2017-HC-DEM-CIV-FDA-160

31B

IN THE HIGH COURT OF THE SUPREME COURT

OF JUDICATURE OF GUYANA

CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

PROCEEDINGS FOR AN INTERPRETATION OF ARTICLE 161(2) OF THE CONSTITUTOIN OF THE COOPERATIVE REPUBLIC OF GUYANA

BETWEEN:

MARCEL GASKIN

and

1. THE ATTORNEY GENERAL

2. DR. BHARRAT JAGDEO, LEADER OF THE OPPOSITION

and

THE GUYANA BAR ASSOCIATION (Amicus)

April 6; May 2, 16; June 5, 14; July 17, 2017

Mr. Glenn Hanoman and Mr. Singh-Lammy for the applicant.
Ms. Judy Stuart and Ms. Leslyn Noble for the first respondent.
Mr. Rajendra Jaigobin, for the second respondent.
Mr. Teni Housty, for Amicus Party

GEORGE, R, CJ (ag): The applicant seeks an interpretation of article 161(2) of the Constitution of Co-operative Republic Guyana pursuant to which the Chairman of the Guyana Elections Commission (GECOM) is appointed. More specifically, the applicant has applied for a declaratory order on:

(a) Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge.

(b) Whether the President is required under the Constitution to state reasons for deeming each of the six names on the List submitted by (sic) the President as unacceptable.

(c) Whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment.

(d) Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable.

The respondents are the Attorney General and the Leader of the Opposition who both filed submissions. In addition, pursuant to Part 31:01(3) of the Civil Procedure Rules 2017, the Guyana Bar Association commendably applied for and was granted permission by me to present an amicus brief to assist the court.

In the context of this case, I concluded that since the issues to be determined were purely questions of law and interpretation, there was no need for an affidavit in answer by the respondents but that submissions on the issues raised would be adequate. Apart from the issue of standing, there has been no challenge to the

jurisdiction of the Court to hear this application. Despite the lack of a specific provision as found in other Constitutions e.g. sections 120 and 124 of the Constitution of Sierra Leone (see also Sesay v President [2006] 2 LRC 704) or section 18(1) of the Constitution of Papua New Guinea (see Southern Highlands Provincial Government & Anor v Somare & Ors [2008] 2 LRC 372), the High Court of Guyana as a court of original and unlimited jurisdiction with inherent jurisdiction and as guardian of the Constitution, has the authority to interpret the Constitution. (See Dumas v AG per Jamadhar JA Civ App P218/2014 CA TT para 128 confirmed by the Privy Council in Privy Council Appeal No. 0068/2015 [2017] UKPC 12 dated May 8, 2017). And as submitted by Mr. Hanoman, this inherent jurisdiction is confirmed by article 133(1) of the Constitution which provides for appeals the Court of Appeal shall lie as of right from final decisions of the High Court in any civil or criminal proceedings on questions as to the interpretation of the Constitution.

LOCUS STANDI

The applicant deposed that he is a citizen of Guyana whose name appears on the electoral list of GECOM. The Attorney-General filed an application challenging the applicant's *locus standi* to institute these proceedings. Due to my decision that there was no need for an affidavit in answer, there has been no opportunity for the applicant to dispute these assertions made in this application. The initial plank of the challenge by the Attorney-General to this application was advanced by Ms. Stuart at the first hearing. While not specifically contending that the applicant was not a citizen and an elector, Ms. Stuart contended that the applicant does not have *locus standi* to make this application. I concluded then that I did not consider that as a citizen and elector that the applicant could be considered not to have *locus standi*. Nevertheless, counsel for the Attorney-General filed written submissions on

this issue which I will now more fully address. It was submitted that the applicant may be regarded as a meddlesome busybody and not a public benefactor, and that he has not established that he has a sufficient direct interest in the appointment of the Chairman of GECOM. Gordon v Minister of Finance & Others (1968) 12 WIR 416 (St Lucia) and Hughes et al v AG [2001] GLR 87 were cited.

The Hughes' case can be distinguished because the action was between the plaintiffs and the State in which it was alleged that the plaintiffs' fundamental rights had been violated. Thus, it was held that the proceedings were a matter between the plaintiffs and the State to which the intervention of the applicant was neither necessary nor instrumental. So Hughes, I find, does not assist the first respondent.

In Gordon, as quoted by counsel for the Attorney-General, Bishop J stated at p 419 E that:

> " ... firstly, it is not just any person who makes an allegation of a contravention of the Constitution of the State who has the right of application to the High Court. This right is specifically conferred upon a person with a relevant interest – not just an interest, but a relevant interest. Further, a person is to be considered as having a relevant interest if the contravention which he alleges, is a contravention that affects his interests. (It is not his interest in or concern over the matter.)
>
> ... the onus rests on the applicant to establish to the satisfaction of the court that he is a person who is qualified under the subsection, and unless he proves his qualification then his complaint cannot be entertained by the Court. In other words, the applicant must prove that such contravention of the Constitution as he alleges, is one which affects his interests."

However, it is apposite to note that this case and therefore the passage quoted are premised on specific provisions of the then St. Lucia Constitution Order in Council 1967 in circumstances where it was alleged that there was a contravention of a provision of the Constitution. Here the applicant alleged that enactment of the Appropriation Act 1968 was unconstitutional for non-compliance with the procedure for its enactment. It was held that the applicant had not established that he possessed relevant interests which would be affected by the alleged contravention and as such he failed to discharge the burden of proving he was qualified to bring the application. Unlike Gordon, the case at bar is not based on an alleged contravention of the Constitution. As in Dumas v AG, (2014 CA & 2017 PC, TT) it is a case in which the applicant seeks an interpretation of a provision of the Constitution. Dumas has confirmed the broader and more liberal thinking as regards *locus standi* in constitutional cases.

