

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2018/0113

BETWEEN:

**GEORGE RICK JAMES
(In person and as Secretary of the Free and Fair Election League Inc.)**

Applicant

and

**NATHANIEL JAMES
(Chairman of the Electoral Commission)**

**JOHN JARVIS
ANTHONYSON KING
PAULA LEE**

**SUZETTE CHARLES
GENARIS ROBINSON
JEANETTE CHARLES
(Electoral Commissioners)**

First-Named Respondents

and

**LORNA SIMON
(In her capacity as Chief Registration Officer and Supervisor of Election)**

Second-Named Respondent

Appearances:

Mr. Ralph A. Francis for the Applicant

Mrs. E. Patricia Simon-Forde for the First-Named Respondents

2018: March 14th, 19th

ORAL JUDGMENT

[1] **WILKINSON J.:** On 7th March 2018, Mr. James filed his application supported by an affidavit. His challenge arises pursuant to **The Representation of the People (Amendment) Act 2001** (the Act). His complaint is confined to the registers in his constituency – St. John’s Rural East. By his application he sought the following relief:

1. An order of mandamus to compel Mr. James et al (“the Electoral Commission”) to prepare and publish the register for election in accordance with the provisions laid down in sections 21 to 25 of the Act.
2. An interim injunction to restrain the Electoral Commission from conducting the general election to be held on 21st March 2018, on any other voters lists except that made pursuant to section 25 of the Act.
3. To prevent the names on the electors’ lists published on 14th February 2018, from being added to the revised register unless the said list has been subjected to the process of claims and objections pursuant to section 20 of **The Representation of People (Amendment) Act 2002**.
4. Any other order which the Honourable Court may deem just.

Also set out in the application was a section titled Other Issues and which stated:

Other Issues

1. The Electoral Commission had failed to publish the register of electors pursuant to section 21 of the Act.
2. The Electoral Commission had failed to prepare and publish the revised register in accordance with section 23 of the Act.
3. The matter is of crucial importance in respect of the general election due on 21st March 2018, since the result of the polls would be illegitimate, unsafe and help to undermine democracy, if any other lists were used to conduct the election.

The single ground of the application was:

1. The Electoral Commission had failed to comply with sections 21 to 24(i) of the Act and section 20(1) of **The Representation of the People (Amendment) Act 2002**.

[2] At the commencement of the hearing, Counsel for the Electoral Commission and Ms. Simon asked the Court for the matter to be stood down for 1 hour for her to attend to some housekeeping matters. Counsel for Mr. James consented to the request. The Court before rising referred both Counsel to the case of **Gladys Petrie and Others v. The Attorney-General and Others (1968) 14 WIR 292.**

The Evidence

[3] Mr. James deposed that he had approached the Court as a citizen of Antigua and Barbuda and in his capacity as the secretary of the Free and Fair Election League Inc. which is a non-profit, non-partisan organization incorporated under the laws of Antigua and Barbuda.

[4] According to him, the aims and objectives of the Free and Fair Election League Inc. (FFEL) were: (a) to strengthen the electoral process and democracy in Antigua and Barbuda by the promotion of, and assisting to ensure the conduct of free and fair elections through education, advocacy and the monitoring of elections; (b) ensure that the register of electors was reliable and had been subjected to public inspection/scrutiny in advance of any poll and that the preparation and publication are done in accordance with the law; and (c) promote the fundamental values of best electoral management practices and provide assistance with electoral programs.

[5] He said that over its 26 years of existence the FFEL had worked assiduously as an election watchdog and had assisted in accomplishing the following: (a) advocating through a national campaign for electoral reform resulting in the establishment of the Electoral Commission, (b) voter-registration, (c) the introduction of voter ID cards and (d) the appointment of scrutineers. The FFEL continues its effort in advocating for the advancement of Electoral Reform in Antigua and Barbuda.

[6] Mr. James deposed that the Electoral Commission was a body established for the purpose of conducting elections pursuant to the Act. According to him, Mr. Jarvis is the Supervisor of Elections who is also the Chief Executive Officer of the Commission, as well as, the Chief Registration Officer. Among the various duties of the Supervisor of Elections, the Act provides that he is to execute and perform all other functions which by the Act or the regulations and rules are conferred or imposed upon him. Additionally, the Chief Registration Officer was to make all additions to the register published pursuant to section 21 and cause removal therefrom in consequence of any action taken under sections 19 or 22.

