to produce a report on time was mandatory.

[87] Counsel for the respondents contends that the appellants have misconstrued what the trial judge decided. He did not decide that the production of a timely report was mandatory in the sense that if submitted out of time it was invalid or would invalidate any election held thereafter. What the trial judge decided was that whatever the effect of a tardy report or its validity, the Commission's obligation to submit a report on time was not something, which the Commission could blithely ignore. He decided nothing more. We agree that this represents an accurate summary of what the learned trial judge decided.

[88] It is necessary to consider section 64 of the Constitution of Antigua and Barbuda. It states:

> "(1) A Constituencies Boundaries Commission shall on its appointment forthwith proceed to review the number of constituencies into which Antigua and Barbuda is divided and the boundaries thereof and shall submit a report to the Speaker stating whether, and if so what, alterations

the Commission recommends should be made to the number or the boundaries of those constituencies.

(2) **A report** by a Constituencies Boundaries Commission **shall be submitted to the Speaker** under this section **not less than two or more than five years after the date when the last such report was submitted.**

(3) In reviewing the number, and the boundaries, of the constituencies and making its report thereon, a Constituencies Boundaries Commission shall be guided by such general principles as may be prescribed by Parliament." (emphasis added)

[89] In **Russell (Randolph) and Others v Attorney-General of St Vincent and the Grenadines**,[90] the courts considered provisions very similar if not identical to those of section 64 (2). The Court of Appeal said:

> "The *Montreal Street Railway* case was concerned with statutory provisions. But I discern no good reason why the judicial practice or principle expounded in that case should not be equally applicable to a constitutional provision.
>
> "In the present case, the neglects to appoint a Constituency Boundaries Commission and to carry out a review of the boundaries of the constituencies were neglects to perform constitutional or public duties. The nullification of the entire general election on the ground of those neglects would result in serious general public inconvenience in the form of a fresh general election. The nullification would not promote the constitutional object of section 33 which was evidently intended to be a constitutional safeguard available in appropriate circumstances to prevent the holding of a general election in the absence of the appointment of a Constituency Boundaries Commission or in the absence of a review or alteration of the boundaries of the constituencies. Indeed, the nullification would defeat the constitutional object of section 33 by sanctioning the utilisation of section 33 as a political weapon to be used after a condoned general election and by persons dissatisfied with the results of the election. In these circumstances, it would be contrary to judicial practice or principle to construe subsections (3)(a) and (4) of section 33 as being mandatory in the sense that failure to comply therewith should be declared to have nullified the general election held on 21st February 1994.'

[90] In essence the respective Courts held that the failure to appoint a boundaries commission or publish a report did not affect the lawfulness of an election. In

[90] (1995) 50 WIR 127.

other words, the appointment of a Boundaries Commission or the submission of its report is not a necessary condition precedent for a lawful election. They, in effect, opined that the provisions of the Constitution which required the establishment of the Commission and submission of a report by the Commission were not mandatory 'in the sense that failure to comply therewith should be declared to have nullified the general election held on 21st February 1994'.

[91] The respondents made clear, as was submitted to the trial judge, that the time allowed for consultation was not ideal. The Commission would have preferred that more time was available. As Mr. Crump said:[91]

> "We had hoped to get to the stage of producing our proposals a lot earlier so that there would be more time for consultation, but we had to wait for the census data. Further, we were constrained by the constitution to send our report to the Speaker by June 28th, so that shortened the time for consultation. We did the best we could under the circumstances. We also had to leave enough time after the consultation to consider what we heard and then make our final decision."

They accordingly submit that although the appellants were given about four days' notice of the four days of consultations which were to be held commencing 17th June 2013, they could have made their input at those meetings, or provide their comments in writing thereafter. They chose not to participate and chose instead, they say 'to put all their eggs in the judicial review basket'.

[92] The Commission does not contend that it was satisfied with the period allowed for consultation. Indeed, the Chairman has said that the Commission was aiming to allow more time, but the circumstances were such that they were operating with a deadline of 28th June 2013 and the crucial census data needed to assist in establishing equality of inhabitants only became available on 7th June 2013, despite the Chairman's efforts and reminders to have the data earlier. Through no fault of the Commission, therefore, a situation of urgency arose which compelled a

[91] See record of appeal Vol. 2, Part B, p. 89.

much shorter period of consultation than would otherwise be advisable and appropriate.