Justice Jamadhar in his analysis of the jurisprudence in this regard at para 42 quoted from the 1995 edition of the text 'Judicial Review of Administrative Action' as follows:

> "All developed legal systems have to face the problem of resolving the conflict between two aspects of the public interest – the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper invoking the jurisdiction of the courts in matters in which he is not concerned. The conflict has been resolved by developing principles which determine who is entitled to bring proceedings: that is who has *locus standi* or standing to bring proceedings. If those principles are satisfactory they should only prevent a litigant who has no legitimate reason for bringing the proceedings from doing so."

Then having analysed the development of the common law around the world on the issue of standing, the learned judge noted that "courts have been working assiduously, if not uniformly, to open the gates to general grievances public interest litigation, where an applicant is not directly affected by the impugned legislation or public/governmental action." (Dumas CA para 67.) At the end of the day, judicial discretion will have to be exercised in each case depending *inter alia* on their legal and factual context, the merits of the challenge, the importance of the issue and the public interest in having it determined. (Dumas CA para 95.) In Prasad v Republic of Fiji [2001] 1 LRC 665, after a coup, an indigent farmer who claimed to have lost rights because of the purported abrogation of the Constitution, sought and obtained declarations upholding the validity of the Constitution as the supreme law and restoring the status quo subject to the appointment of the Prime Minister by the restored President. The Court considered that "the proceedings could not be considered frivolous or the work of a mere busybody since the applicant was claiming to have lost rights by the purported abrogation and seeking to be re-assured that the Constitution was still in place so as to protect him and to maintain those rights." The Court considered that "the issues raised were sufficiently grave, or of sufficient public importance and involved high constitutional principle" such as to permit the applicant's case to be considered. Using the language of Bishop J in Gordon, I consider that as a citizen and elector the applicant in the case at bar definitely has a relevant and sufficient interest in knowing how the position of such an important office is to be filled and to have the Court interpret the relevant article of the Constitution in circumstances where it may be that there is ambiguity or uncertainty in its interpretation and thereby application. The appointment of the Chairman of GECOM is one of national interest and importance, moreso to those who are entitled to vote in the national, regional and local government elections in the country, which elections are part of

the foundation of our democracy. I do not consider the declarations sought to be of academic interest only and thus unfit for the intervention of the Court as contended on behalf of the Attorney-General. I therefore hold that as a citizen and an elector, the applicant has a relevant interest in the appointment of a Chairman of GECOM and as such has *locus standi* to make this application.

SUBSTANTIVE ISSUES

Constitutional provisions

Article 161 (1) and (2), as is relevant to a determination of the issues in this case, and which was inserted into the Constitution of Guyana by Act 15 of 1995 (as amended by Act No. 2 of 2000 to replace the words 'Minority Leader' with the words 'Leader of the Opposition' with other consequential amendments, that are not relevant), provides as follows:

> "161(1) There shall be an Elections Commission for Guyana consisting of a Chairman, who shall be a full-time Chairman and shall not engage in any other form of employment, and such other members as may be appointed in accordance with the provisions of this article.
>
> (2) Subject to the provisions of paragraph (4), the Chairman of the Elections Commission shall be a person who holds or who has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge, **or any other fit and proper person**, to be appointed by the President from a list of six persons, **not unacceptable to the President**, submitted by the Leader of the Opposition after meaningful consultation with the non-governmental political parties represented in the National Assembly.

Provided that if the Leader of the Opposition fails to submit a list as provided for, the President shall appoint a person who holds or has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge." (Emphasis mine.)

Paragraph 161(4) states that persons are not qualified to be appointed the Chairman and members of GECOM if they are aliens.

Historical Perspective

A review of the 1970 and 1980 Constitutions reveals an incremental addition to the category of persons who could be appointed as Chairman of the Elections Commission. Article 68(2) of the 1970 Republic Constitution provided that the Chairman of the Elections Commission be appointed by the President (then a non-Executive President) on the advice of the Prime Minister "from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court". Article 161(2) of the 1980 Constitution maintained this criteria for appointment of the Chairman of the Elections Commission by the President which, by this Constitution, had become an Executive President, but an additional qualifying criterion was added, that is, that persons "who are qualified to be appointed as any such judge" could also have been considered for appointment. Thus in the context of Guyana, High and Appellate Court judges of Guyana and the Commonwealth or such former judges as well as persons who were qualified to be appointed to the High or Appellate Courts of Guyana or the Commonwealth became eligible to be appointed. Although expanded, the category provided for was still limited to what I would

term the 'judicial category' requiring as it did that a person was the holder or held the office of judge or a person who was qualified to be appointed to such a post. Therefore, the provision in effect limited the pool of qualified persons to those who are legally trained. In its wisdom, no doubt to widen the pool of possible candidates, in 1995, Parliament added another category by including for consideration "any other fit and proper person" which I will term the 'non-judicial category'.