- [7] He was aware that a notice as to making claims and objections was posted with respect to the electors' list published on 14th February, 2018. He disclosed the said notice.
- [8] According him sections 21 to 24 of the Act clearly state the manner in which the register of electors, the revised register and the register for election shall be prepared and published. To date the Electoral Commissioner had not published a Register of Electors pursuant to Section 21 of the Act. In its place the Electoral Commission had published a list entitled "Revised Register of Electors, which Mr. James contends is invalid as it has no foundation in law. A copy of the cover of the register was disclosed.
- [9] Mr. James deposed that when the irregularity of preparing and publishing the wrong register pursuant to Section 21 of the **Act** first occurred, he pointed out the error to the then chairman of Electoral Commission. Sir Gerald A. Watt Q.C. in a letter dated 15th December, 2008, but no steps were ever taken to comply with the law. A copy of the letter was disclosed.
- [10] As a result of the Electoral Commission not making any attempt to rectify the mistake, Mr. James says brought this suit.
- [11] Ms. Lorna Simon, the Chief Registration Officer and Supervisor of Elections made 2 affidavits on behalf of all the Respondents including herself. She is charged with the responsibility of carrying out the mandate of the Electoral Commission in a general direction, control and supervision of the preparation of the voters' registers and the conduct of elections in Antigua and Barbuda.
- [12] She deposed that the writs for election for each constituency were issued on the 27th February 2018, including the one for the constituency for St. John's Rural East. A copy was disclosed.
- [13] She further deposed that the register of electors for each Constituency is published bi-annually, that is, to say, no later than 30th June and 31st December of each year including that for St. John's Rural East.
- [14] The law she said provides for a revised register, which is published shortly after the register of electors, (after 30th April and 31st October annually) if necessary. This is the case as the revised register is a revision of the earlier register of electors, and it consist of:-
- a) Persons who have notified the Chief Registration Officer of a change of address and appear to be ordinarily resident in the constituency.

- b) Persons who have affected the change of address with Chief Registration Officer.
- c) Persons who have reached 18 years of age.
- d) Who otherwise become qualified persons.

[15] According to Ms. Simon, there was an error in the labeling of the December 2017 Register of Electors cover page, it being labelled "Revised Register of Electors" but for all intents and purposes it was the Register of Electors for the constituency of St. John's Rural East, for the aforesaid period. This page had since been rectified.

[16] The bi-annual registers she said consisted of all persons who had been registered up to 30th April and 31st October, respectively.

[17] She said that at this time, meaning the election period, the law mandates there be published a fresh list of electors referred to as the Register of Elections, and this was comprised of the Register of Electors and the Revised Registers for each constituency, up to the 31st January 2018. These Registers of Elections, for all constituencies were being published as at the 13th March 2018, and they included the Register of Electors for St John's Rural East. They will be the only applicable Registers, at this time, since all the prior Registers were now redundant.

[18] In her supplemental affidavit filed minutes into the hearing on 14th March 2018, Ms. Simon said that it was her intention to show through the various registers, the actual Register of Elections for the constituency, however she was unable to produce it for the hearing because the printing of the registers for all 17 constituencies was being finalized that very day for use on election day, 21st March 2018.

Submissions

[19] On 8th March 2018, the Court on receiving the application to fix a hearing date ordered that it be served and asked that the Court be informed as to the nature of the proceedings on which the application would hang. Mr. James response was to on 12th March 2018, file an application for leave to file judicial review proceedings with an affidavit in support.

- [20] At the start of the hearing of Mr. James' application, Counsel for the members of the Electoral Commission and Ms. Simon, raised a preliminary point. It is a point that the Court must address before it can move on.
- [21] Counsel's preliminary point was that the Court had no jurisdiction sitting as it was to hear an election matter because by the issue of the writ of election on 27th February 2018, by the Governor General, the country was in the process of an election which was comprised of varied parts to lead to a poll, election of a member of the House of Representative and return of the writ. By issuance of the writ, the matter became an election matter and so became subject to the prescribed procedure in law for dealing with election matters and which was namely, that questions touching and concerning the elections fixed for 21st March 2018, could only be brought by an election petition before an election court. In support she referred the Court to **N.P Ponnuswami v. The Returning Officer, Namakkal Constituency et al** civil appeal case No. 351 of 1951(India), **Gladys Petrie and Others v. The Attorney-General and Others (1968) 14 WIR 292** and **Seecomar Singh and Another v. R.C. Butler (1973) 21 WIR 34**. **Gladys Petrie** and **Seecomar** followed the principle in **N.P Ponnuswami**.
- [22] Mr. James's Counsel said that he was making it abundantly clear that they were not in an election court and did not subscribed to the view that it was only after an election that the Court could be moved to address a matter observed before the conduct of the election. He further submitted that their position was that the election had yet to occur and so they could not be required to go to an election court for relief. He submitted that an election was conducted at great costs, and so that costs could be saved by addressing matters before the conduct of the election. His example was what if the register for constituency A was published for B and so the register was in the wrong place. He said that he could not accept that a declaration could not made by the Court before the polling date to correct the wrong because the writ of election had been issued.
- [23] Counsel further submitted that notwithstanding Ms. Simon's statement that the printing of the actual Register of Electors for use on election day was at press on 14th March 2018, his client still had an objection – the foundation of the list of the register for his constituency was previously not a proper list.
- [24] In support of his contention, Counsel referred the Court to the cases of **Radix v. Gairy (1978) 25 WIR 553** and **Drew and Others v. Hall and Others (1983) 33 WIR 97**.