[93] The respondents submit that the right to make submissions in one's defence may be curtailed where it is justified by urgency or administrative necessity *and* cites **Evan Rees and Others v Richard Alfred Crane**.[92] They also rely on **Port Louis Corporation v Attorney-General of Mauritius**[93] where the Privy Council stated:

> "The time within which the views were originally requested does seem to their Lordships to have been remarkably short and particularly so in the absence of stated reasons which pointed to a measure of urgency. Even, however, if this was so it does not alter the fact that the proposal itself was clearly stated and would at once be readily understood."

[94] Counsel for the respondents argues that the urgency in this case was created by the late provision of the census data and the fact that the Commission was mandated by the Constitution to produce a report by June 28th 2013. The Commission could not simply ignore its constitutional obligation to produce the report by 28th June 2013. Section 64(1) is cast in imperative terms. The Commission was required to submit its report by a certain date and this obligation severely constrained its ability to permit a longer period of time for the consultation process. They say however, that this analysis is not in any way affected by the decision of this Court and of the Privy Council in **Russell v Attorney General of St Vincent and the Grenadines.**

[95] The respondents concede that the time allowed for consultation was less than ideal. They would have preferred to have more time but the Commission was constrained by the late provision of the crucial census data (available around 7th June) and the fact that the Commission was mandated by the Constitution to produce a report to the Speaker by 28th June. The urgency that therefore had arisen severely curtailed its ability to permit a longer period of time for consultation. The respondents submit that it is against this background that the

[92] [1994] 2 AC 173,192.
[93] [1965] 3 WLR 67, 78B-C.

court must assess whether the Commission breached its duty to consult by failing to give more time for consultation.

[96] Having regard to the context in which the analogous provision in the Constitution of St. Vincent and the Grenadines, came to be before the Privy Council in **Russell**, we agree that the question as to whether section 64(2) of the Constitution is mandatory in the sense that the Commission is obliged to submit its report by the time as stipulated therein, is in no way affected by what the Privy Council in fact decided in **Russell**. We are of the view that **Russell** is authority only for the proposition that a breach of the Constitutional provision requiring the appointment of a Commission (as the case with Russell) or the requirement to submit a report by a specified time (as is the case here) does not invalidate or nullify a subsequent election. It decided nothing more. Indeed the Privy Council was careful to note that the point was not really addressed. Accordingly, we do not consider that **Russell** can be used as authority for the proposition that section 64(2) of the Constitution is merely directory as a general principle. The construction to be placed thereon is clearly dependant on the context as may be dictated by the underlying factual circumstances. Accordingly, we do not consider that the proper test to be applied to the construction of section 64(2) is as urged by the Appellants in the particular circumstances of this case. As to whether breach by the Commission of section 64(2) has the consequence of nullifying a subsequent election (which it does not), or put another way, is a condition precedent to a valid or lawful election, is quite a different matter to the question whether the Commission was obliged to comply with the requirements under section 64(2). The focus in **Russell** was as to whether such a provision was a condition precedent to a valid election. That is the special sense in which the Privy Council held the provision not to be mandatory. We are not of the view, that **Russell** may be taken as laying down any broader or general principle as to how section 64(2) is to be construed. It cannot be doubted that the Commission is not at liberty to simply flout its constitutional obligations.

[97] In the Judicial Committee of the Privy Council Lord Mustill stated at page 384 (b) to (e), [1997] 3 LRC :

"Is section 33(3) '**mandatory,**' **in the special sense** used in the courts below, **i.e. is the appointment of a boundaries commission a condition precedent to a valid election?**

Their Lordships answer this question in the negative. They have fully in mind the importance to the effective exercise of the right to vote of constituency boundaries which are properly balanced in accordance with section 33(2). Nevertheless the conclusion sought to be drawn, that a fresh delineation of the boundaries must be completed before an election can be held, is impossible to sustain in the face of sections 48 and 49 of the Constitution. It would plainly be absurd to hold that a breach of section 33, persisting until the expiry of the five-year period, could leave the state with no government and no effective means of electing a successor. The adoption of a stop-gap interim remedy, such as was imposed by the Supreme Court of British Columbia in Dixon v. British Columbia (Attorney-General) (1989) 59 D.L.R. (4th) 247 is not in their Lordships' view an option under the Constitution. The only alternative would be to imply into section 48(2) a provision of the basis of 'or for such additional term as may be necessary to enable a Constituency Boundaries Commission appointed pursuant to s 33(3) hereof to complete its review and make the necessary orders'. As a matter of practical politics such a term would be unthinkable, the more so since it would make nonsense of the Governor-General's power to bring about dissolution 'at any time'".