It is against this background that this application is to be determined. I have concluded, relying on a number of authorities, that the Constitution, and in this case article 161(2), is to be given a generous and purposive interpretation. Indeed, the Constitution has to be seen as a living document, with the interpretation of it as far as possible adapting to the times or period to which it is being applied; and in this case, article 161(2) itself has been adapted by amendments to the Constitution to meet changing circumstances. In the context of this case, the purpose of article 161(2) – to widen the categories of persons who may be appointed as Chairperson of GECOM - should be the basis for ensuring its implementation. (See State v Makwanyane [1995] 1 LRC 269 and Kannadasan v Khose [2010] 1 LRC 105.)

Basis for this application

The applicant bases his application on the fact and so deposed that the Leader of the Opposition, who is named as the second respondent, submitted a list of six persons deemed by him to be fit and proper for appointment as Chairman of GECOM to the President by way of letter dated December 21, 2016. The persons named were Ms. Ryaan Shaw - business woman, columnist and Indian rights activist, Mr. Ramesh Dookhoo – business executive of Banks DIH Limited and former Chairman of the Private Sector Commission, Mr. Lawrence Latchmansingh – governance and peace practitioner, Mr. Norman McLean – former Chief of Staff

of the Guyana Defence Force and current mining executive, Mr. Christopher Ram – chartered accountant and attorney-at-law and Dr. James Rose – Professor of History at the University of Guyana. Subsequently, on December 28, 2016 the curriculum vitae of these persons were submitted to the President by the Leader of the Opposition. This list was rejected and according to the media – Stabroek News of January 20, 2017 - which was exhibited to the applicant's affidavit, it was reported that the President stated as follows: "I am going to choose somebody who is fit to be a judge and who can discharge the functions of the office of Chairman of the Elections Commission with integrity, with impartiality and with intelligence. So many writers seem to be putting so much emphasis on 'any other fit and proper person'. Fit and proper means you have to possess those three qualities." The applicant stated that he had learnt that Mr. Ram was a person who was qualified to be a judge, he having been admitted to practice at the bar in excess of seven years. Article 129 of the Constitution provides for the qualifications of judges and states:

> "129(1) A person shall not be qualified to be appointed to hold or to act in the office of a Judge unless –
>
> (a) he or she has been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; or
>
> (b) he or she is qualified for admission as an attorney-at-law in Guyana and has been so qualified for such period as may be prescribed by Parliament.
>
> (2) Parliament may prescribe different periods under subparagraph (b) of the preceding paragraph in relation to the office of the different judges mentioned in article 126."

Article 126 provides that "Except as otherwise expressly provided or required by the context, in this Constitution the word 'Judge' includes the Chancellor, the Chief Justice, a Justice of Appeal, a Puisne Judge and a part time Judge." The High Court Act, Chapter 3:02, section 5, provides that the period for which one must be an attorney-at-law in order to qualify for appointment to hold or act in the office of Puisne Judge is seven years. However, it is to be noted that years of call are not necessarily the only criteria for qualification to be appointed as a judge. Considerations of age and suitability would also be factors, though having considered the Indian case of State of Uttaranchal v Balwant Singh Chaufal & Ors [2010] 4 LRC 54 the age of retirement of a judge may not be applicable to the post of Chairman of GECOM. I make no definitive pronouncement on this, it not being necessary for the determination of the issues in this case.

The applicant further swore in his affidavit in support of application that having carried out research he ascertained that the provision for the appointment of the Chairman of GECOM in article 161 (2) was "to give effect to a recommendation made in 1992 by President Carter of the United States of America and accepted by President Desmond Hoyte to reflect a consultative process with regard to the Chairman of GECOM." His research also revealed that of the five Chairmen of GECOM since 1992, only one person was qualified to be a judge – that is Mr. Doodnauth Singh SC, attorney-at-law, who was appointed in 1997. The other Chairmen were Mr. Rudy Collins – diplomat (1992), Mr. Edward Hopkinson – geologist (1994), Major General Joe Singh – army officer (2001) and Dr. Steve Surujbally –veterinary doctor (September 2001).

The applicant urged that based on the advice of his lawyer, "once a list of six persons has been submitted, none of whom the President has found to be unacceptable, the President was obligated under the Constitution to appoint

someone from the list." The applicant has asked this Court to find that the words in article 161 (2): "or any other fit and proper person" should be construed disjunctively and that the list submitted by the Leader of the Opposition met the requirements of this sub-article.

QUESTIONS FOR INTERPRETATION

The first question for which the applicant seeks an interpretation is as follows: **Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge.**

Judicial and Non-Judicial categories

The Attorney-General filed three submissions in which ultimately two opposing positions were canvassed. It was firstly submitted that the Constitution did not create any preferential order as regards the three categories named i.e. 1) judge or former judge; 2) person qualified to be a judge, which, as I have stated earlier, I have termed the judicial category, and 3) any other fit and proper person which I have referred to as the non-judicial category. As such it was concluded in this part of the submission that the sub-article is wider in scope and therefore permits the submission of a list that may comprise "six judges, six former judges, six persons qualified to be judges, or six fit and proper persons. The list can also be comprised of one judge or former judge and five persons qualified to be judges or considered fit and proper persons not unacceptable to the President." (Quoted from the submission.) It was submitted that in the final analysis the entire list must be acceptable otherwise the conditions of article 161(2) would not be met and the President would be entitled in his discretion to reject the list.

However, it was also submitted by the Attorney-General that the three categories are ranked in order of preference. Therefore, counsel for the Attorney-General urged that article 161 (2) should be read to mean that there are two categories of qualifying criteria for candidates for the post of Chairman of GECOM: (1) mandatory qualifications and (2) optional qualifications. Rather confusingly, it was contended that the judicial category is mandatory. It was stated that "where the list of candidates submitted by the opposition leader contains a sitting or a former judge, it was mandatory to consider those two nominees first before considering others."