- [25] On being given sight of **Radix** during the hearing, the Court observed that it was a case brought by an election petition before an election court. Further at the held at (ii) it was stated that the appropriate time to object to the electors' list is sometime prior to its proclamation which renders it conclusive as to those entitled to vote at the next election or by-election as the case may be.
- [26] In relation to **Drew** the Court did not find this case helpful as it appeared to describe a scheme of legislation very dissimilar to that under consideration.
- [27] On the matter of the possibility of hanging the application on judicial review proceedings, the Court remarked at the hearing that it had perused the well-recognized texts on judicial review, **Administrative Law** by **H.W.R Wade** and **C.E Forsyth**¹ and **Judicial Review** by **Michael Fordham QC**² and both texts were silent on election matters.

The Law

- [28] The preliminary issue raised falls to be considered under **The Antigua and Barbuda Constitution Cap. 23** and the **Representation of the People Act Cap. 379**.
- [29] The **Constitution** provides:

The House of Representatives

36.

40. (1) Each of the constituencies established in accordance with the provisions of section 62 of this Constitution shall return one member to the House who shall be directly elected in such manner as may, subject to the provisions of this Constitution, be prescribed by or under any law.

(2) Every Commonwealth citizen of the age of eighteen years or upwards who possesses such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe shall, unless he is disqualified by any law from registration as a voter for the purpose of electing a member of the House, be entitled to be registered as

¹ 8th Edition.

² 5th Edition.

such a voter in accordance with the provisions of any law in that behalf and no other person may be registered.

(3) Every person who is registered as a voter in pursuance of subsection (2) of this section in any constituency shall, unless he is disqualified by any law from voting in that constituency in any election of members of the House, be entitled so to vote in accordance with the provisions of any law in that behalf.

(4) In any election of members of the House the votes shall be exercised freely and shall be given by secret ballot in such manner as Parliament may prescribe.

44. (1) The High Court shall have jurisdiction to hear and determine any question whether-

- (a) any person has been validly elected as a member of the House;
- (b) ...

(2) Any application to the High Court for the determination of any question under subsection (1) (a) of this section may be made by any person entitled to vote in the election to which the application relates or by any person who was a candidate at that election or by the Attorney-General.

(3)

[30] The **Representation of the People Act Cap. 379** provides:

“2. (1) In this Act, unless the context otherwise requires –

“at an election” means that period of time beginning with the issue of the writ of election and ending with the return of the said writ in accordance with the provisions of this Act.

“election” means an election of a member or members to the House of Representative.

“election court” means in relation to an election petition, the High Court having jurisdiction by virtue of the provisions of section 44 of the Constitution or the provisions of this Act.

LEGAL PROCEEDINGS

Questioning of an Election

43. (1) No election and no return to the House of Representatives shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as an election petition) presented in accordance with this Part. (My emphasis)

(2) A petition complaining of no return shall be deemed to be an election petition and the High Court may make such order thereon as it considers expedient for compelling a return to be made or may allow the petition to be heard by an election court as provided with respect to ordinary election petitions.

44. (1) An election petition may be presented by one or more of the following persons-

- (a) a person who voted as an elector at the election or who had a right so to vote;
- (b) a person claiming to have had a right to be elected or returned at the election; or
- (c) a person alleging himself to have been a candidate at the election.

(2)

46. (1) An election petition shall be tried by the High Court and the judge presiding at the trial of an election petition is hereinafter referred to as the election court.

(2) The election court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of the High Court.