[98] In our judgment, while the appointment of a Commission or report is not a condition precedent to a lawful election, as was clearly the case in **Russell**, it cannot be said that the Commission was not to perform its duty as required by the Constitution. However, even though the Commission was required to submit its report by a specified date, it was also required to do so in full observance of its statutory duties as contemplated by 64(3) of the Constitution. In short, one obligation cannot be sacrificed so as to achieve compliance with another. The Commission was not entitled to deprive or deny interested parties the right to

proper and adequate consultations. In December 2012 the Parliament, well knowing of section 64(2) of the Constitution, required the Commission to hold consultations. It could not have been the intention of the Parliament that the statutory right to be consulted which it had enacted into law could or would be rendered nugatory by delay through no fault of the appellants, or due to the conduct or failures of the Commission. Adequate time for consultation in relation to changes in constituency boundaries is a matter of considerable public importance in ensuring the effective exercise of the right to vote in properly constituted constituency boundaries drawn in full regard of the principles and provisions set out in the Guidance Act.

[99] The last election in Antigua was held in March 2009. Just under three years elapsed before the appointment of the Commission by March 2012. The Guidance Act was enacted in December 2012. Several months were wasted in 2012 and early 2013 because the respondents insisted on proceeding without proper consultation, eventually leading to a court challenge and the subsequent withdrawal of the First Report. The process had to be started anew. The appellants were not in any way responsible for any delay. It is clear that the delays were caused or substantially contributed to by the respondents or public officers assisting them in the review. In the circumstances, the learned judge erred in failing to hold that the respondents could not rely on any urgency. We are unable to agree with the respondents' submission that given the time constraints and the history of the process, the time allowed for consultation was adequate, even if only just, or was justified by the urgency with which the Commission was faced. In our judgment, the respondents could not rely on an urgency primarily of its own making to justify the wholly inadequate time given for consultation. Whilst the appellants may be regarded as veteran politicians that does not diminish the right to be accorded adequate time to study, review carry out their own investigations on the proposal, and formulate counter-proposals if need be in a meaningful way. Seven days in a matter of this kind, coupled with the lack of printed maps depicting the changes can hardly be said to be adequate. In this context there is merit in the appellant's submission that whereas failure to produce or lack of a report does

not invalidate a subsequent election, a flawed report could jeopardise the constitutional right to vote in a properly demarcated constituency. The words of Mr. Justice Cranston in **East Devon District Council v Electoral Commission, The Boundary Committee for England** are quite apt: 'consultation at the end of the process is unacceptable, where there is insufficient time to comment or where the impact of any response on the body consulting is likely to be minimal since it will already have formulated its view'.

[100] For the above reasons we are unable to agree with the learned trial judge in holding that the consultation though 'not ideal were adequate'. In our view, the time allowed for consultation were neither ideal nor adequate. The urgency brought about in part by the Commission does not justify abrogation of the duty to adequately consult on so vital a matter. On this ground we allow the appeal.

[101] The miscellaneous complaints raised about the consultation process do not advance the matter. In any event, in view of the Court's conclusion, it is not necessary to consider them.

Costs

[102] The court has a general discretion in awarding costs. As a general rule, costs normally follows the event. In judicial review proceedings the general rule is that no costs award may be made against an applicant unless the court considers that the applicant has acted unreasonably. This general rule is not applicable in the present case as the appellants have succeeded albeit on one issue only. In all the circumstances of this case, the court considers that the appropriate order as to costs in this appeal is to order that each party shall bear their own costs. The Court so orders.

Conclusion

[103] For the reasons given, the appeal is allowed and the parties shall each bear their own costs.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise E. Blenman
Justice of Appeal