By way of explanation, it was submitted that it was mandatory that the President when appointing the Chairman of GECOM to first consider a person who holds the office of judge, that is a sitting judge and that if it were not possible that a sitting judge could be named, then it was mandatory for the President to consider the second option that is a person who has held office as a judge, that is a former judge. Therefore, it was incumbent on the Leader of the Opposition to include the names of persons in the judicial category in the list and that a list without such persons would be an unacceptable list. It was further submitted that it is only when the President is unable to find a candidate from the mandatory two options that he can use his discretion to determine who is fit and proper. It was then submitted that where the President determines that no listed person is fit and proper to be appointed, that his decision cannot be challenged. On being pressed, that the positions adopted were inconsistent, Ms. Noble who, on that occasion, appeared on behalf of the Attorney-General abandoned the wider formulation that permits persons from any of the categories to be listed and maintained that the mandatory formula was being advanced as the final position.

To my mind, if a person from the judicial category is listed, it would be a matter for the President if it is that he decides to consider the judicial category as being in order of priority. It does not mean that anyone else named is automatically not fit and proper. Thus, with great respect, I consider the latter submissions on behalf of the Attorney-General to be fundamentally flawed. It does appear that by submitting that the President must first consider a sitting judge, and if such a person is not available, then a former judge or person eligible to be a judge, before exercising a discretion to determine who is fit and proper, that this does not embody the true meaning and intent of article 161(2). While it is appreciated that the President will ultimately make the appointment, it must be from the list of six persons that has been submitted to him by the Leader of the Opposition once he finds the list not unacceptable.

The further submission on behalf of the Attorney-General which states that if there is no single nominee that satisfies the mandatory qualification on the list then the President can resort to alternative qualifications is untenable for the following reasons:

(a) How would the President resort to alternative qualifications if it is that no other category should be included in the list as advanced in the submission on behalf of the Attorney-General?

(b) If there is no mandatory nominee listed, such that the President "can resort to alternative qualifications which gives him wide discretionary powers in considering the list [including the power] to reject the list in its entirety" (quote from the submission), then what alternative qualifications would he be considering?

It was submitted on behalf of the Leader of the Opposition that question (a) should be answered in the negative since there is nothing in the provision that expressly or by implication lends to the view that the list of persons submitted must include anyone from the judicial category, moreso given the expansion of the categories of persons as evidenced by the amendments to the Constitution as outlined above. It was further submitted that applying the Interpretation and General Clauses Act, Chapter 2:01 which Act pursuant to section 5 is applicable to the interpretation of the Constitution, the words 'or any other fit and proper person' should be read disjunctively. It was contended that the sub-article contemplates two different, separate and distinct categories of persons bearing little or no similarity.

The Bar Association submitted that article 161(2) simply categorises those who may be appointed as Chairman into those who are presumptively fit and proper persons to be appointed because they fall into the 'judicial category', and any other fit and proper person. Put another way, the words 'or any other' indicate that the judicial category is considered to be presumptively 'fit and proper'. But, it was submitted, the provision does not create a hierarchy of appointees. Any person who qualifies to be in either category would be eligible for appointment. Thus, anyone from either category can be included in the list submitted by the Leader of the Opposition.

It is common knowledge that a second list was submitted by the Leader of the Opposition in which three of the persons named fell into the mandatory judicial category advanced by Ms. Noble. In these circumstances, I enquired of her, if it is her position that this mandatory category must be considered, then it begged the question, without more, why a GECOM Chairman had not been chosen. Ms. Noble made no submission in answer.

Meaning of Fit and Proper Person and Who Determines This

The issue then is - how is the term 'or any other fit and proper person' to be interpreted? As noted above, this category is an alternative to that of the judicial category. In the context of this case, there are no objective criteria for a determination of who can be deemed to be a fit and proper person. Mr. Hanoman submitted on behalf of the applicant that 'any other fit and proper person' "does not necessarily include a person with the requisite qualifications and characteristics of a judge' and he emphasised that apart from Mr. Singh, the other persons who would have served as GECOM Chairmen would have come from the category of 'any other fit and proper person'. He cited the cases of R v Crown Court at Warrington ex parte RBNB [2002] 1 WLR 1954 HL(E) and Democratic Alliance v President of the Republic of South Africa [2013] 2 LRC 617, a decision of the Constitutional Court. In Ex parte RBNB the issue was whether an employee of the unlimited company RBNB was a fit and proper person to hold a justices' licence to sell intoxicating liquor. The licensing policy which the court at first instance accepted stated that no licence would be granted to a person of bad character or to a person who was outwardly fit and proper but who may be influenced by others in the management of the premises that were to benefit from the licence. Lord Bingham said (at pages 1955 F and 1960 B-D):

> "This apparently simple question has proved difficult to resolve.
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> ...
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> ... some consideration must be given to the expression 'fit and proper' person. This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring

that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do.

... But the focus is on the particular applicant's suitability ... ."