Procedure on all election petitions

48. On the expiration of the time limited for objections, or, after objection made, on the objection being disallowed or removed whichever last happens, the petition shall be at issue.

49. (1) The prescribed officer shall, as soon as may be, make out a list of all election petitions at issue presented, placing them in the order in which they were presented, and shall keep at his office a copy of the list, open to inspection in the prescribed manner.

(2) The petitions shall, so far as conveniently may be, be tried in the order in which they stand in the list.

(3) Where more petitions than one are presented relating to the same election, all those petitions shall be bracketed together in the election list and shall be dealt with as one petition, standing, unless the election court otherwise direct, in the election list in the place where the last of them would have stood if it had been the only petition presented.

50. (1) An election petition shall be tried in open court, without a jury, and notice of the time and place of trial shall be given in the prescribed manner, not less than seven days before the day of trial.

(2)

52. (1) At the conclusion of the trial of an election petition, the election court shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or whether the election was void or whether there was an equality of votes at that election, and shall forthwith certify in writing the determination to the Speaker, and the determination so certified shall be final to all intents and purposes.

(2)

[31] The Court found the case of **Gladys Petrie and Others v. The Attorney-General and Others (1968) 14 WIR 292** very instructive. The facts here were that pursuant to article 67 of the Constitution of Guyana, the Governor-General appointed 16th December 1968, as the stated day for the election of the members of the National Assembly. On 13th November 1968, the plaintiffs took out a writ of summons seeking declarations that the Acts of Parliament and the regulations made thereunder, by virtue of which the elections were to be held, should be declared unconstitutional, illegal, null and void, and injunction restraining the chief elections officer from holding any election on the basis of registers of electors compiled pursuant to the legislation. On 26th November 1968, the plaintiffs filed a summons seeking 3 interlocutory orders of (a) one directing the several of the defendants comprising of the elections commission to assume as elections commission the general direction and supervision of the preparation of the register of electors and the general direction and supervision of administrative conduct of elections for the

National Assembly,(b) one directing several defendants comprising of the elections commission to act in accordance with art. 69 (1) (a) and (b) of the Constitution for the purpose of an election to the National Assembly, and (c) one restraining the sixth defendant (chief elections officer) from conducting, holding or administering any election to the National Assembly on the basis of registers of electors compiled pursuant to the provisions of the National Registration Act made or purporting to be made thereunder and from accepting nominations or conducting balloting or returning candidates as elected in any election for the National Assembly conducted with or by the use of such registers.

[32] At the hearing of the summons the Attorney-General raised a preliminary objection. Chief Justice Bollers summarized the Attorney-General's submissions as being that the proper procedure to be adopted for the determination of any question relating to a question which arises under article 71 (a), (b) and (c) – and there being specific reference in this case to article 71 (b)(i) – should be by election petition pursuant to regulation 3 of the House of Assembly (Validity of Election) Regulations 1964, as enacted under the 1968 Act and in this special jurisdiction of the high court as conferred upon it by article 71 of the Constitution, and by virtue of the language used in article 71 this procedure should be adopted after the holding of the election. Accordingly, the Attorney-General urged that courts would always construe legislation of this kind vesting jurisdiction to deal with disputes as to elections with special circumspection, and in particular would only exercise its jurisdiction in accordance with the law which creates it. In particular it would not seek to eke out a jurisdiction on which the statute dealing with the matter may be silent.

[33] In this case the Constitution of Guyana at article 71 (1) provided that subject to the provision of the article, the high court shall have exclusive jurisdiction to amongst other matters determine any question (a) regarding the qualification of any person to be elected as a member of the National Assembly, and (b) whether either generally or in any particular place, an election had been lawfully conducted or the result thereof had been or may have been affected by any unlawful act or omission. By article 71(2) it was provided that proceedings for determination of any question referred to in article 71(1) may be instituted by any person other than the Attorney-General and if he was not a party thereto he could intervene. By article 71(3) there was appeal to the court of appeal. By article 71(5) it was provided that Parliament may make provision with respect to (a) the circumstances and manner in which and the conditions upon which proceedings for the

determination of any question under this article may be instituted in the high court and an appeal may be brought to the court of appeal and (b) the consequences of the determination of any question under this article and the powers of the high court in relation to the determination of any such question and so forth.