In Democratic Alliance, the Court considered s 179 of the Constitution of South Africa which established a National Prosecuting Authority with a National Director of Public Prosecutions (National DPP) as its head who was to be appointed by the President. Pursuant to the Constitution and an Act of Parliament, the National DPP was to be a person with "(a) ... legal qualifications that would entitle him or her to practise in all courts of the Republic; and (b) be a fit and proper person with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned." The appointment made to this office by the President of South Africa was challenged on the ground that the appointee was not a fit and proper person. It was held that the requirements for appointment as National DPP represented "objective jurisdictional facts" based on the requirement that the appointee had to be appropriately qualified as provided for by an Act of Parliament. It was further held that "the Constitution did not, in terms, leave the determination of appropriate qualification to the President" for whether a candidate fulfilled the fit and proper requirement stipulated by the Act involved a value judgment. However, "a construction that rendered the determination of the qualification criteria to the President's subjective opinion was not in keeping with the constitutional guarantee of prosecutorial independence." Thus for any decision to be constitutional it had to be rational – both as to "the process by which the decision was made and the decision itself... ." It was therefore held that in assessing the qualifications of an applicant for the post of DPP, the President was enjoined by law to act rationally

and reasonably. I do not consider this case entirely helpful given its facts because there were objective criteria as provided for in the Constitution and the Act of Parliament for determining who would be the National DPP and the facts disclosed that despite adverse findings against him, the President still went ahead and appointed the person as National DPP. Therefore, when considered objectively, the appointee was not a fit and proper person to be appointed. Nevertheless, what is evident from this case is that the personal qualities of conscientiousness and integrity as well as experience were part of the criteria to be applied in assessing who would be fit and proper to be appointed.

The submissions on behalf of the Attorney-General did not seek to interpret the phrase 'any other fit and proper person', merely contending that "the meaning of the phrase 'fit and proper' is subjective" and that it was for the President and not the Leader of the Opposition to decide who is fit and proper, moreso because the list of persons must not be unacceptable to the President. The submissions on behalf of the Leader of the Opposition are that the President is to simply decide if the persons named are acceptable or not, and not whether they are fit and proper. While Mr Jaigobin for the Leader of the Opposition contended that a decision whether a person is fit and proper is objective, and not subjective, having regard to the circumstances there is still imported an element or elements of subjectivity. Re Chikweche [1995] 2 LRC 93 was cited. In this case, a lawyer was refused admission to practice as a lawyer at the bar of Zimbabwe as being not a fit and proper person because he was a Rastafarian who wore dreadlocks. On assumption that the judge at first instance considered that the applicant was not a fit and proper person, the Supreme Court of Zimbabwe held that his appearance did not and could not affect whether he was a fit and proper person to be admitted to the

practice of law. Chief Justice Gubbay, giving the main decision of the Court stated (p 101 e) said:

> "Construed in context, the words 'a fit and proper person' allude, in my view to the personal qualities of an applicant – that he is a person of honesty and reliability. ... I am not persuaded that the lawmaker intended by use of the phrase to embrace the physical characteristics of an applicant. For appearance bears no rational connection with the object of maintaining the integrity and honour of the profession."

Counsel for the Guyana Bar Association have made submissions in this regard and cited a number of constitutional provisions regarding the qualifications of persons for membership of Electoral Commissions of Commonwealth countries of Uganda, Sri Lanka, Nepal, Pakistan, Ghana, Jamaica and Trinidad and Tobago. They in effect speak to the members having qualities of integrity, impartiality and independence. The Bar submitted that the interpretation of who would be fit and proper 'must only be that the person is fit and proper for the appointment at hand, in this case, Chairman of GECOM, no other inference would be appropriate'. However, it is unclear what was meant when, like Mr. Hanoman, the Bar then submitted stated that 'there is no requirement that the person must have judge like qualities'. In my view it is precisely the judge-like qualities that are required of the Chairman even though they may not be a judge, former judge or a person eligible to be a judge. The sub-article is therefore to be read disjunctively with the words 'any other' indicating a separate but equal category of person. Though linked to the judicial category, this category is not circumscribed by the *ejusdem generis* rule. (Badri Prasad v Demerara Mutual Life Assurance (1981) 31 WIR 196)

It is presumed that persons who are or were judges or who are eligible to be so appointed would be fit and proper persons to hold the office of judge i.e. persons of integrity, honesty and impartiality and thereby, all things being equal, persons in the 'judicial category' are prima facie eligible to be appointed as the Chairman of GECOM. Thus, the reference to "any other fit and proper person" in the context of art 161 (2) speaks to the qualities that one would look for in the appointment of someone as a judge but a nominee does not have to have legal qualifications or training. The word 'any' widens the types of persons who may be identified. Permitting the appointment of any other fit and proper person does not restrict the type of person or profession or other qualification of a person who can be chosen – just that looked at objectively the person would have the qualities that one would expect to see if one were considering the appointment of a judge. It cannot be gainsaid that the said qualities of integrity, honesty and impartiality are what are required in a GECOM Chairman. In this regard, the reported statement of the President that he would choose someone who is 'fit to be a judge' mirrors my interpretation of who a fit and proper person to be appointed to the post of Chairman of GECOM should be. However, I emphasise that there is no mandatory category and the categories have equal weight. The list of persons therefore as pointed out before can include persons from the judicial category who one may say are presumptively fit and proper by virtue of their office or eligibility for such office "or any other fit and proper person" who would be anyone who would be considered to be a person of integrity, honesty and impartiality. Article 122A of the Constitution gives some idea as to what is expected of a judge in the performance of his or her functions. It provides that "All courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority; and shall be free and independent from political, executive and any other form of direction and control." Similarly, in addition to the

qualities just outlined, one would expect that the Chairman of GECOM to be independent.

I therefore agree with counsel for the respondents and the Bar Association (which is in accord with the abandoned position on behalf of the Attorney-General) and hold that the sub-article permits the submission of names of six judges, six former judges, six persons who are eligible to be appointed as judges, as well as six persons who are fit and proper, or any combination of persons from these categories. There is no mandatory category. There is no order of preference in the categories of persons listed in relation to nominees for the post of Chairman of GECOM. Persons from each category are each equally entitled to be appointed.

If there are any persons named on the list as falling into the judicial category and the President chooses to consider them in priority to the other persons named but who do not so fall, then that is in his discretion so to do. But the Leader of the Opposition cannot be fettered into naming persons who are, or have been, or are qualified to be a judge in the list of persons. There is nothing in the sub-article that so requires. What if there are no sitting judges who are available or agree to be listed? What if there are no former judges who are available or agree to be listed? What if there are no persons who are qualified to be appointed judges who are available or agree to be listed? I hold that art 161(2) does not contain any provision creating a mandatory category and which as such should have priority of consideration. The sub-article provides for alternatives and thus gives the Leader of the Opposition a wider field of persons to advance as candidates for the post. Clearly, from the history of the article from the 1970 Constitution onwards, there was a decision to expand the categories of persons qualified to be appointed to the position of Chairman of GECOM. And it must be noted that while the focus appears to be on identifying a local candidate, the Constitution recognises that this

may pose a difficulty and allows for a sitting judge, former judge or person eligible to be a judge from the Commonwealth to be appointed. And in the context of the provision for "any other fit and proper person", the sub-article would include a fit and proper person of the Commonwealth.

The affidavit of the applicant states that the Leader of the Opposition submitted a list of persons whom he deemed to be fit and proper. One would not expect otherwise of the Leader of the Opposition for it is expected that he would act judiciously and not capriciously in naming persons who are prima facie fit and proper whether presumptively so from the 'judicial category' or so deemed pursuant to the non-judicial category.

Who then is to make this determination is thus in issue, as well as the criteria in so determining? Given that the list of persons must not be unacceptable to the President, it follows that it is he who will ultimately make the final determination of who is a fit and proper person to be appointed as Chairman of GECOM. The residuary proviso to article 161(2) emphasises that the person to be appointed the Chairman of GECOM must not be unacceptable to the President because it provides that the President independently of anyone and without the assistance of a list, would clearly be acting in his own deliberate judgment in appointing someone from the judicial category who is presumptively fit and proper to be Chairman.

Also this is to say that in determining whether the list of persons is acceptable or not, as advanced in the submissions on behalf of the Leader of the Opposition, the President "is obliged to act reasonably, rationally, and objectively and not capriciously and arbitrarily. He must objectively assess the person's ability to discharge the functions of his office, their integrity, political impartiality and such like." In like vein, the Solicitor General in her submissions for the Attorney-

General, submitted that "It is only hoped that the discretion be exercised in a manner that promotes the public interest and the common good."

Given my analysis of article 161(2), the answer to the first question in the application – 'Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge' has to be in the negative.

It is in this context of determining whether the exercise of a discretion as regards determining whether the list or the persons is acceptable that I turn now to questions (c) and (d) which in my view overlap or are complementary. **Question (c) asks – 'Whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment.' Question (d) asks - Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable.'**

I consider these questions to be asking whether the President must choose a Chairman unless he finds all of the nominees to be unacceptable; that is, is the President obliged to make a choice once any of the names is or some are acceptable? This is to say must every person listed be individually "not unacceptable" or is it the entire list that must be "not unacceptable" to the President?

As noted earlier, the applicant deposed that based on the advice of his lawyer, "once a list of six persons has been submitted, none of whom the President has found to be unacceptable, the President is obligated under the Constitution to appoint someone from the list." In his oral submissions, Mr. Hanoman

acknowledged that each of the named persons in the list must be acceptable so that the President would have a full list from which to choose a candidate. He submitted that it would appear that the entire list had to be acceptable to the President otherwise there would be a limitation on the President's ability to choose a Chairman. This submission accords with that on behalf of the Attorney-General.

The Bar Association on the other hand contended that the President is obliged to appoint a person who is not unacceptable so that 'a person must be positively identified in the determination of the President to be unacceptable for his appointment not to take place.' So a person who is found not to be acceptable can be rejected. It was also submitted by the Bar Association that grammatically the subject of art 161(2) is the person being appointed to the office of Chairman and not the list that is to be submitted to the President. Indeed, when one parses the sub-article it would read that the Chairman shall be a person (qualified as outlined) who is not unacceptable to the President. Therefore the list of six persons only becomes the mechanism by which the President can, in the first instance, appoint such a person. In this regard, each person would have to be considered by the President for a determination whether each is acceptable.

I am of the view that ensuring that each person named is acceptable to the President may be difficult to achieve unless the President provides the Leader of the Opposition with guidelines for choosing who should be listed. The Constitution provides a framework for consultation by the Leader of the Opposition with the non-governmental political parties represented in the National Assembly. Needless to say, this provision cannot be honoured because there is no longer a plurality of non-governmental political parties represented in the National Assembly.

However, not because a person named falls into any of the categories provided for by the Constitution it means that they must be appointed. A person may be included in the list as being fit and proper, whether because they are so presumed by virtue of being in the judicial category or whether they can be so deemed as any other fit and proper person, but may yet be considered to be unacceptable for some valid reason e.g. it may be known that the person has not been or is not in the best of health, or is otherwise unable to withstand the rigours of, or is unsuitable for such a demanding job as Chairman of GECOM, or there may be national security concerns, or as submitted on behalf of the Leader of the Opposition, which I quoted earlier, a nominee may not be considered to be politically impartial. In my research I found the case of Kannadasan v Khose (*supra*) in which the fact of being a former judge was held not to mean automatic eligibility for appointment to a state commission as provided for in the Constitution. It was held that having regard to the purpose and object of the constitutional provision, "it had been assumed by the Supreme Court to be available for the eligible persons who were retired judges, which meant those judges who had retired from service without a blemish and not merely a person who 'has been a judge'." (p106) Thus it was considered that a former judge who had not been confirmed in the position would not qualify for appointment because "[i]f a person did not have the qualification for continuing to hold the office of judge of a High Court, it would be difficult to conceive how, despite such deficiency in qualification, he could be recommended for appointment to a statutory post, the eligibility criteria wherefor was, inter alia, being a former judge." (p107.) Thus, in short, eligibility does not *ipso facto* equate with suitability.

Despite Mr. Hanoman's concession in this regard, it would appear to me to adopt a restrictive position if it is maintained that all the persons on the list must be acceptable before a choice can be made. If in the entire list there is one person who

is eminently qualified and therefore is fit and proper and acceptable, then one would expect that that person would be chosen. The choosing of one of the listed persons would mean that the others have not been considered suitable for the post for whatever reason. Otherwise the list would always have to be rejected in its entirety with the consequence that the acceptable person could not be appointed. Thus, it is not mandatory that the entire list of names be acceptable. One or some may be either acceptable or unacceptable. If only one is acceptable then the President may choose such person; moreso because at the end of the day only one person can be appointed so automatically that person would be deemed to be acceptable for appointment. It would seem to me that a commonsense approach would be that once there is a person named who is acceptable, then the President has the discretion to choose this person. However, the President can nevertheless exercise his discretion to reject the entire list as being unacceptable as submitted by Mr. Hanoman and on behalf of the Attorney-General.

It would be up to the President to determine whether he would choose a person who is eminently qualified even though no other person on the list is acceptable or whether he would reject the entire list. In making this determination, the President would perforce have to consider whether each person named is acceptable or not. Simply, where the President has determined that some persons on the list are unacceptable he is not obliged to select anyone else from the six names for appointment. Thus, if the President considers that one or more persons on the list is not a fit and proper person and therefore unacceptable, then he may decide to reject the entire list as being incomplete or restrictive, or he may decide to choose one of the persons if they qualify even though every person named in the list is not acceptable. Therefore the whole list need not be rejected.

Thus, the questions at (c) **whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment,** and (d) **Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable.'** are answered in the negative.

Giving reasons for who is or is not a fit and proper person

Where the President is dissatisfied with persons named in the list or the entire list – what is the process for so indicating? This leads to the final question for determination in this application: (b) **Whether the President is required under the Constitution to state reasons for deeming each of the six names on the list submitted to the President as unacceptable.** This is to say: Does the President have to give reasons for rejecting the individuals named or the list as a whole if it is that all the persons named are considered by him to be unacceptable?

The submissions on behalf of the Attorney-General indicate that the President's discretion in this regard is unfettered and cannot be questioned. They speak to the immunity of the President and cited arts 111(1) and 182(1) of the Constitution. Article 111(1) states that -

> "In the exercise of his or her functions under this Constitution or any other law, the President shall act in accordance with his or her own deliberate judgment except in cases where, by this Constitution or by any other law, he or she is required to act in accordance with the advice or on the recommendation of any person or authority."

Article 182 (1) provides *inter alia* that the President is not to be personally answerable to any court for the performance of the functions of his office.

It was therefore submitted that the President is beyond the reach of judicial direction.

As I stated earlier, one would expect that the Leader of the Opposition would name persons who are *prima facie* fit and proper to be appointed to such an important post as Chairman of GECOM. Article 161(2) to my mind therefore speaks to the need for dialogue and compromise. And as I said, fit and proper must speak to integrity, honesty, impartiality and independence – qualities expected in a judge and by the extension of the Constitution, in any other person who is to be appointed the Chairman of GECOM. So as mentioned earlier, the report in the media that the President stated he would appoint a person who is fit to be a judge and who can function with integrity, impartiality and intelligence, if accurate, would accord with the provisions of the Constitution. But as I have concluded above, these attributes are not to be found in persons who would qualify for the judicial category alone. The Constitution recognises that other fit and proper persons can have these necessary attributes which one presumes that persons in the judicial category would possess.

There is no requirement under the Constitution for the President to state reasons for deeming each of the six names on the list or the entire list to be unacceptable. Nevertheless, the modern thinking is that reasons for decisions and actions should be given. The giving of adequate reasons is in effect the essence of democracy and good governance. (Re Hanoman (1999) 65 WIR 157.) It was held in the case of R v. Secretary of State for the Home Department, Exp Fayed and Another [1997] 1 All E.R. 228 that even where a provision of an Act expressly states that there is no requirement to give reasons, in order to be fair, where the decision involved the exercise of discretion, there is a requirement to give sufficient information as to the subject matter of concern to enable the aggrieved party to make representations.

There is no aggrieved party as such in this case, but the Leader of the Opposition is entitled to know the reason for the rejection of persons named on, or of the entire list which he would have submitted pursuant to the Constitutional provisions permitting him to do so.

In Malawi in the State v President [2008] 4 LRC 239, it was the President who wrote the opposition parties inviting feedback on the names and resumés of the intended appointees to the Electoral Commission. In this case, the facts disclose that in rejecting the proposal of the opposition parties regarding the appointment of the members of the Electoral Commission, the President gave his reasons for disagreeing with the proposal with one of the reasons being the need for a politically neutral commission. The leaders of the opposition parties also gave their reasons for their concerns about some of the President's nominees and those were that they were not politically neutral.

The constitutional provision in the case at bar highlights that more than consultation is required; a consideration of a list that is supplied is required. The fact that pursuant to article 111(1) the President shall act in his own deliberate judgment does not mean that he should not provide reasons for arriving at his decision to reject the list because in the context of article 161(2) where the Leader of the Opposition is constitutionally mandated to submit and has submitted lists of names for consideration one would expect that the President would have a reason or reasons why in his deliberate judgment the list was rejected. Given that article 161(2) requires the involvement of the Leader of the Opposition, the exercise of the President's discretion is not and cannot be considered to be absolute or singular. The Leader of the Opposition, and others for that matter, may not agree with the reasons given, but they must be given so that the parameters for the submission of another list, if required, would be set. Such reason or reasons should

be communicated to the Leader of the Opposition moreso as clearly a decision was taken that a second list be submitted. It is now common knowledge that a second list was also rejected. By being given reasons, the Leader of the Opposition would be given an indication of who, in the sense of the qualities in persons, would be acceptable. Further and importantly, the exercise of his judgment to reject the list and giving reasons therefor could support the resort to the proviso to article 161(2) which permits the President to act independently to appoint a person of the judicial category to be the Chairman of GECOM, that is a person who is presumptively fit and proper.

Therefore, I hold that reasons for rejection must be given whether as regards the entire list of names that is unacceptable or some of the names on the list that has resulted in the rejection of the list.

The submission of the list does not mean that the President is obliged to accept the list or the persons named in it. If the President is of the view that the list is deficient either in totality or in the names that have been included, he can exercise his discretion to deem the entire list unacceptable. He must, however, give reasons for so doing so that it is known why there was a rejection so that he could properly move to apply the proviso to article 161(2) which allows the appointment of persons from the judicial category only. While the President is immune from suit, his decisions and actions are not. Thus, whether in the exercise of his discretion there has been compliance with the Constitution is justiciable. The case of Re Blake (1994) 47 WIR 174 cited on behalf of the Attorney-General can be distinguished. There it was for the Governor-General to decide who would be appointed Prime Minister. In this case, the activation of article 161 (2) commences with what is in effect a recommendation of the Leader of the Opposition which starts the process for the selection of a Chairman of GECOM. It is also noted that

while Dr. Fiadjoe was quoted from his text 'Commonwealth Caribbean Public Law' (p71) in the further additional submissions on behalf of the Attorney-General to contend that the discretion of a Head of State cannot be questioned, in my view the learned author did not exclude this totally. Dumas v AG (PC, 2017, *supra* para 34.) confirms this. In any event, in this case, the applicant is not seeking to enquire into the discretion exercised and the judgment arrived at but to have clarified how such discretion or judgment should be exercised given the provisions of article 161 (2).

The observation of the Court in State v President, that the process seeks to build consensus and thereby the acceptability by all stakeholders is relevant to Guyana so that the bona fides of the Commission is maintained moreso as the other members of the Commission are chosen by the political parties. It is nevertheless also pointed out in State v President, at p 249, that "it does not automatically follow that belonging to a political party makes one lose their independence or professionalism. ... that they would not discharge their duties in a professional, neutral and objective manner."

It is now common knowledge that more than one list has been submitted and/or requested. However, while the applicant has not applied for a determination of this issue, it was raised by the Bar Association in its brief which was filed and served on all parties. It was submitted that the Constitution only contemplates the submission of one list. Neither the Attorney-General nor the Leader of the Opposition sought to address this issue. For completeness, since it was raised, I have decided to mention it moreso because, as noted above, it speaks to the issue of why reasons for rejection of anyone listed or the entire list are important. It does appear, as canvassed by the Bar Association, that article 161(2) does not contemplate the submission of more than one list. The proviso states that if the

Leader of the Opposition fails to submit a list as provided for, then the President shall appoint someone from the judicial category only. It does appear to me that failure to submit a list as provided for speaks to the provision of an acceptable list as discussed earlier. If by not choosing any of the persons listed the President thereby finds the list unacceptable, the proviso to art 161(2) would apply and the President should then go on to appoint a judge or former judge or person who would qualify for appointment as a judge in Guyana or the Commonwealth to the post of Chairman of GECOM. But all of this is in effect academic because more than one list has been sought and provided. And in this context I re-quote from the submission of the Solicitor-General as regards the President choosing a Chairman of GECOM: "it is only hoped that the discretion be exercised in a manner that promotes the public interest and common good."

So in conclusion it is declared that the answers to the questions posed are as follows:

(a) Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge The answer to this question is hereby declared to be in the negative – No.

(b) Whether the President is required under the Constitution to state reasons for deeming each of the six names on the List submitted by (sic) the President as unacceptable. The answer is hereby declared to be in the positive – Yes.

(c) Whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are

unacceptable as a fit and proper person for appointment. It is hereby declared that the answer is in the negative – No.

(d) Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable. It is hereby declared that the answer is in the negative – No.

Judgment accordingly with no order as to costs.

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Roxane George
Chief Justice (ag)
July 17, 2017.