[34] According to his Lordship, it was to be pointed out that Parliament by virtue of the **Representation of the People (Adaptation and Modification of Laws) Act 1968** which enacted and incorporated by reference the House of Assembly (Validity of Election) Regulations 1964, by reg. 3, prescribed that the manner in which proceedings for the determination of these questions under article 71 should be referred was by petition, election petition, and under regulation 4(1), an election petition may be presented by an elector or a candidate. Under paragraph 5(b) of the article, Parliament was empowered to make, firstly, provisions as to the powers of the High Court in relation to the determination of the class of questions referred in article 71 (1) and sought to be determined in the proceedings instituted under para. 5 (a); in other words, what order the Court could make including an order to hold fresh elections throughout Guyana; under paragraph 5(c) Parliament was empowered to make provisions as to the practice and procedure of the High Court firstly, in relation to the jurisdiction of the court given in article 71(1) and secondly in relation to the powers conferred upon it, and thirdly, of the jurisdiction and powers of the High Court and Court of Appeal.

[35] After examination of the historical context which led to the concept and development of an election court and cases being brought in connection with election matters the Chief Justice said:

“The Attorney-General has been able to show that the scheme of Part 2 of Cap. 6 of the Constitution of Guyana, headed “Elections” is very similar to the Part XV of the Indian Constitution which is also headed “Elections”, and I accept his submission on the authority of the cases cited that the whole scheme of Part 2 of Cap.6 of the Constitution is directed towards the creation of a tribunal, that is, the High Court, on which is conferred a special or peculiar jurisdiction in relation to the questions to be determined under the said art. 71 and that on the authority of the **Ponnuswami** case, any matter arising therefrom which has the effect of vitiating an election, should be brought up only at the appropriate stage in an appropriate manner before the special tribunal and should not be brought up at an intermediate stage before any court....

I think that the history of this special jurisdiction, which has been conferred on the High Court by art. 71, indicates clearly that the court never had such a jurisdiction at common law, nor can it be said that the summons raises the specific question as to the interpretation of the Constitution....

In the result, I must accept the submission of the Attorney-General on the first point as being sound, and refuse to entertain this application on the ground that this court has no jurisdiction since the question raised in the summons pertain to a class of question enunciated by art. 71 of the Constitution exclusively within a special jurisdiction of the court, and must be presented by way of an election petition after the result of the election has been made known....

Under the Constitution of Guyana, if an injunction were granted in terms of the summons, it would be a negation of art. 67 of the Constitution, the function of the Governor-General exercised under this article not having been challenged. The relief sought in the summons is equitable, but one must always bear in mind that equity follows the law, and where the statute law is direct and governs the case with all circumstances, a court of equity is as much bound by it as a court of law.”

Findings and Analysis

- [36] The Court has cited so much of **Gladys Petrie** to show the similarity of provisions of the **Constitution** and the **Representation of People Act** at Antigua and Barbuda – creation of the procedure where questions arise about the elections. As in **Gladys Petrie**, on examination of the Antigua and Barbuda legislation one finds in the first instance that the **Constitution** at the heading “The House of Representatives” has provided for all matters connected to the House of Representatives such as composition, attendance, qualifications for membership, disqualifications, election of members, tenure, speaker and deputy speaker, clerks of the house, and determination of questions of membership. The provision is clearly set out to be all encompassing of all matters to do with the House of Representatives.

[37] Then as seen, section 44 provides for the High Court to have jurisdiction to hear and determine any question whether any person has been validly elected as a member of the House. Clearly a question can arise at any time of the process leading to the election of a member of the house. The **Constitution** does not limit the nature and type of question about the validity. In the Court's view, since members are elected based on who is set out in registers as eligible to vote, that must include questions that go to the root of the registers.

[38] The matter of procedure for the implementation of section 44 of the **Constitution** is found in the **Representation of People Act Cap. 379** sections 43 to 52. Here the section is headed "LEGAL PROCEEDINGS Questions of an Election". To the Court's mind, it is speaking in broad terms of elections. The terms of "election" as accepted in **Gladys Petrie**.

[39] The Court accepting the broad definition of 'election' and 'at an election' and so giving the word 'election' not only its meaning of the single election of a member to the House of Parliament, but the wider meaning encompassing the process from the writ of election issued 27th February 2018, until return of the writ, is of the view that any challenge to any part of the election process can only be conducted pursuant to an election petition and before an election court.

[40] The Court has recently had the benefit of reading decision of Henry J in **ANUHCV2018/0096 Trevor Walker v. Nathaniel James et al** delivered on 15th March 2018, and feels fortified in its decision.

[41] The Applicant's claim will therefore be struck out.

[42] Court's order:

1. The application is struck out.
2. No order for costs.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar